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IN THE SUPREME COURT OF PENNSYLVANIA

NO. 29 WAP 2019

GARY L. GREGG AND MARY E. GREGG,

Respondents,

v.

AMERIPRISE FINANCIAL, INC., AMERIPRISE FINANCIAL SERVICES, INC., RIVERSOURCE LIFE INSURANCE COMPANY, AND ROBERT A. KOVALCHIK,

Petitioners.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, PENNSYLVANIA BANKERS ASSOCIATION, PENNSYLVANIA HEALTH CARE ASSOCIATION, PENNSYLVANIA MANUFACTURERS' ASSOCIATION, UNIVERSITY OF PITTSBURGH MEDICAL CENTER, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Pennsylvania Rule of Appellate Procedure 531, *amici curiae*, identified below, submit this brief in support of Petitioners.

Pennsylvania Coalition for Civil Justice Reform: The Pennsylvania Coalition for Civil Justice Reform is a statewide, nonpartisan alliance of organizations and individuals representing businesses, professional, and trade associations, health care providers, nonprofit entities, taxpayers, and other perspectives. The coalition is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

Pennsylvania Bankers Association: The Pennsylvania Bankers Association is a voluntary, nonprofit membership organization made up of more than 120 federally-chartered and state-chartered banks, savings associations, and their affiliates that do business in Pennsylvania. The Association supports the diverse needs of its membership through volunteer participation, industry advocacy, education, and membership services. It also serves as an advocate in matters of federal, state, and local public policy on behalf of its members.

Pennsylvania Health Care Association: The Pennsylvania Health Care Association is comprised of hundreds of long-term care and senior-service providers who care for Pennsylvania's elderly and disabled residents. The Association provides a unified voice in senior care, offering information,

education, and guidance in an effort to improve the quality of care. It has filed *amicus curiae* briefs to address important state liability issues affecting long-term care.

Pennsylvania Manufacturers' Association: Founded in 1909, the Pennsylvania Manufacturers' Association is the statewide non-profit trade organization representing the people who make things in the Commonwealth. Manufacturing is the engine that drives Pennsylvania's economy, generating $87 billion in value every year, directly employing more than 500,000 Pennsylvanians on the plant floor, and supporting millions of additional Pennsylvania jobs in supply chains, distribution networks, and vendors of industrial services.

University of Pittsburgh Medical Center: University of Pittsburgh Medical Center ("UPMC") is a world-renowned health care provider and insurer, inventing new models of patient-centered, cost effective, accountable care. UPMC provides more than $1 billion a year in benefits to its communities. UPMC is the largest nongovernmental employer in Pennsylvania, with approximately 87,000 employees, 40 hospitals, 700 doctors' offices and outpatient sites, and a 3.5-million-member Insurance Services Division.

American Property Casualty Insurance Association: American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects

the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe.

American Tort Reform Association: Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

Chamber of Commerce of the United States of America: The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

National Federation of Independent Business: The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Although there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's small business community.

INTRODUCTION

In the proceedings below, a Superior Court panel held that when the General Assembly in 1996 amended the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 *et seq.*, to include "deceptive" conduct in the catchall provision outlawing "any . . . fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding" in a consumer transaction, it (i) "imposed strict liability" on all persons or entities that market, sell, or lease goods or services and (ii) eliminated any "state of mind element." *Gregg v. Ameriprise Fin., Inc.*, 195 A.3d 930, 940 (Pa. Super. Ct. 2018). Under the panel's decision, it does not matter whether the defendant acted intentionally, negligently, or innocently – liability is now strict and absolute.

The panel's conclusion that the Legislature intended to transform the catchall provision from one requiring proof of fraudulent intent to one that renders state of mind irrelevant and imposes strict liability makes little sense. If the Legislature had intended to effect such a radical change in the law:

- Why did the Legislature not ***expressly*** provide for strict liability, as it has done when imposing strict liability in other areas?
- Why did the Legislature ***add a second qualifier*** – "deceptive" – instead of simply striking the original qualifier – "fraudulent" – and thereby leaving the provision to outlaw "any conduct that creates a likelihood of confusion or of misunderstanding"?
- Why is there ***no mention*** in the legislative history of any intention to create strict liability and impose liability for purely innocent conduct?

The answer to these questions is clear: The Legislature did not intend to create strict liability by *adding* "deceptive" conduct to the catchall provision.

Apart from the panel's failure to raise – let alone address – these critical questions, the panel failed to conduct the proper analysis. First, the panel violated the statutory duty to interpret "deceptive" in accordance with its "common and approved usage." 1 P.S. § 1903(a). The terms "deceptive," "deceit," and "deception" are generally understood to require culpable intent – as evidenced by dictionaries, common law definitions, model jury instructions, and treatises. Second, the panel violated the canon of statutory construction that courts should give meaning to every word. In holding that the catchall provision imposes strict liability, the panel failed to give the limiting language – "fraudulent or deceptive" – any meaning, and read the state of mind element right out of the statute. And, by relying on the perceived purpose of the statute rather than its language, the panel reached a result that is wholly inconsistent with the statute's plain language and legislative history.

