

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF :
PENNSYLVANIA ACTING BY :
ATTORNEY GENERAL :
D. MICHAEL FISHER, :
Plaintiff :
v. : NO. 1009 M.D. 1998
: ARGUED: October 4, 2000
ALLSTATE INSURANCE :
COMPANY, :
Defendant :

BEFORE: HONORABLE DAN PELLEGRINI, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: January 18, 2001

Before this Court is a motion for summary judgment filed by Allstate Insurance Company and a cross-motion for partial summary judgment filed by the Commonwealth through the Attorney General in response to a complaint filed by the Commonwealth in which it alleged that Allstate violated various provisions of the¹ Unfair Trade Practices and Consumer Protection Law (Consumer Protection Law).¹

¹ Act of December 17, 1968, P.L. 1224, *as amended*, 73 P.S. §§201-1 – 201.9.3.

On December 7, 1998, the Commonwealth filed a two-count complaint against Allstate. In Count I, it alleged that Allstate had violated the provisions of the Consumer Protection Law by willfully misleading claimants to their detriment and for the benefit of Allstate with information contained in three Allstate documents: 1) a "Quality Service Pledge" and cover letter; 2) a letter entitled "Do I Need an Attorney?"; and 3) a form entitled "Authorization to Furnish Medical/Employment Information." In Count II, it alleged that Allstate had engaged in the unauthorized practice of law by making representations in these documents to potential claimants that involved the exercise of legal judgment regarding the merits of claims filed by third parties and the necessity of retaining an attorney to pursue those claims. Allstate filed preliminary objections to both counts and we dismissed Count II allowing the first Count to go forward.² See *Commonwealth of Pennsylvania v. Allstate Insurance Company*, 729 A.2d 135 (Pa. Cmwlth. 1999). During discovery, Allstate filed a motion for summary judgment and the Commonwealth filed a cross-motion for partial summary judgment, both of which are presently before this Court.

The following facts are undisputed. In 1993, Allstate began a claims reorganization process referred to as the Claim Core Process Redesign (CCPR). The purpose of this process was to enhance its economic interest and return for its shareholders' position. Pursuant to research conducted by the Insurance Research

² Prior to us entertaining this complaint, Allstate filed a petition to amend its complaint based on after-discovered evidence which we granted.

Council (IRC) in 1994,³ Allstate concluded that this was most feasible by focusing on third party claimants and attempting to get them to settle their claims by eliminating the need for attorney involvement. In doing so, Allstate relied on a May 1994 study published by the IRC that was based upon a survey of 5,500 individuals that were involved in auto accidents from 1989 to 1992. The study concluded that "the use of attorneys results in a big cost to the auto insurance reimbursement system" and that "claimants who hired attorneys actually received a lower net reimbursement amount, on average, after deducting their economic losses, attorney fee, and legal expenses". In addition, claims with attorneys took longer to settle, relied on more benefit sources, and left claimants less satisfied with the overall amount received." Supporting this notion that attorney representation was driving up costs for Allstate and eliminating such representation would have the desired effect of reducing costs were confidential CCPR documents that specified this was Allstate's goal. The following are excerpts from those documents:

- Page 2 Notes – CCPR Goals: If we can contain loss costs, our agents can sell our product at a more competitive price. The more we sell, the better the return for our shareholders and the more we can grow. As we grow, opportunities for all employees will improve. Most important, a competitive price would improve Allstate's image in the community. The processes you are about to see are predominantly focused on third party claimants. However, we are not ignoring the policyholder. The ultimate return to

³ The IRC is a nonprofit organization that conducts public policy research on issues related to property and casualty insurers. It is composed of and founded by 14 insurance companies and trade group members, including Allstate.

the policyholder is the great reduction in third party premium.

- **THE STRATEGY:** Win by exploiting the economics of the practice of law.
- **Page 3 Notes – The Strategy:** To "win" in the new game, we want those who would drive up loss (attorneys, who drive up the cost of settling claims) to lose.
- **The Tactical Perspective states:** A primary focus on building relationships with claimants – Eliminate the need for lawyers.
- **Page 4 Notes – the Tactical Perspective:** To win we've created processes entirely different from the old way of thinking. In the old way of thinking, we felt that attorney handling in most cases was inevitable and unavoidable. In fact, we learned that only 1/3 of claimants are predisposed to get attorneys. The majority go to attorneys because of the poor quality or lack of claimant contact. We also learned that when an attorney represents a claimant, we pay 2-3 times more to settle the claim. The new measures focus on prompt contact with specific process steps for building trust, and the % of claimants that remain unrepresented.
- **Page 8 Notes – Attorneys are busy soliciting clients, sometimes within 24 hours of the accident.** We want to get there first so that we can give them information about attorney economics. They need to know that attorneys often take up to one-third of the settlement after deducting expenses incurred. We want the chance to work with them to make a settlement offer first, and afterwards, they are welcome to consult with an attorney.

