

RESPONDING TO CHAPTER 93A DEMAND LETTERS IN PERSONAL INJURY CASES

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In Massachusetts, manufacturers, distributors, suppliers and retailers face the grave reality that a product liability lawsuit brought against them will almost always include a cause of action under G.L. c. 93A, §§ 2 & 9. This unfortunate truth is the result of the Supreme Judicial Court's decision in Maillet v. ATF-Davidson Co., 407 Mass. 185, 193 (1990), which held that “[g]enerally, a breach of warranty constitutes a violation of G.L. c. 93A, § 2.” *Id.* The addition of a G.L. c. 93A claim to a product liability case increases the stakes both for plaintiffs and defendants. Under G.L. c. 93A, § 9, defendants are faced with the task of evaluating a case prior to litigation, and before discovery has been completed, based upon minimal information, in order to make a "reasonable" settlement offer within 30 days of receiving a demand letter. The consequences for failing to do so appropriately are no less than the doubling or trebling of damages. Worse yet, the Supreme Judicial Court held recently in Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486 (2012), that a plaintiff may recover the original verdict and up to three times that amount under chapter 93A, for a total recovery of four times the judgment. Mishandling the matter during the pre-suit demand letter stage can have severe ramifications on the potential damages and may dictate whether the case will be ultimately settled or tried and, if it is to be settled, for how much.

A. THE DEMAND LETTER

Section 9 of G.L. c. 93A requires that the plaintiff serve a demand letter on any "prospective defendant" 30 days prior to filing suit. The purpose of the demand letter is two-fold.

First, it encourages settlement negotiations by notifying the prospective defendant of claims arising from his allegedly unlawful conduct and thereby reducing the amount of litigation. See Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 505 (2011). Second, it may limit the amount of damages recoverable by the plaintiff if he proves his case. Slaney v. Westwood Auto, Inc., 366 Mass. 688, 689 (1975).

The demand letter is a prerequisite to suit, which must be alleged and proved by the plaintiff. Spring v. Geriatric Authority of Holyoke, 394 Mass. 274, 287 (1985); York v. Sullivan, 369 Mass. 157, 163 (1975). A proper demand letter must contain certain language which will apprise the recipient that the letter seeks relief under chapter 93A. Cassano v. Goqos, 20 Mass. App. Ct. 348, 350 (1985). The Cassano Court listed the following options, any one of which will satisfy the requirement that the letter characterize the claim as one under Chapter 93A:

1. Any express reference to c. 93A;
2. Any express reference to the consumer protection act;
3. Any assertion that the rights of the plaintiffs as consumers have been violated;
4. Any assertion that the defendant has acted in an unfair manner (G.L. c. 93A, § 2[a]);
5. Any reference that the plaintiffs anticipate a settlement offer within thirty days; or
6. Any assertion that the plaintiff will pursue multiple damages and legal expenses should relief be denied.

Id.

The demand letter must also reasonably describe the unfair or deceptive act(s) alleged. Richards v. Arteva Specialties S.A.R.L., 66 Mass. App. Ct. 726, 731 (2006). For instance, the plaintiff's failure to identify a particular statute or regulation in the demand letter, the violation of which the plaintiff claims is a breach of 93A, will foreclose recovery as a matter of law.

Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812 (1975); Bressel v. Jolicoeur, 34 Mass, App.

Ct. 205, 211 (1993). A demand letter which includes only conclusory statements alleging that the defendant acted in bad faith, but fails to articulate specific unfair or deceptive acts provides an insufficient basis for the recovery of 93A damages. Lingis v. Waisbren, Jr., 75 Mass. App. Ct. 464, 468 (2009); Skarupski v. Webman, 74 Mass. App. Ct. 1127, *2 (2009) (unpublished decision).

Thus, it is essential that the demand letter contain a definite description of the “injury suffered and the relief demanded in a manner that provides the prospective defendant with an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied and enables him to make a reasonable tender of settlement.” Casavant, 460 Mass. at 505 (quoting Spring, 394 Mass. at 288) (internal quotations omitted). However, the demand letter need not identify every specific unfair or deceptive violation alleged, so long as the letter provides the defendant with reasonable notice of the injuries suffered by those actions. *Id.* at 506. The letter must set forth the actual injuries suffered in sufficient detail to permit the defendant reasonably to ascertain its potential exposure. Generally, although not specifically required, it would be prudent for a plaintiff to state a specific figure representing the amount of damages sought. Simas v. House of Cabinets, Inc., 53 Mass. App. Ct. 131, 140 (2001); Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541, 544 (1st Cir. 1993); Spring, 394 Mass. at 288.

