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Can A Finding Of A Breach Of Warranty Be The Basis For Recovery Of Attorney's Fees And Punitive Damages?

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Introduction. Massachusetts does not recognize common law punitive damages. It follows the American Rule, which provides that each party is responsible to pay its own attorney's fees unless specific statute or contract allows assessment of those fees against the other party. Under certain circumstances, attorney's fees and punitive damages have been granted under Massachusetts' consumer protection statute, Mass. Gen. L. ch. 93A. There is viable cause of action under the consumer protection statute for breach of warranty claims in the context of products liability cases.

Warranties. In connection with product liability claims, Massachusetts recognizes the implied warranty of merchantability. Mass. Gen. L. ch. 106, § 2-314; *Back v. Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964, 969 (1978). The warranty of merchantability provides that goods must be "fit for the ordinary purposes for which such goods are used." Mass. Gen. L. ch. 106, § 2-314. "A breach of warranty can occur if either (1) the product is defectively designed, or (2) foreseeable users are not adequately warned of the dangers associated with its use." *Kearney v. Philip Morris, Inc.*, 916 F.Supp. 61, 64 (D.Mass.1996). Massachusetts also recognizes the implied warranty of fitness for a particular purpose. Mass. Gen. L. ch. 106, § 2-315. *Wasylow v. Glock, Inc.*, 975 F.Supp. 370, 377 (D.Mass. 1996).

Chapter 93A. The Massachusetts consumer protection statute, Mass. Gen. L. ch. 93A, § 2, makes it unlawful to engage in "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Section 9 of the statute applies to claims brought by consumers, while Section 11 applies to claims brought by businesses. The consumer protection statute has also been used in class action product liability claims. There are statutory prerequisites prior to filing an action under Section 9. A 30-day demand letter must be sent to the party responsible for the breach of warranty. There is no corresponding requirement in a claim brought by a business under Section 11.

Interplay between Breach of Warranty and Mass. Gen. L. ch. 93A. Generally, a breach of warranty may support a collateral count under Mass. Gen. L. ch. 93A, § 2. *One Beacon Ins. Co. v. Electrolux & Sears Roebuck & Co.*, 436 F. Supp. 2d 291, 296- 297 (D. Mass. 2006); *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193, 552 N.E.2d 95 (1990). A breach of warranty is virtually a per se Mass. Gen. L. ch. 93A, § 2 violation, if the claim is brought by a consumer, under Mass. Gen. L. ch. 93A, § 9. *Glyptal, Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 899 (D. Mass. 1992); *Mustapha v. DaimlerChrysler Co.*, 2008 Mass. Super. LEXIS 45, 30-31 (Mass. Super. Ct. 2008). In contrast, in a claim brought by a business under Mass. Gen. L. ch. 93A, § 11, a breach of warranty alone does not necessarily give rise to a Mass. Gen. L. ch. 93A violation. The element of proof in a Section 11 case is much more stringent. When a breach of warranty is alleged to be an unfair or deceptive act, the "objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 396 N.E.2d 149, 153 (1979); *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 642 N.E.2d 587, 597 (1994).

Attorney's Fees. A finding of violation of Mass. Gen. L. ch. 93A, § 2 entitles the plaintiff to reasonable attorney's fees. Under both Mass. Gen. L. ch. 93A, §§ 9 and 11, if the court finds there has been a violation of section two, the plaintiff shall, "in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action. . . ." *Cummings v. HPG Int'l, Inc.*, 244 F.3d 16, 27 (1st Cir. 2001).

Multiple Damages. Under both Mass. Gen. L. ch. 93A, §§ 9 and 11, the court may award up to three but not less than two times the amount of the petitioner's actual damages if the court finds that "the use of employment of the unfair or deceptive act or practice was a willful or knowing violation of Chapter 93A, § 2, or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated § 2."

Comments. The Massachusetts consumer protection statute can serve as a powerful tool in recovering more than the actual damages sustained. It is a source of recovery for consequential damages and attorney's fees in breach of warranty claims. Instead of including only breach of warranty and negligence counts in product liability cases, consideration should be made to also include a count under this statute.