

Commonwealth v. Mega Life & Health Ins. Co.

Superior Court of Massachusetts, At Suffolk

November 8, 2023, Decided

CIVIL ACTION NO. 0684CV4411-BLS1

Reporter

2023 Mass. Super. LEXIS 662 *; 2023 WL 8541129

COMMONWEALTH OF MASSACHUSETTS vs. MEGA LIFE & HEALTH
INSURANCE COMPANY et al.

Prior History: [Commonwealth v. Mega Life & Health Ins. Co., 2022 Mass. Super. LEXIS 12, 2022 WL 10392550 \(Mass. Super. Ct., Apr. 25, 2022\)](#)

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade
Practices > State Regulation

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Remedies

Governments > Legislation > Interpretation

[HN1](#) Deceptive & Unfair Trade Practices, State Regulation

The unambiguous language of [Mass. Gen. Laws ch. 93A, § 4](#), requires that any amounts ordered to be paid as restitution must be measurable and causally related to the consumer loss suffered due to the violative conduct.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade
Practices > Federal Trade Commission Act

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

[HN2\[↓\]](#) Deceptive & Unfair Trade Practices, Federal Trade Commission Act

Although it is well-settled that Massachusetts is to be guided by the Federal Trade Commission Act (FTC Act) in construing [Mass. Gen. Laws ch. 93A](#), important differences between those two statutes do exist. The FTC Act contains different remedial language and different procedures from ch. 93A. The FTC Act also includes consumer refunds as an express remedy, which language does not appear in [Mass. Gen. Laws ch. 93A, § 4](#). [15 U.S.C.S. § 57b\(b\)](#). Nevertheless, in the federal system as in Massachusetts, there may be no redress without proof of injury caused by those practices. And the relief must be necessary to redress the injury.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Torts > Business Torts > Unfair Business Practices > Remedies

[HN3\[↓\]](#) Deceptive & Unfair Trade Practices, State Regulation

Under [Mass. Gen. Laws Ann. ch. 93A, § 4](#), the court has discretion in how it fashions a remedy using its equitable authority, but a restitution order nevertheless must be an ascertainable amount, related to defendants' false and deceptive conduct, as required under the statute.

Judges: [*1] Hélène Kazanjian, Associate Justice, Superior Court.

Opinion by: Hélène Kazanjian

Opinion

MEMORANDUM AND ORDER ON MOTIONS IN LIMINE REGARDING THE STANDARD FOR PROOF OF RESTITUTION

The plaintiff, the Commonwealth of Massachusetts (the "Commonwealth"), brought this action against defendants HealthMarkets, Inc.; The Chesapeake Life

Insurance Company; and HealthMarkets Insurance Agency. Inc. f/k/a Insphere Insurance Solutions Inc. (collectively, "Defendants"), for contempt and violation of [G.L. c. 93A](#). The contempt complaint alleges that Defendants violated the terms of a consent judgment that was agreed upon in August 2009 (the "Consent Judgment"). This court (Davis, J.) allowed summary judgment for the Commonwealth on liability only ("Summary Judgment Decision"). A bench trial on damages is scheduled to begin on November 20, 2023.

In anticipation of the damages trial, both parties have moved in limine for the court to decide the applicable standard of proof for the Commonwealth's claim for restitution (Docket Nos. 192 and 206). The Commonwealth argues that the court should award restitution in the form of a full refund to each affected customer. Defendants argue that a more individualized calculation is warranted. While [*2] ultimately the court must consider this issue in the context of the actual evidence introduced during the damages trial and will make a final decision on the award of damages at that time, the court provides the following guidance.

A. [G.L. c. 93A, § 4](#) and Relevant Massachusetts Cases

[General Laws c. 93A, § 4](#), which governs actions by the attorney general, provides, in relevant part:

Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice. . . .

[The Superior Court] may issue temporary restraining orders or preliminary or permanent injunctions and make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such method, act, or practice. If the court finds that [*3] a person has employed any method, act or practice which he knew or should have known to be in violation of said section two, the court may require such person to pay to the commonwealth a civil penalty of not more than five thousand dollars for each such violation and also may require the said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorneys' fees.

* * *

Any person who violates the terms of an injunction or other order issued under this section shall forfeit and pay to the commonwealth a civil penalty of not more than ten thousand dollars for each violation. For the purposes of this section, the court issuing such an injunction or order shall retain jurisdiction, and the cause shall be continued, and in such case the attorney general acting in the name of the commonwealth may petition for recovery of such civil penalty.