The panel also violated this Court's admonition against judicial free-lancing in the legislative policy-making arena, particularly with respect to matters as serious as expanding a scheme of liability without fault. The creation of strict liability is a subject to be studied, debated, and decided by the Legislature, which this Court has recognized is far better equipped for such policy-making tasks.

Finally, if the panel's erroneous decision stands, tens of millions of consumer transactions will be subject to strict liability – the most draconian form of civil liability. This new strict liability cause of action based solely on allegations of "confusion" or "misunderstanding" will be subject to great abuse. It will be easy to plead and will open the floodgates to an explosion of litigation by consumers with nothing more than "buyer's remorse." Litigation costs will inevitably rise and be passed on to consumers. In the end, the panel's ruling will significantly harm consumers, businesses, and the Commonwealth.

ARGUMENT

Contrary to the panel's decision, the Legislature did not "impose[ ]strict liability" under the catchall provision. *Gregg*, 195 A.3d at 940. Rather, the panel, on its own initiative, "imposed strict liability" in violation of the statute's plain language, canons of statutory interpretation, and the UTPCPL's legislative history.

I. The Panel's Imposition of Strict Liability Violates the Plain Language of the Statute and Bedrock Principles of Statutory Construction

The rules of statutory interpretation are well settled. "[T]he object of all statutory interpretation is to ascertain and effectuate the intention of the General Assembly." *Commonwealth v. Walter*, 93 A.3d 442, 450 (Pa. 2014) (citing 1 P.S. § 1921(a)). To discern that intent, the Court "first resorts to the language of the statute itself." *Mohamed v. Comm. Dep't of Transp.*, 40 A.3d 1186, 1193 (Pa. 2012). "When the words of a statute are clear and unambiguous, [the Court] may

not go beyond the plain meaning of the language of the statute under the pretext of pursuing its spirit." *Walter*, 93 A.3d at 450 (citing 1 Pa. C.S. § 1921(b)); *see also Pennsylvania Rest. and Lodging Ass'n v. City of Pittsburgh*, 211 A.3d 810, 822 (Pa. 2019) ("In seeking the General Assembly's intent, our inquiry begins and ends with the plain language of the statute if that statute is unambiguous.").

The panel held that the addition of one word – "deceptive" – to the catchall provision transformed that provision from a longstanding prohibition against fraudulent conduct into a sprawling, new strict liability regime. *Gregg*, 195 A.3d at 939. The panel reached this erroneous and counterintuitive result by ignoring the plain meaning of "deceptive" and violating cardinal principles of statutory interpretation.

A. The Panel's Interpretation Ignores the Common and Approved Meaning of "Deceptive"

It is a core tenet of statutory construction that "[w]ords and phrases shall be construed . . . according to their common and approved usage." 1 P.S. § 1903(a); *see also Commonwealth v. Johnson*, 26 A.3d 1078, 1090 (Pa. 2011). Where a term is not defined in a statute, Pennsylvania courts look to dictionary definitions to ascertain the plain meaning. *See Commonwealth v. Hart*, 28 A.3d 898, 909 (Pa. 2011). Moreover, where words have acquired a "particular meaning in the law," they should be construed in accordance with that meaning. *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007); *see also Commonwealth v. 2101*

Cooperative, Inc., 183 A.2d 325, 330 (Pa. 1962) ("When a term has a well-settled meaning within the law . . . , it is presumed that the legislature intended to convey such meaning when using the word in a statute.").

When the catchall provision was amended in 1996, *Black's Law Dictionary* defined "deception" as "*intentional* misleading by falsehood spoken or acted," "*knowingly* and *willfully* making a false statement or representation, express or implied, pertaining to a present or past existing fact," and "synonymous with fraud." Black's Law Dictionary 406 (6th ed. 1990) (emphasis added). Other dictionaries similarly define "deceit" as "an act or device *intended* to deceive" and synonymous with "fraud." *See* The Compact Edition of the Oxford English Dictionary 659–60 (1971) (emphasis added). Accordingly, "deception" is commonly understood and associated with a specific intent to mislead.

Pennsylvania case law confirms this understanding. Pennsylvania law has long defined "fraud" and "deceit" as requiring wrongful intent. *See, e.g., Savitz v. Weinstein*, 149 A.2d 110, 113 (Pa. 1959) (claim for "deceit or fraud" requires "fraudulent" "misrepresentation"); *Jamestown Iron & Metal Co. v. Knofsky*, 154 A. 15, 16 (Pa. 1930) ("Deceit lies where one makes a statement, misrepresenting material facts, known to be false or made in ignorance of, and reckless disregard of, its truth . . . ."); *Wilson v. Donegal Mut. Ins. Co.*, 598 A.2d 1310, 1315 (Pa.