Similarly, Allstate's training materials provided:

Indicate that while some claimants choose to seek attorney representation, it is by no means a requirement. Even if the claimant chooses to seek representation, it may be advantageous to work with us first. Assess claimant's interest in receiving the "Do I Need an Attorney?" form. (From "Unrepresented Segment Training Manual" A00085.)

Also, a script provided by Allstate to its adjusters to be used when speaking with claimants stated:

Quite often we are asked if an attorney is necessary to settle a claim. Some people choose to hire an attorney, but we would really like the opportunity to work directly with you to settle the claim. (From "Unrepresented Segment Training Manual" A00086.)

In an effort to reduce attorney representation, Allstate created the "Quality Service Pledge" and cover letter, the letter entitled "Do I Need an Attorney?"; and a form entitled "Authorization to Furnish Medical/Employment Information," the three documents that are now at issue. Utilizing these documents together in handling claims, Allstate then contacted unrepresented third party claimants who had or may have had claims against Allstate policyholders, attempting to have them settle their claims quickly by telling them they would offer a fair amount and they did not need an attorney, and obtaining authorizations from claimants to obtain their medical and employment records.

As a result of Allstate's conduct, the Commonwealth filed its complaint alleging that Allstate had violated the Consumer Protection Law because the representations it made in these documents were unfair, deceptive, misleading

and created the likelihood of confusion constituting violations of Sections 2(4)(ii), (iii), (v) and (xxi) of the Consumer Protection Law, 73 P.S. §§201-2(4)(ii), (iii), (v) and (xxi).⁴

Allstate contends in its motion for summary judgment⁵ that these documents do not violate the Consumer Protection Law because they do not prove fraudulent or deceptive conduct by Allstate. It argues that to prove fraud, the Commonwealth must show that there was (1) a material misrepresentation of existing fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance on the misrepresentation; and (5) damages to the party defrauded as a proximate result. *Chatham Racquet Club v. Commonwealth*, 561 A.2d 354 (Pa. Cmwlth. 1989), *petition for allowance of appeal denied*, 527 Pa. 604, 589 A.2d 694 (1991). Allstate argues that because all of the statements

⁴ In August 1999, Allstate ceased distributing the "Quality Service Pledge" and the "Do I Need an Attorney?" form and since that time has distributed new documents entitled "What to Expect During the Claims Process" and "The Role of Attorneys in the Claim Process." The Commonwealth has not amended its complaint to object to these documents. The Commonwealth has, however, requested injunctive relief under 73 P.S. §201-4 and restitution, but because Allstate changed its forms and the Commonwealth does not object to these forms, the only forms at issue are the old ones. Therefore, the request for injunctive relief is moot.

⁵ Summary judgment may only be granted when 1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or 2) after completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Schreck v. Department of Transportation*, 749 A.2d 1041 (Pa. Cmwlth. 2000). The grant of summary judgment is warranted only in a clear case, and the record must be viewed in a light most favorable to the non-moving party resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *Id.* The moving party has the burden to prove entitlement to summary judgment by proving the non-existence of any genuine issue of material fact. *Id.*

contained in the documents are truthful and consistent with insurance department statutes, regulations and policies, not only can the Commonwealth not prove fraud, but it cannot prove any intent by Allstate to defraud claimants, and civil penalties may not be awarded pursuant to Section 2 of the Consumer Protection Law, 73 P.S. §201-8(b).⁶

In its cross-motion for partial summary judgment, the Commonwealth argues that Allstate's communications with claimants were deceptive, and, under the Consumer Protection Law, it is not necessary to prove the elements of fraud but only that Allstate's communications to claimants constituted deceptive conduct that created the likelihood of confusion or misunderstanding. It further argues that to determine if Allstate's conduct was deceptive, we must rely on the net impression that was likely to be made upon a person of average intelligence. The Commonwealth also argues that under the Consumer Protection Law, civil penalties are appropriate if Allstate's conduct was willful, i.e., that it willfully sent out the forms at issue to claimants. It requests that we find that Allstate has violated the Consumer Protection Law because its conduct was deceptive and

⁶ Section 2 of the Consumer Protection Law, 73 P.S. §201-8(b), provides in relevant part:

In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is willfully using or has willfully used a method, act or practice declared unlawful by section 3 of this act, the 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 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 4.1 of this act.

willful and direct that a hearing be held on the imposition of the relief requested, including but not limited to the imposition of civil penalties under Section 2 of the Consumer Protection Law.