Thus, [§ 4](#) allows the court to order: (1) the payment of civil penalties; (2) injunctive relief; and (3) the payment of restitution. [HN1](#)^[↑] The unambiguous language of the restitution provision requires that any amounts ordered to be paid must be measurable and causally related to the consumer loss suffered due to [\[*4\]](#) the violative conduct. See *id.* ("restore" the "*ascertainable loss by reason of the use or employment of such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such method, act, or practice*" [emphasis added]); see also [Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 558, 964 A.2d 741 \(2009\)](#) ("ascertainable loss" . . . means that plaintiff must suffer a definite, certain and measurable loss, rather than one that is merely theoretical"); [State v. New Beginning Credit Ass'n Inc., 2006 Tenn. App. LEXIS 346, 2006 WL 1472284, at *8 \(2006\)](#) ("A loss is ascertainable if it is measurable, even though the precise amount of the loss is unknown").

The few Massachusetts appellate cases examining this language emphasize that the trial court has wide discretion. In [Commonwealth v. Crowther, 93 Mass. App. Ct. 1120, 107 N.E.3d 1256, 2018 WL 3520805 \(2018\)](#) (Unpublished Opinion), the Appeals Court noted that the statute's "permissive language allows the courts to use their traditional equity power to tailor appropriate remedies to the facts of each case" — including by use of the statutorily provided equitable remedy of restitution. *Id.* at *3 (citing [Commonwealth v. AmCan Enterprises, Inc., 47 Mass. App. Ct. 330, 337, 712 N.E.2d 1205 \(1999\)](#); [Commonwealth v. DeCotis, 366 Mass. 234, 245, 316 N.E.2d 748 \(1974\)](#)). Consistent with this discretionary authority, the court in *Crowther* held that "contrary to the Commonwealth's claim, neither the language of [§ 4](#), nor anything in our case law, required the judge to select the complete disgorgement of profits as the damages remedy." [\[*5\]](#) *Id.* Rather, the court affirmed a restitution award, rendered after a twenty-two-day jury trial, that required the defendant insurance brokers "to turn over all profits above a twenty percent commission," deeming it, under the circumstances of that case, to be "an appropriate remedy." *Id.*

[DeCotis](#), the only other appellate case examining a restitution order, involved resale fees a mobile home park charged residents that were unconnected to any service performed. [366 Mass. at 243](#). Again, the court emphasized that "[G.L. c. 93A](#) granted full authority to the courts to use their traditional equity power to fashion decrees to remedy the wrong complained of and to make the decree effective" and affirmed the order of restitution of the full fee to those who had paid it. [Id. at 245](#).¹

B. Calculation of Restitution in this Case

The present case involves the wide dissemination of false and deceptive advertising concerning Defendants' insurance products to thousands of consumers that apparently acted on Defendants' misrepresentations. The Commonwealth is seeking full refunds for all of those consumers as a matter of law, without presenting evidence of each individual consumer loss at trial, which they claim would be overly [*6] burdensome and is not required under the law. Two separate issues arise with regard to the Commonwealth's position: (1) is proof of loss required as to each individual consumer; and (2) how is the loss calculated - i.e., are blanket, full refunds warranted?

The Massachusetts cases do not fully resolve these two issues. [DeCotis](#) involved a relatively small number of mobile homeowners who paid a worthless fee - thus the burden of proof was not an issue, and the amount of the award was easily calculated. Crowther included no discussion about the Commonwealth's burden of proof as to each consumer harmed, which was not raised on appeal.² On the second issue, the restitution amount affirmed in Crowther was not a full refund or "disgorgement of profits," which is what the Commonwealth sought. 3 Mass. App.

¹ Other cases discussing [§ 4](#) address the civil penalties portion of the statute. See [Commonwealth v. AmCan Enterprises, Inc.](#), 47 Mass. App. Ct. 330, 338, 712 N.E.2d 1205 (1999); [Commonwealth v. Fall River Motor Sales, Inc.](#), 409 Mass. 302, 310-11, 565 N.E.2d 1205 (1991). Although *AmCan Enterprises* included restitution damages, the defendants in that case did not challenge them on appeal. [47 Mass. App. Ct. at 337](#). In [Fall River Motor Sales](#), the court set forth factors to consider in determining the amount of the civil penalty: "(1) the good or bad faith of the Defendants; (2) the injury to the public; (3) the Defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC." [409 Mass. at 311](#) (quoting *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 967 (3d Cir. 1981)). The court adopted the factors from the federal court's assessment of penalties under the cognate [Federal Trade Commission Act](#). *Id.* No such factors or analytical framework exist in published Massachusetts cases in the context of [§ 4](#) restitution.

² Defendants argue that the Attorney General must prove the loss as to each individual consumer — as it did in [DeCotis, supra](#), [AmCan Enterprises, Inc.](#), 47 Mass. App. Ct. at 332; and in a Superior Court case, *Commonwealth v. Maroun*, 2022 WL 18145481, at *30 (Sup. Ct. 2022). However, no Massachusetts case examines or holds that this the only possible method of proof in cases involving widely disseminated false and deceptive advertising, or that the Attorney General is bound by its past practice in this respect.

Ct. 1120, 107 N.E.3d 1256, 2018 WL 3520805 at *3. Rather, the Appeals Court affirmed a partial disgorgement of profits, which the trial court judge calculated based on the evidence presented in that case. *Id.* This result runs counter to the Commonwealth's demand for full refunds here as a matter of law.