Super. Ct. 1991) (claim for "fraud or deceit" requires a "fraudulent" "misrepresentation," which includes "any artifice by which a person is deceived").

Summarizing this body of law, the Pennsylvania model jury instructions explain that the fraud instruction, which requires the element of "fraudulent" intent, "encompasses the common-law tort of fraud or deceit." Pennsylvania Bar Institute, Pennsylvania Suggested Standard Civil Jury Instructions § 17.240 (4th ed. 2018). Similarly, a leading Pennsylvania law treatise recognizes that fraud or deceit require "fraudulent" intent. *See* 2 Summary of Pennsylvania Jurisprudence 2d §16:7 (2014) ("[T]he essential elements of a cause of action for fraud or deceit are misrepresentation, a fraudulent utterance thereof, an intention to induce action thereby, justifiable reliance thereon, and damage as a proximate result."). [1] Accordingly, whether considered under its everyday or legal meaning, "deceptive" conduct under the catchall provision requires *wrongful intent*.

Consistent with the statutory language, the U.S. Court of Appeals for the Third Circuit, interpreting the UTPCPL and predicting how this Court would read the catchall provision, has held that "deceptive" conduct requires "knowledge of

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[1] The panel's boundless reading of "deceptive" conduct as encompassing purely innocent conduct also conflicts with interpretations of that term in other contexts. For example, this Court has interpreted the Medicaid Fraud and Abuse Control Act, which seeks "to eliminate fraudulent, abusive and deceptive conduct," as "most certainly . . . referring to willful conduct." *Commonwealth v. Lurie*, 569 A.2d 329, 331 (Pa. 1990).

the falsity of one's statements or the misleading quality of one's conduct." *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 498 (3d Cir. 2013). Significantly, one of the three judges that decided *Belmont* – the Honorable Michael Fisher – is a former Pennsylvania Senator and was a principal sponsor of the bill that added "deceptive" to the catchall provision. *See* Pa. Legislative Journal–Senate at 2427–28 (Sept. 25, 1996). Thus, *Belmont's* holding that "deceptive" conduct must be *knowingly* false or misleading is instructive.

In reaching the contrary interpretation – that the 1996 amendment renders a defendant's state of mind irrelevant – the panel ignored the common, everyday meaning of the term "deceptive" and erroneously disregarded Pennsylvania case law construing "deceit" as requiring an intent to mislead.

B. The Panel's Interpretation Renders Key Statutory Language Meaningless

It is a basic canon of statutory construction that courts "must take care to give meaning to every word and provision of the statute." *Whitmoyer v. Workers' Comp. Appeal Bd. (Mountain Country Meats)*, 186 A.3d 947, 954 (Pa. 2018); *see also Trust Under Agreement of Taylor*, 164 A.3d 1147, 1157 (Pa. 2017) ("We must presume that in drafting the statute, the General Assembly intended the entire statute, including all of its provisions, to be effective."). The decision below violates this canon by rendering key parts of the statute meaningless.

The catchall provision prohibits "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201-2(4)(xxi). In holding that the statute imposes strict liability, the panel erroneously and circularly equated "deception" with creating a "likelihood of confusion or of misunderstanding." *Gregg*, 195 A.3d at 937–40. In so doing, it failed to give the limiting language – "fraudulent or deceptive" – any independent meaning and improperly read the state of mind element out of the statute.

The panel's interpretation is especially problematic given the statute's drafting history. The originally proposed version of the catchall provision would have prohibited "[e]ngaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." House Bill No. 2431, 1968 Reg. Sess., Printer's No. 3270, at § 2(4)(ixv) (Apr. 29, 1968).

In the enacted version, the Legislature *rejected* a strict liability scheme that turned solely on "creat[ing] a likelihood of confusion or of misunderstanding" and instead limited liability to "*fraudulent* conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201-2(4)(xiii), Dec. 17, 1968, P.L. 1224, No. 387, at § 2 (emphasis added). The addition of "deceptive" in 1996 did not erase the state of mind requirement. Had that been the Legislature's intent, it could have simply deleted the word "fraudulent" (and gone back to the originally

proposed version of the catchall provision) rather than inserting another word – "deceptive" – requiring a bad intent.

