

Alert | Class Action Litigation/Retail

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Massachusetts Businesses Face Consumer Class Actions Alleging Improper Product Substitution

The Massachusetts Consumer Protection Act (Chapter 93A) protects consumers against unfair or deceptive business practices and allows consumers, under certain circumstances, to bring class actions against businesses to stop such practices and seek damages. Generally, unless a business responds to a presuit demand letter with a reasonable settlement tender, violation of Chapter 93A requires payment of actual or statutory (\$25.00) damages, whichever is greater, and attorneys' fees as well as exposes a business to double or treble damages. In a class action setting, the aggregation of such damages produces significant risk and potential exposure.

Recently, putative Chapter 93A class-action lawsuits have been filed against businesses (coffee purveyors) that allegedly have given consumers a butter substitute, like margarine, with the purchase of a baked good – but still charged consumers for butter. The plaintiffs in these cases assert this alleged practice violates several Massachusetts statutes and regulations and, therefore, constitutes an unfair or deceptive business practice under Chapter 93A – entitling them and all like consumers multiple damages plus attorneys' fees.

To state a claim under Chapter 93A, however, a consumer must allege some harm or injury, separate and distinct from the underlying statutory violation (among other things). Whether the plaintiffs in the recent lawsuits actually suffered a separate and distinct injury likely will turn on whether they paid a “price premium” for butter but received only a lower cost non-butter substitute. For example, assume that a business charges \$2.25 and \$2.12 for butter and margarine on a bagel, respectively. Assume further that a customer ordered butter, paid \$2.25, but received a bagel with margarine. Arguably, the consumer overpaid for the “battered” bagel by \$.13. Under Chapter 93A, this could entitle the consumer to statutory damages of \$25.00. If the consumer could certify a class action and prove similar injuries, the business could face the same \$25.00 statutory damages award for *each* bagel with butter substitute sold (for the bagel with butter price) over the past four years (the statute of limitations under Chapter 93A).

As a result, it is important for businesses to immediately review their practices to determine if they are substituting products or otherwise giving consumers something of less value than advertised and potentially creating exposure under Chapter 93A.

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