

MASSACHUSETTS CONSUMER PROTECTION ACT'S APPLICABILITY TO PRODUCTS LIABILITY ACTIONS

On April 9, 1990, the Supreme Judicial Court of Massachusetts held in Maillet v. ATF-Davidson Co., Inc., 407 Mass. 185 (1990), that negligence and breach of implied warranty by a product manufacturer may constitute "unfair and deceptive acts or practices" under the Massachusetts Consumer Protection Act, commonly called Chapter 93A. Maillet is an alarming development which will have a significant impact on the preparation, evaluation, and trial of products liability actions in the Commonwealth. The decision is of concern to product manufacturers principally because:

- The Consumer Protection Act permits potential recovery of *multiple damages* (two to three times actual damages) plus costs and attorneys' fees;
- If exposure is to be minimized, demand letters alleging personal injury as a result of violations of Chapter 93A must be answered promptly, with care, and with an understanding of how the statute operates;

NOTE: *When a Chapter 93A demand letter is received, it is imperative that you ensure that appropriate steps are taken to respond in accordance with Massachusetts requirements. Legal counsel familiar with these procedures should be consulted promptly.*

- The decision raises numerous unanswered legal questions affecting the liability of products liability defendants;
- The decision may expand the scope of permissible discovery in products liability cases.

Chapter 93A provides that unfair and deceptive acts or practices in the conduct of trade or commerce are unlawful. Successful plaintiffs may recover actual damages *plus all costs and attorneys' fees*. If the violation is deemed "willful" or "knowing," or if the defendant in "bad faith" refuses to grant relief upon receiving a demand, *damages must be doubled and may be trebled*.

Several earlier commercial cases had stated, without analysis, that as a general proposition a breach of warranty may constitute a violation of Chapter 93A, § 2. *See, e.g., Canal Electric Company v. Westinghouse Electric Corp.*, 406 Mass. 369, 378-379 (1990); Calimlim v. Foreign Car Center, Inc., 392 Mass. 228, 235 (1984); Burnham v. Mark IV Homes, Inc., 387 Mass. 575, 577 (1982); Hannon v. Original Gunite Aquitech Pools, Inc., 385 Mass. 813, 821 (1982). In addition, the Massachusetts Attorney General has promulgated a regulation providing that it is an unfair and deceptive act or practice to fail to perform or fulfill promises or obligations arising under warranty, including the implied warranty of merchantability (940 Code Mass. Regs. §§ 3.01, 3.08(2)(1986)).

Until Maillet, however, no reported decision had held in a products liability action involving *personal injury* that a breach of an implied warranty (the legal equivalent in Massachusetts to the strict liability standard of the Restatement (Second) of Torts § 402A) also violates the Act. In Maillet, after the jury awarded damages against a printing press manufacturer on negligence and breach of warranty claims, the trial judge held that the breach of warranty also constituted a violation of Chapter 93A and awarded the injured plaintiff attorneys' fees and costs (including expert witness fees). The Supreme Judicial Court affirmed based upon the findings of negligence and breach of warranty.

Maillet will likely have an immediate impact on the conduct of pending and future products liability litigation in Massachusetts. In actions now pending, plaintiffs can be expected to send Chapter 93A demand letters (a prerequisite to initiating a consumer suit), to which defendants must respond within 30 days if rights are to be protected, and then to seek leave to amend complaints to add claims for violations of the statute. Also, products manufacturers may expect increasing numbers of pre-lawsuit demand letters from injured parties. Because the time allotted to respond is short and failing to respond appropriately to such a demand letter increases a manufacturer's exposure, these letters must be promptly and carefully answered, and an immediate investigation and assessment of the claims is necessary.

Since Massachusetts has heretofore permitted punitive damages only in very limited circumstances (e.g., wrongful death), Maillet also presents a significant risk of greatly increased damage awards, and complicates case evaluation by applying multiple damage concepts to an area where, unlike most commercial cases, even compensatory damages are difficult to predict with accuracy. Even where multiple damages are not awarded, the statute increases the potential exposure because costs and attorneys' fees, often quite substantial in products liability litigation, are awarded to successful plaintiffs. Under present law, Chapter 93A damage issues are decided by the trial judge, but legislation which would leave such issues to the jury has been filed in the Legislature.

In addition, a Chapter 93A claim *may be employed by plaintiffs to seek expanded discovery*. Since the statute expressly prohibits unfair and deceptive "practices," plaintiffs may seek wider latitude in discovery into tangential areas such as similar incidents, other claims received and/or responses made to claims in the past.