C. The Panel's Interpretation Improperly Elevates the Perceived Policy Goals of the Statute Above Its Plain Language

Ignoring the statute's plain language, the panel's decision relies heavily upon the perceived policy goals of the UTPCPL and the need to construe the statute "liberally" to advance those goals. *Gregg*, 195 A.3d at 937, 939–40. But as this Court explained last year when construing the UTPCPL, courts "may not supply additional terms to, or alter, the language that the Legislature has chosen." *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 17 (Pa. 2018). Where, as here, the "words of a statute are clear and unambiguous, [the Court] may not go beyond the plain meaning of the language of the statute under the pretext of pursuing its spirit." *Walter*, 93 A.3d at 450.

Moreover, the panel's absolutist approach to the perceived policy goals of the UTPCPL stretches the statute well beyond its breaking point. This Court has acknowledged that the UTPCPL's "underlying foundation" is "fraud prevention." *Danganan*, 179 A.3d at 16; *Toy*, 928 A.2d at 46. This is borne out by the legislative history, as discussed below. There is nothing in the language of the statute or its legislative history that even remotely suggests that the Legislature intended to turn a consumer protection statute primarily aimed at combating fraud into a sprawling, strict liability scheme.

II. The Panel's Imposition of Strict Liability Is Contrary to the UTPCPL's Legislative History

The legislative history in no way supports the panel's radical departure from the statutory text. In fact, the legislative history strongly cuts *against* interpreting the catchall provision as a strict liability regime.

A. When Enacting the UTPCPL, the General Assembly Purposefully Modified the Catchall Provision To Require Fraudulent Intent

The legislative history reveals that the Legislature twice rejected a strict liability approach to the catchall provision. The UTPCPL was based on suggested model legislation promulgated in 1967. *See* Council of State Governments, Suggested State Legislation, Vol. XXVI: Unfair Trade Practices and Consumer Protection Law, A72–A78 (1968). The model act contained a broad catchall provision prohibiting "engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." *Id.* But, as discussed above, when the Legislature enacted the UTPCPL in 1968, it purposefully modified the model act by inserting "fraudulent" into the catchall provision, thereby rejecting strict liability and limiting its scope to culpable conduct.

During the 1976 amendment process, a proposal was made to amend the catchall provision to remove the reference to "fraudulent" conduct. *See* House Bill No. 485, 1975 Reg. Sess., Printer's No. 537, at § 2 (Feb. 18, 1975); Pa. Legislative Journal–House at 2150 (July 16, 1975). But the amendment was defeated and the

catchall provision remained unchanged, with one representative explaining that "to define an unfair and deceptive practice as 'conduct which creates a likelihood of confusion or of misunderstanding' is simply the type of language that is both ambiguous and is overkill of a situation and I do not think really intended." Pa. Legislative Journal–House at 1798 (June 28, 1976).

The 1968 Legislature's policy choice to limit the catchall provision to fraudulent conduct is consistent with the UTPCPL's antifraud roots. In a special message to the General Assembly in 1968, the Governor explained that the proposed bill was aimed at combating "fraudulent practices" by "a relatively few individuals and firms on the fringes of the legitimate business community." Pa. Legislative Journal–House at 420 (Apr. 29, 1968).[2] The overriding goal of "protect[ing] consumers while at the same time . . . not unduly restrict[ing] or burden[ing] honest businessmen" was echoed in connection with the 1976 amendment. Pa. Legislative Journal–House at 2142 (July 16, 1975).

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[2] *See also* Pa. Legislative Journal–House at 7 (Jan. 2, 1968) (UTPCPL part of "a new program to provide better protection for the millions of consumers in our communities from ruthless and fraudulent practices of a few businessmen who prey on innocence and ignorance"); Pa. Legislative Journal–House at 1231 (July 8, 1968) ("[UTPCPL] protects both the unsuspecting and innocent consumer and the legitimate businessman, both of whom are subject to fraudulent schemes by the unscrupulous profiteer.").

B. The 1996 Amendment Targeted Telemarketing Fraud and Said Nothing about Strict Liability

The 1996 amendment added "deceptive" to the catchall provision as part of a package of measures targeting telemarketing fraud. "Deceptive" was added in the first version of the bill and remained in successive versions until enacted.

There is not a word in the legislative history suggesting that the addition of "deceptive" was intended to eliminate the catchall provision's state of mind requirement and create a strict liability regime. To the contrary, the relevant commentary is focused on the Legislature's efforts to curb telemarketing fraud and the use of misleading tactics to swindle Pennsylvanians. *See, e.g.*, Pa. Legislative Journal–Senate at 2427–28 (Sept. 25, 1996); Testimony of Office of Attorney General on S.B. 1315, 1316, and 1317, Before the Senate Consumer Protection Committee (Jan. 3, 1995) (Thomas W. Corbett, Jr., Attorney General).