In cases involving the Federal Trade Commission ("FTC"), federal courts have resolved the first issue by holding that "[p]roof of individual reliance by each purchasing customer [*7] is not a prerequisite to the provision of equitable relief needed to redress fraud. . . . A presumption of actual reliance arises once the [FTC] has proved that the Defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the Defendant's product." [*McGregor v. Chierico*, 206 F.3d 1378, 1388 \(11th Cir. 2000\)](#) (quoting [*FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 \(9th Cir. 1993\)](#)).

As for the second issue, federal courts have field in similar contexts that "the total gross receipts from all consumers entitled to compensation should serve as the baseline for calculating the actual loss to consumers caused by the Defendants' contemptuous conduct." [*FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 244 \(2d Cir. 2014\)](#) (citing [*McGregor*, 206 F.3d at 1387-88](#); [*FTC v. Kuykendall*, 371 F.3d 745, 765 \(10th Cir. 2004\)](#)). "After the court uses the Defendants' gross receipts as a baseline for calculating damages, the court must permit the Defendants 'to put forth evidence showing that certain amounts should offset the sanctions assessed against them.'" [*BlueHippo Funding*, 762 F.3d at 245](#) (quoting [*Kuykendall*, 371 F.3d at 766](#)). An analogous "accounting" or "disgorgement" restitution remedy is also set forth in the Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011).

This approach more closely fits within chapter 93A's statutory parameters of measurable restitution damages, caused by Defendants' conduct — as opposed to the automatic full refund approach the Commonwealth proposes. Although several of the federal cases the Commonwealth [*8] cites did result in orders for full refunds, the facts of those cases dictated that result - i.e., the consumers in those cases had purchased unwanted or worthless products or services. See, e.g., [*Figgie Int'l, Inc.*, 994 F.2d at 606](#) ("The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them"). At trial, Defendants here should have the opportunity to prove that the value consumers received from their insurance products should be applied as an offset to the baseline total gross receipts amount.

Moreover, this approach is generally consistent with the Supreme Judicial Court's decision in [Aspinall v. Philip Morris Companies, Inc.](#), 442 Mass. 381, 813 N.E.2d 476 (2004). [Aspinall](#) was a class action chapter 93A case involving the deceptive advertising of light cigarettes. [Id.](#) at 385-86. In its decision, the Supreme Judicial Court "comment[ed] on the nature of damages under [G. L. c. 93A](#)" — holding that the "traditional 'benefit of the bargain' rule that awards a defrauded party the monetary difference between the actual value of the product at the time of purchase and what its value would have been if the representations had been true" would be appropriate in that case. [Id.](#) at 398-99. The opportunity for Defendants to prove an offset, [*9] such as value afforded though total claims paid, would result in similar benefit of the bargain type damages.

HN2[\[↑\]](#) The court further notes that although it is well-settled that Massachusetts is to be guided by the FTC Act in construing [G.L. c. 93A](#), see [Aspinall](#), 442 Mass. at 395; [Fall River Motor Sales](#), 409 Mass. at 310, important differences between those two statutes do exist. As relevant here, the FTC Act contains different remedial language and different procedures from [G.L. c. 93A](#). The FTC Act also includes consumer "refund[s]" as an express remedy, which language does not appear in [G.L. c. 93A, § 4](#). See [15 U.S.C. §§ 57b\(b\)](#). Nevertheless, in the federal system as here, "there may be no redress without proof of injury caused by those practices. And the relief must be necessary to redress the injury." [Figgie Int'l.](#), 994 F.2d at 605.

HN3[\[↑\]](#) In sum, under [§ 4](#), the court has discretion in how it fashions a remedy using its equitable authority, but a restitution order nevertheless must be an "ascertainable" amount, related to Defendants' false and deceptive conduct, as required under the statute. Here, the court will exercise its discretion in applying the approach of assumed reliance, and a baseline award of gross receipts, offset by any proof of value Defendants credibly offer at trial.

Whether the Commonwealth already has established assumed reliance [*10] requires further discussion. As previously set forth, *supra* at 5, a presumption of actual reliance is established once the Commonwealth has proven that: (1) Defendants made material misrepresentations; (2) the misrepresentations were widely disseminated, and (3) consumers purchased Defendants' product. [McGregor](#), 206 F.3d at 1388 (quoting [FTC v. Figgie Int'l, Inc.](#), 994 F.2d at 605-06). In his Summary Judgment Decision, Judge Davis determined that Defendants had made material misrepresentations in connection with the sale of certain products in Massachusetts. The Summary Judgment Decision, and the facts underlying it, support the conclusion that each of these prongs has been proven or is

undisputed. Nevertheless, the court will hear further argument and evidence on this issue if necessary.

/s/ Hélène Kazanjian

Hélène Kazanjian

Associate Justice, Superior Court

Dated: November 8, 2023

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