Maillet has opened, but not answered, other issues which are likely to be contested in future litigation:

- Can a *non-negligent* manufacturer in breach of an implied warranty be held liable under Chapter 93A? Maillet declined to answer the question, since the jury had found both negligence and breach of warranty.
- Is the Massachusetts Attorney General's regulation that makes a breach of warranty (including implied warranty) a *per se* violation of Chapter 93A beyond the regulator's statutory authority? In Maillet the court refused to address this issue.

- Does the three year statute of limitations generally governing products liability actions apply to personal injury claims brought under this statute, or does the four year limitation of Chapter 93A control?
- Will recognized defenses to negligence and warranty actions bar or reduce damage awards under this additional liability theory? What relevance, for example, does unreasonable use of the product with knowledge of its hazards — an outright bar under a warranty theory — have to a corresponding Chapter 93A claim?
- What role does a party's reliance play? Chapter 93A deals with reliance questions very differently than do traditional products liability theories.
- What limitations on insurance coverage may be asserted with respect to damages awarded under Chapter 93A, including litigation costs and multiple damages?

These are important, but by no means exhaustive, questions suggested by the injection of this statute into products liability jurisprudence. A restrictive approach to such issues by the Massachusetts courts in future products liability litigation seems unlikely. The tone of the Maillet opinion, and the absence of a dissenting opinion, suggests that other expansive judicial interpretations of Chapter 93A applied to products liability cases may well come down in the future. Any reform would have to come from the Legislature, and we are not optimistic that such reform will be forthcoming.

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CHAPTER 93A

REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION

Sec.

1. Definitions.
2. Unfair practices; legislative intent; rules and regulations.
3. Exempted transactions.
4. Actions by attorney general; notice; venue; injunctions.
5. Assurance of discontinuance of unlawful method or practice.
6. Examination of books and records; attendance of persons; notice.
7. Failure to appear or to comply with notice.
8. Habitual violation of injunctions.
9. Civil actions and remedies; class action; demand for relief; damages; costs; exhausting administrative remedies.
10. Notice to attorney general; injunction, prima facie evidence.
11. Persons engaged in business; actions for unfair trade practices; class actions; damages; injunction; costs.

The section headings for Massachusetts General Laws Annotated have been editorially supplied.

Chapter 93A of the General Laws was added by St.1967, c. 813, § 1.

Cross References

Abuse of patients or residents of long term care facilities, civil actions by attorney general, see c. 111, § 72K.
Consumer credit cost disclosure, application of this chapter, see c. 140D, § 34.
Debt collection in an unfair, deceptive or unreasonable manner, see c. 93, § 49.
Entitlement of mortgagor paying attorney's fees to certification of title, failure to comply as unfair practice under this chapter, see c. 93, § 70.
Health maintenance organizations, application of this chapter, see c. 176G, § 9.
Retail installment sales of motor vehicles, unfair or deceptive practices, see c. 255B, § 6.
Tampering with odometer of motor vehicle with intent to defraud as unfair method of competition under this chapter, see c. 266, § 141.

Law Review Commentaries

Acceleration and sale of collateral; damages for wrongful sale of stock. (1979) 64 Mass.L.Rev. 89.

Attorney negligence in real estate title examination and will drafting. (1981-1982) 17 New England L.Rev. 955.

Commercial section and the First Amendment: Supreme Court, 1974 term. (1975) 89 Harvard L.Rev. 111.

Commercial speech and FTC. (1981) 16 New England L.Rev. 793.

Consumer class action. Sidney Margolius (1969) 49 Boston U.L.Rev. 211; James E. Starrs (1969) 49 Boston U.L.Rev. 407.

Consumer fraud. Harold Baer, Jr. (1969) 4 New England L.Rev. 97.

Consumer protection. James R. McCall (1972) 34 ATLA L.J. 136; 16 Annual Survey of Mass.Law, Boston College, p. 157 (1969).

Consumer Protection Act. (1981) 16 New England L.Rev. 449.

Consumer Protection Act of Massachusetts. Robert L. Meade (1969) 4 New England L.Rev. 121.

Consumer protection legislation and the assertion of tenant rights. (1979) 59 Boston U.L.Rev. 483.

Consumer redress through small claims court: A proposed Model Consumer Justice Act. Jeffrey H. Joseph and Barry A. Friedman (1977) 18 Boston College L.Rev. 839.

Contempt proceedings: Another dimension to consumer protection. Robert D. Co-