Then-Senator Fisher made clear that the legislation's purpose was to "crack down on telemarketing fraud and other scams that target Pennsylvania consumers, particularly the elderly." Testimony of Senator Mike Fisher, Public Hearing on Telemarketing Fraud at 1 (Jan. 3, 1995). His testimony is replete with references to "fraud," "fraudulent operators," "fraudulent schemes," "fraudulent marketers," "con artists," and "scam artists." *Id.* He also testified about cracking down on "con artists" who used "high pressure sales tactics and threats to talk people into all kinds of 'so-called' deals." *Id.* At the same time, the amendments sought to

protect "those people who are legitimately using telemarketing to sell their goods in Pennsylvania." Pa. Legislative Journal–Senate at 2427 (Sept. 25, 1996).[3]

C. Legislative Intent to Impose Strict Liability Must be Absolutely Clear

Given the draconian nature of liability without fault, "if the Legislature had intended to create strict liability, an obvious departure from established case law, it would have done so in a manner that its intention would be absolutely clear." *Commonwealth Dept. of Public Welfare v. Hickey*, 582 A.2d 734, 736 (Pa. Commw. Ct. 1990). The Legislature knows how to impose strict liability. *See* Petitioner's Br. at 40–42 (identifying statutes imposing strict liability using language such as "absolute liability," "strictly liable," "regardless of intent," and "without proof of fault"). Such language is missing from the catchall provision.

It is impossible to conclude that the Legislature intended to create a brand new strict liability regime by retaining the limiting term "fraudulent" and simply adding another limiting term – "deceptive" – to the catchall provision, rather than

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[3] Although the panel assumes the UTPCPL did not prohibit "deceptive" trade practices until 1996, the Legislature did not perceive the pre-1996 law as so limited. Even the 1968 Legislature viewed the law as prohibiting "unfair methods of competition *and deceptive* trade practice." Pa. Legislative Journal–House at 1231 (July 8, 1968) (emphasis added); *see also* Pa. Legislative Journal–House at 432 (Apr. 29, 1968) (UTPCPL bills "were designed to bring a halt to the fraudulent *and deceptive* consumer and credit practices that are very much in evidence today" (emphasis added)).

using the well-established language of strict or absolute liability. And it is even more absurd to suggest that the Legislature did so without any mention in the legislative history that it was making such a dramatic change to Pennsylvania law.

III. The Panel's Imposition of Strict Liability Usurps the Role of the Legislature

The panel's decision not only conflicts with the statute's language and legislative history, but it also violates this Court's admonition against judicial free-lancing in the legislative policy-making arena. The creation of a strict liability scheme involves making important policy judgments about the allocation of risk and the proper balancing of competing societal interests, and thus is more appropriately within the province of the Legislature – not the judiciary.

In *Tincher v. Omega Flex Inc.*, 104 A.3d 328, 353 (Pa. 2014), this Court recognized the shortcomings of the judicial process in attempting to resolve the policy judgments inherent in creating liability schemes. "[C]ommon law decision-making is subject to inherent limitations, as it is grounded in records of individual cases and the advocacy by the parties shaped by those records. Unlike the legislative process, the adjudicatory process is structured to cast a narrow focus on matters framed by litigants before the Court in a highly directed fashion." *Id.*

These concerns are particularly acute when it comes to expanding liability through the imposition of strict liability. As this Court has explained, "[t]he social effects of expanding a scheme of liability without fault must be considered

carefully before such innovations may be rationally implemented," and "legislative involvement in addressing such effects is desirable." *Schmidt v. Boardman Co.*, 11 A.3d 924, 952–53 (Pa. 2011).

This Court also warned against making "broad-based pronouncements" where such decisions "are better suited to the information-gathering and give-and-take balancing of competing concerns available in the legislative arena." *Id.* at 352–53. Accordingly, the Court has cautioned that the judiciary "must generally show restraint in altering existing allocations of risk" and "resist the temptation or experimentation with untested social policies." *Tincher*, 104 A.3d at 354.

The imposition of a strict liability regime under the catchall provision – eliminating any culpable intent and making even innocent conduct actionable – raises serious policy questions that are best left to be studied, debated, and decided by the Legislature. The Legislature possesses the necessary tools to conduct fact-finding and analysis on critical issues such as: the practical need and policy justification for strict liability; the adequacy of existing laws and remedies; the scope and contours of the strict liability regime; the micro-and-macro-economic impact of strict liability; and the impact on consumers, businesses, the Commonwealth, and the overall business climate.

Here, the panel ignored this Court's guidance, failed to exercise restraint, and imposed upon the Commonwealth a profound and untested expansion of strict

liability that was never contemplated or considered by the Legislature. In doing so, the panel engaged in an impermissible foray into legislative policy-making.

IV. The Panel's Imposition of Strict Liability Creates a Dangerous and Unworkable Regime Ripe for Abuse

The panel's strict liability regime is dangerous, unworkable, and ripe for abuse. Subjecting millions of consumer transactions to this new liability scheme – based on such vague concepts as "confusion" and "misunderstanding" – will open the floodgates to claims by consumers with "buyer's remorse" and ultimately harm consumers, businesses, and the Commonwealth.