Pursuant to the Consumer Protection Law, the Commonwealth need not prove fraud but only that Allstate acted deceptively by causing confusion or misunderstanding. Section 2(4) of the Consumer Protection Law provides:

"Unfair methods of competition" and "unfair or deceptive acts or practices" mean any one or more of the following:

(ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

* * *

(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

* * *

(xxi) Engaging in other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. (Emphasis in original.)

Before the 1996 amendments to the Consumer Protection Law, the catchall provision provided for "other fraudulent conduct which creates a

likelihood of confusion or misunderstanding."⁷ This language was consistently held to require satisfaction of the elements of common law fraud. *See, e.g., Chatham Racquet Club*. In 1996, the General Assembly amended the catchall provision to include "other fraudulent or deceptive conduct." The inclusion of deceptive conduct expanded the types of unfair business practices covered by the Consumer Protection Law to include practices which otherwise had been excluded by the courts' limitation to fraud. The elements for deceptive conduct for purposes of unfair business practices require: 1) a representation; 2) that is likely to mislead consumers acting reasonably under the circumstances; and 3) which is material. *Cliffdale Associates, Inc. v. Sussman*, 103 F.T.C. 110 (1984).

Although Allstate argues that its documents are truthful, traditionally, a representation is deceptive if it has the capacity or tendency to deceive. A representation can be deceptive although based on truthful statements. *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303 (1988). The deceptive impressions, as alleged by the Commonwealth as having a capacity or tendency to deceive consumers, are actionable representations under the Consumer Protection Law, even if the underlying statements may be technically correct. *See Weinberg v. Sun Company, Inc.*, 740 A.2d 1152 (Pa. Super. 1999) (citing *L.G. Balfour Co. v. F.T.C.*, 442 F.2d 1 (7th Cir. 1971)).

The Federal Trade Commission (FTC) has coined the phrase "reasonable consumer" as the standard to be applied for deceptive conduct. The

⁷ Act of December 17, 1968, P.L. 1224, as amended and reenacted by the Act of November 24, 1976, P.L. 1166, 73 P.S. §201-2(4)(xvii).

FTC noted that virtually any representation, even truthful, could be misunderstood by some consumers, and it has long held the position that deceptive conduct would not be found merely because it could be unreasonably misunderstood by an insignificant and unrepresented segment of the class of persons to whom it was addressed. *Cliffdale Associates*, 103 F.T.C. at 165. The reasonable consumer standard is based upon the representation and is not equated with an individual consumer's sophistication or intelligence. An unsophisticated consumer could reasonably act based upon hearing, reading or understanding the representation. *See Lukin's, Inc. v. Consumer Protection Division*, 726 A.2d 702 (Md. App. 1999). This standard has been interpreted as meaning whether a representation would likely mislead a consumer acting reasonably upon the representation, not whether a specific consumer was actually misled. *See Federal Trade Commission v. Wilcox*, 926 F. Supp. 1091 (S.D. Fla. 1995).

Applying this standard to the present case, we find that the documents in question create a likelihood of confusion or misunderstanding to a reasonable claimant. Regarding the Quality Service Pledge and its accompanying cover letter, when read together, they represent that Allstate will act in the interest of the third party claimant, leaving the impression that it will take care of the claimants and look out for all of their interests. The cover letter provides in relevant part:

... I want to reaffirm Allstate's policy that we consider anyone who has been involved in an accident with one of our policyholders an Allstate "customer," who is entitled to quality customer service.

As your claim representative, my role is to ensure that you receive this quality customer service, outlined in the enclosed "Customer Service Pledge."⁸

The cover letter is misleading because Allstate is not the third party claimant's own insurance company, yet the letter states that the third party claimant is a customer of Allstate that is represented by "your claim representative." As for the "Quality Service Pledge," it provides in relevant part:

Because you have been involved in an accident with an Allstate policyholder, we will provide you with quality service... Your claim representative is dedicated to carrying out this Quality Service Pledge.

The Pledge, which in different versions has also indicated that Allstate's claim representative will be the third party claimant's advocate, is deceptive because it serves to reinforce the cover letter's attempt to instill confidence and the belief that Allstate has the interest of the third party claimant at heart, when, in fact, it probably does not because it would be in conflict with its representation of its policyholders and its duty to its shareholders.