A. The Panel's Decision Implicates Tens of Millions of Consumer Transactions

The UTPCPL covers any "purchases or leases of goods or services, primarily for personal, family or household purposes." 73 P.S. § 201-9.2. It applies to millions of consumer transactions across dozens of industries and sectors: banking, insurance, healthcare and hospitals, nursing homes, retail and department stores, mortgages, residential construction and contracting, residential real estate sales and leasing, automobile sales and leasing, food and restaurants, utilities, telecommunications, cable, funerals, moving companies, and debt-collection firms. It also touches nearly all services, such as financial advisory, medical, tax, accounting, and legal services.

With over 12 million people living in the Commonwealth and more than 5 million households engaging in multiple transactions daily, the scope of the UTPCPL's new strict liability regime is enormous.[4] Statewide, the number of qualifying transactions in a given year could easily reach the tens of millions.[5]

Pennsylvania is home to more than two million small and large businesses.[6] Those businesses could now be subject to strict liability for transactions that not only occur in the Commonwealth, but also across the United States. Recently, this Court held that a non-Pennsylvania resident may file a UTPCPL claim against a Pennsylvania business based on transactions that occur out-of-state. *Danganan*, 179 A.3d at 12. In light of *Danganan*, the panel's strict liability standard could reach millions of additional transactions, potentially exposing Pennsylvania businesses to strict liability whenever they do business across the nation.

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4 United States Census Bureau, "Quick Facts: Pennsylvania" (last updated July 1, 2018), https://www.census.gov/quickfacts/PA.

5 In 2018 alone, there was over $178 billion of retail sales in the Commonwealth. *Id.*

6 United States Small Business Administration, "2018 Small Business Profile: Pennsylvania" (2018), https://bit.ly/2kv1kPA.

B. The Panel's Decision Creates a Dangerous New Cause of Action That is Easy for Plaintiffs to Abuse and Difficult for Defendants to Avoid

The panel held that a defendant may be held strictly liable for any conduct that creates a likelihood of "confusion" or "misunderstanding." The result is a new cause of action premised solely on the consumer's state of mind. Liability is now triggered not by any wrongful conduct by the defendant that causes "confusion" or "misunderstanding," but rather solely by the effect on the consumer's state of mind – even if the defendant acted innocently and without any fault. This radical departure from the law is dangerous for many reasons.

First, the panel decision makes innocent conduct actionable. As originally enacted, to recover on a catchall claim, the plaintiff had to plead and prove the state of mind of both the plaintiff and the defendant. The plaintiff had to establish that the defendant fraudulently – with intent to deceive – caused the plaintiff's confusion or misunderstanding. But now only the plaintiff's state of mind matters. *Gregg*, 195 A.3d 940 ("we hold that the General Assembly, by eliminating the common law state of mind element . . . , imposed strict liability on vendors"). The defendant can be held liable no matter how much care he or she exercised to avoid confusion or misunderstanding.

Second, imposing strict liability solely on the basis of a standard as vague as "confusion" or "misunderstanding" is highly inappropriate. This is particularly

true because "confusion or . . . misunderstanding," 73 P.S. § 201-2(4)(xxi), is largely based on the facts and circumstances of each case. *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 598 (Pa. Super. Ct. 2013). Typically, a consumer cause of action focuses on the wrongful conduct of the defendant and a concrete injury. In light of the panel ruling, the new catchall cause of action arises in the mind of the consumer. This new cause of action will be very difficult to challenge in litigation and will seriously and unfairly prejudice defendants.

Third, the panel's decision makes it easy for a disappointed consumer with nothing more than "buyer's remorse" to sue based on an assertion that he or she was "confused" about or "misunderstood" some aspect of the transaction. This is especially troubling given the complexity of many consumer transactions, such as the purchase of a home, a cellular plan, or an insurance policy. Virtually every consumer, regardless of sophistication and intelligence, has experienced some form or level of "confusion" or "misunderstanding" in purchasing goods or services in our modern economy. Whereas the plaintiff previously had to allege facts showing that the defendant intended to deceive the consumer, now the consumer must allege only that he or she was confused about or misunderstood some aspect of the transaction. Such a cause of action is susceptible to great abuse.

Fourth, the creation of this new strict liability cause of action is dangerous because of the enormous difficulty that businesses will face in attempting to adhere

to such an amorphous and unpredictable standard. To avoid liability, businesses subject to the panel's new strict liability standard must anticipate the state of mind and understanding of each and every consumer they may encounter, and then try to take action to prevent that confusion or misunderstanding. This is nearly impossible given the varying levels of sophistication, intelligence, education, and life experience of the enormous consumer population.

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In summary, the panel has now created a strict liability cause of action that is easy to abuse and difficult to avoid by even the most conscientious businesses.

C. The Panel's Decision Will Flood Civil Dockets With a New Misguided Brand of UTPCPL Litigation

Combining the massive number of transactions covered by the UTPCPL with the panel's creation of a new strict liability standard that renders the seller's state of mind wholly irrelevant will result in an enormous increase in litigation and the swallowing of traditional causes of action.

Normally, "[s]trict liability is not applied to all products and services in the economy."[7] But after the panel's decision, traditional causes of action like fraud and negligent misrepresentation are no longer necessary. Instead, aggrieved

[7] T. Randolph Beard, et al., "Tort Liability for Software Developers: A Law & Economics Perspective," 27 J. Marshall J. Computer & Info. L. 199, 205 (Winter 2009) (citing Restatement (Second) of Torts § 402A, cmt. f).

consumers can avoid the heightened pleading requirements of a common law fraud claim and simply allege a violation of the UTPCPL's catchall provision, claiming that they were "confused" or "misunderstood" some aspect of the transaction.

For example, consumers alleging misrepresentations associated with real estate transactions against licensed agents traditionally bring either intentional or negligent misrepresentation causes of action. *See Bortz v. Noon*, 729 A.2d 555 (Pa. 2002). This Court expressly rejected extending liability to agents for innocent misrepresentations made during the sale of real estate, explaining "[s]uch strict liability would place too high a burden on the real estate broker." *Id.* at 565.

Despite those concerns, the panel's strict liability standard creates precisely this type of untenable burden, and provides a backdoor for aggrieved purchasers to impose tort liability upon real estate agents for innocent misrepresentations. According to the panel below, it does not matter whether the real estate agent's conduct was "committed intentionally (as in a fraudulent misrepresentation), carelessly (as in a negligent misrepresentation), or with the utmost care (as in strict liability)" – liability may be imposed as long as there is a likelihood of confusion or misunderstanding on the part of the consumer. *Gregg*, 195 A.3d at 939.

The panel's expansion of the catchall provision will overwhelm the lower courts by creating a flood of new UTPCPL litigation, unrelated to traditional UTPCPL subject matter.

V. The Panel's Imposition of Strict Liability Will Harm Consumers

Allowing the UTPCPL's catchall provision to encompass a strict liability regime will not protect consumers. Rather, such a standard will likely harm them in the long term.

First, consumers will ultimately bear the costs of this new strict liability standard.[8] Studies have shown that "[h]igh litigation and administrative costs constitute the majority of the price increases" passed onto consumers.[9] To the extent that businesses can obtain insurance coverage for claims under this strict liability regime, that coverage necessarily will come at a higher cost than current insurance premiums.[10] And to the extent insurance is unavailable, businesses will inevitably pass additional costs onto consumers.

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8 Beard, et al., *supra* note 7 at 205.

9 *See* Joanna M. Shepard, "Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Business, Employment and Production," 66 Vand. L. Rev. 257, 287 (Jan. 2013) ("increasing litigation costs will continue to increase prices, deterring potentially socially beneficial transactions"); *see also* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1471–72 (Apr. 2010) ("In the extreme, the litigation cost-related price increase due to product liability could be so high that it would discourage most consumers from purchasing the product and consequently cause the manufacturer to withdraw the product from the marketplace or to go out of business.").

10 *See id.* at 288–89 ("empirical studies have shown that greater legal uncertainty is associated with higher premium rates"); *see also* Patricia H. Born & W. Kip Viscusi, *The Distribution of the Insurance Market Effects of Tort Liability Reforms*, Brookings Papers on Economic Activity: Microeconomics 55, 62–66 (1998), https://brook.gs/2ktfJMk (in the medical

Second, by placing "the duty of UTPCPL compliance squarely and solely on vendors," *Gregg*, 195 A.3d at 940, businesses may act in ways that tend to harm consumers.

For example, to try to avoid "confusion" and "misunderstanding," businesses may decide to provide more forms and disclosures to consumers, or perhaps require consumers to complete questionnaires and other forms evidencing their lack of confusion or misunderstanding. Consumers already over-burdened by documentation and legal disclosures will be hit with yet more disclosures, which may have the opposite effect of deterring consumers from reading and absorbing such information. Indeed, empirical studies show that increased disclosure requirements often harm consumers by preventing them from finding the relevant information they need to make informed decisions.[11] As a result, over-disclosure may result in more – not less – confusion and misunderstanding.

These potential adverse impacts on consumers demonstrate why the creation of a strict liability regime should be left to the Legislature. Regrettably, the panel

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field, increased litigation costs and uncertain liability risks resulted in higher insurance premiums that were ultimately passed on to consumers).