Regarding the "Do I Need an Attorney?" form, the form specifies that an attorney is not required to handle a claim; that insurance claims settle more quickly when an attorney is not involved; and attorneys' fees may range from 25%

⁸ We note that there are several versions of the cover letter that were sent to third party claimants. However, all of them indicate that anyone who has been involved in an accident with an Allstate policyholder is also considered an Allstate customer who is entitled to quality customer service.

to 40% of the settlement.⁹ The form further provides that should a claimant choose to hire an attorney, he or she can do so anytime during the settlement process. While the form also provides that it is up to the claimant as to whether he or she should retain an attorney, clearly the intent of this document is to sway the claimant away from using an attorney to settle his or her claim and to suggest that there is no benefit to using an attorney because to do so might net a smaller settlement. Because there is a likelihood that a reasonable person reading this document might consider that retaining an attorney would not be in his or her best interest in settling a claim, the document is misleading and deceptive.

Finally, as to the Authorization to Furnish Medical/Employment Information,¹⁰ this form provides that the information may be released to other insurance companies; however, the cover letter that accompanies the form states that the information is being collected only for Allstate's use.¹¹ Not only is this conflicting information likely to cause confusion and misunderstanding, but without the benefit of an attorney to review the document, the claimant could lose any benefit in a settlement and the information could be used against him or her if the matter went to litigation. This is indicated by its language that "the authorization will remain valid until my claim with Allstate is legally concluded."

⁹ There are also several versions of this document but they all contain these three essential points.

¹⁰ There are also several variations of this document as well.

¹¹ The cover letter states that a medical authorization form has been included for the claimant to fill out and that he or she should "please be assured that this authorization only gives Allstate the permission to gather information to review your case."

Consequently, we conclude that the three Allstate documents, especially when taken together, are deceptive, misleading and create the likelihood of confusion to a reasonable individual.

As to whether Allstate's conduct was willful in violation of the Consumer Protection Law and requiring the imposition of penalties, it is clear from the undisputed facts that the documents in question were the result of Allstate's organized plan to reduce the settlement of third party claims by eliminating the need for attorney involvement. This is supported in the record by Allstate's confidential documents comprising the redesign process which specify that it is Allstate's intent to eliminate the need for attorneys. Because it was Allstate's intent to create confusion in the minds of its third party claimants, its conduct was willful and in violation of the Consumer Protection Law. Accordingly, Allstate's motion for summary judgment is denied, and the Commonwealth's motion for partial summary judgment is granted in part as to its request for a hearing on the imposition of penalties. A hearing to determine civil penalties as provided for under Section 2 of the Consumer Protection Law is now necessary and will be scheduled by a separate order.¹²



DAN PELLEGRINI, JUDGE

¹² Although Allstate also contends that because it made truthful communications to claimants that they were constitutionally protected by the First Amendment to the United States Constitution and Article 1, Section 7 of the Pennsylvania Constitution, because it violated the provisions of the Consumer Protection Law by misleading claimants with deceptive language, its argument is erroneous. *See Commonwealth v. Bell Telephone Co.*, 551 A.2d 602 (Pa. Cmwlth. 1988) (commercial speech that is false, deceptive or misleading is not entitled to First Amendment protection).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA ACTING BY
ATTORNEY GENERAL
D. MICHAEL FISHER,

Plaintiff

v.

ALLSTATE INSURANCE
COMPANY,

Defendant

NO. 1009 M.D. 1998

ORDER

AND NOW, this 18th day of January, 2001, the motion for summary judgment filed by Allstate Insurance Company is denied and the motion for partial summary judgment filed by the Commonwealth of Pennsylvania by Attorney General D. Michael Fisher is granted in part as to its request for a hearing to be held on the imposition of penalties.


DAN PELLEGRINI, JUDGE

Certified from the Record

JAN 18 2001

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA ACTING BY
ATTORNEY GENERAL
D. MICHAEL FISHER,

Plaintiff

v.

ALLSTATE INSURANCE
COMPANY,

Defendant

NO. 1009 M.D. 1998

ORDER

AND NOW, this 18th day of January, 2001, it is ORDERED that a hearing on penalties is scheduled to be heard on Thursday, February 15, 2001, at 9:30 a.m. in Courtroom No. 1, Fifth Floor, South Office Building, Harrisburg, Pennsylvania. Within 14 days of this order, the parties are to submit:

1. a memorandum setting forth reasons that the parties identify as either justifying or mitigating the penalty amount; and
2. a brief setting forth the standards the court is to use in setting forth penalties.

Without leave of court, no party is to call more than three (3) witnesses.



DAN PELLEGRINI, JUDGE

Certified from the Record

JAN 19 2001

and Order Exit