[11] Shlomit Azgad-Tromer, "The Case for Consumer-Oriented Corporate Governance, Accountability and Disclosure," 17 U. Pa. J. Bus. L. 227, 263–64 (Fall 2014).

did not even mention – let alone consider – the potential harm to consumers before announcing a radical change in the law.

VI. The Panel's Imposition of Strict Liability Will Harm the Commonwealth

A key purpose of the UTPCPL is "to benefit the public at large by eradicating unfair or deceptive business practices and to ensure fairness of market transactions." *Danganan*, 179 A.3d at 12. If left uncorrected, however, the new strict liability standard will ultimately harm Pennsylvania and its residents by eliminating competition and choice from the consumer market.[12]

The U.S. Chamber estimated that the cost of the U.S. tort system amounted to approximately $429 billion in 2016.[13] Tort costs in Pennsylvania exceeded $18.3 billion, and consumed approximately 2.5% of Pennsylvania's gross domestic product.[14] The panel's expansion of liability will not only increase those costs, but also will adversely affect the Commonwealth in a number of other ways.

First, Pennsylvania businesses will face increased liability costs in industries not historically subject to strict liability standards. "Although some of these costs are passed on to consumers in the form of higher prices," the "unpredictable and

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12 Shepard, *supra* note 9 at 259; Polinsky & Shavell, *supra* note 9 at 1471–72.

13 U.S. Chamber Institute for Legal Reform, Costs and Compensation of the U.S. Tort System at 4 (October 2018), https://bit.ly/2lx5k2s.

14 *Id.* at 22.

arbitrary nature" of injuries under a strict liability regime "means that ex ante price increases cannot incorporate all liability costs and that many manufacturers will subsequently pay."[15] These unpredictable and significant liability costs will affect many important business decisions, including "whether to open or close businesses, relocate to lower-liability areas, and increase or decrease production."[16]

Second, increased liability costs resulting from a strict liability UTPCPL regime will have a direct effect on the ability of Pennsylvania businesses to compete nationally and internationally.[17] If the panel's strict liability regime is left in place, Pennsylvania businesses will be less competitive than business in many other states due to increased tort costs. For example, studies have shown that increased liability costs in the U.S. reduce international cost competitiveness by at least 3.2%.[18] These increased liability costs associated with doing business under a

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15 Shepard, *supra* note 9 at 288.

16 *Id.*

17 Costs and Compensation of U.S. Tort System, *supra* note 13 at 4 (studies have shown that "[t]ort system costs and compensation in the most expensive states are up to 2.1 times larger than in the least expensive states").

18 Jeremy A. Leonard, How Structural Costs Imposed on U.S. Manufacturers Harm Workers and Threaten Competitiveness 16 (2003), https://bit.ly/2kiMA6E.

strict liability UTPCPL regime could discourage direct investment by making the Commonwealth less attractive to out-of-state and foreign capital.[19]

Third, research has shown that the risk of frivolous or abusive litigation, such as that imposed by a new strict liability UTPCPL standard, can discourage the sale of new products and slow innovation.[20] This slowing of innovation is greatest in industries with the highest litigation risks, such as the pharmaceutical industry, which employs over 78,000 individuals in Pennsylvania.[21]

Finally, new and expanding businesses may overlook Pennsylvania as a viable and competitive option to do business. A recent poll of in-house general counsel and executives at public and private companies with annual revenue of at least $100 million reveals that more than 85% of those executives feel that a state's litigation environment is likely to influence business decisions, "such as where to locate or where to expand business[]."[22] These decisions will have harmful

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19 Costs and Compensation of U.S. Tort System, *supra* note 13 at 6.

20 *Id.* at 4; *see also* Shepard, *supra* note 9 at 287–88 ("expanding the scope of [strict] products liability should decrease economic activity such as production, employment, innovation, and business openings").

21 Commonwealth of Pennsylvania, Dep't of Community and Economic Development, "Key Industries," (last visited Aug. 20, 2019), https://dced.pa.gov/key-industries/.

22 U.S. Chamber Institute for Legal Reform, 2017 Lawsuit Climate Survey: Ranking the States at 3 (Sept. 2017), https://bit.ly/2lXx7Jr.

economic consequences for the Commonwealth, as new or expanding businesses could decide to go elsewhere in light of the panel's decision below.

Again, these are all matters that should be considered and carefully weighed by the Legislature before adopting a strict liability regime.

CONCLUSION

For the reasons above and those articulated in Petitioners' brief, the panel's decision should be reversed because it ignores the plain language of the statute and fifty years of legislative policy by injecting into the UTPCPL catchall provision a strict liability standard specifically rejected by the Legislature. If allowed to stand, the decision will have a serious and negative impact on Pennsylvania consumers, its businesses, and the Commonwealth as a whole.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2135(a)(1)

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