B. THE RESPONSE LETTER

As result of the Maillet Court’s finding that a breach of warranty in the product liability context constitutes a *per se* c. 93A violation, a defendant’s best opportunity to limit its c. 93A damages arises at the time it responds to the demand letter. There are three significant benefits to making a reasonable tender of settlement in response to the demand: (1) the damages

recoverable by a plaintiff will be limited to the amount of the defendant's tender if the plaintiff rejects the settlement offer; (2) the Court's ability to award double or treble damages will be restricted; and (3) attorneys fees and costs which are otherwise automatic upon a finding of a c. 93A violation, incurred after the rejection of a reasonable offer, will not be awarded. However, if the defendant fails to respond to the letter or makes an unreasonable settlement offer, then, in addition to the greater of actual damages or \$25.00, G.L. c. 93A, § 9(3), "authorizes the judge to award up to three, but not less than two, times the amount of actual damages if he finds a wilful or knowing violation of c. 93A, § 2, or that the refusal to grant relief on demand was made in bad faith with knowledge or reason to know that the practice complained of violated [section] 2." Heller v. Silverbranch Const. Corp., 376 Mass. 621, 626 (1978).

A defendant's response to the demand letter must be made within 30 days of its "mailing or delivery" or within such other time as the plaintiff may agree to permit. Mass. G.L. c. 93A, § 9(3); York, 369 Mass. at 163-164. In York, the Court determined that the 30 day requirement was not a jurisdictional requirement and thus, the plaintiff could agree to waive it. York, 369 Mass. at 163. Further, should the Plaintiff refuse or deny a defendant's request for an extension of time to investigate and prepare a response, a defendant may make an application to the Court for additional time. *Id.* at 164.

There is no requirement that the defendant offer anything so long as the offer is reasonable in relation to the injury actually suffered. G.L. c. 93A, § 9(3). Whether the offer was reasonable is a question of fact to be determined in light of "all the attendant facts and circumstances" at the time the offer was made. Patry v. Harmony Homes, Inc., 10 Mass. App. Ct. 1, 6 (1980); see Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 799 (1976). The defendant

seeking to take advantage “of the statutory limitation of damages appearing in § 9(3) has the burden of proving” that its offer was reasonable. Kohl, 369 Mass. at 799.

C. THE INVESTIGATION

Upon receipt of a demand letter which contains little or no explanation of the plaintiff’s allegations, the defendant cannot simply respond that it has insufficient information to evaluate the claim and therefore, must deny it. The defendant has the duty to take affirmative steps “to investigate the facts and consider the legal precedents.” Heller, 376 Mass. at 627-628; see Burnham v. Mark IV Homes, Inc., 387 Mass. 575, 583 (1982). The defendant’s failure to undertake and document this investigation in its response letter will place the defendant in peril of a double or treble damages award when the court objectively reviews the circumstances surrounding the denial of the claim. The defendant's response should (1) set forth the evidence available to it through diligent investigation and (2) state the specific reasons that, based upon this evidence, the defendant is either denying the claim or making the offer proffered.

In traditional contract and fraud type cases, the defendant quite often has nearly all of the information it needs to conduct a diligent investigation. However, in the product liability context much of the information the defendant needs is often in the exclusive control of the plaintiff. The defendant can obtain official reports from the police and fire department, but cannot obtain the plaintiff’s medical information without her consent. Moreover, the product at issue and any other relevant physical evidence is almost always in the exclusive control of the plaintiff. Not to mention that the percipient witnesses to the accident are often members of the plaintiff’s family, co-workers or the plaintiff’s friends who will not speak with the defendant's representatives without the plaintiff’s permission. Thus, the product liability defendant which has a duty to

investigate the claim, does not have access to the evidence which can provide the most complete understanding of the claim at the pre-suit stage. Therefore, as an initial matter, upon receipt of the demand letter, defense counsel should contact plaintiff's counsel to request an extension of time to investigate and to ask for the information needed to assess the demand. Any extension granted should be confirmed by letter and that initial letter should request the information needed to conduct the investigation. All of these exchanges should be in writing so that, later, the court will have objective proof that the defendant acted reasonably and complied with the duty to investigate.

I. Information Request Letter

While there is no exact science as to what should be included in the defendant's initial request letter, the written request should inform plaintiff's counsel that the defendant requires additional information in order to respond adequately and appropriately to the demand letter.

This letter should include specific requests for information such as:

- A preliminary examination of the product at issue;
- A specific explanation of the precise manner in which the product was defective and how it caused the plaintiff's accident and/or injuries;
- Any expert reports regarding the defective condition of the product at issue;
- Any testing or investigation the plaintiff's retained expert has performed including any alteration of the evidence;
- Documentation regarding the ownership of the product including all invoices, owner's manuals and warranty materials which came with the product;
- Documents concerning repair and maintenance work performed on the product and a description of all such work to the extent that the plaintiff knows this information;
- Documentation of the plaintiff's claimed damages including any lost wages, medical expenses or other losses;
- Plaintiff's complete medical records and any photographs of the injuries;
- The names and addresses of any witnesses to the accident;
- A complete explanation of how the accident happened; and
- Any police reports or other official reports regarding the accident.

This initial response letter will seek much of the same information typically sought in an initial set of interrogatories and documents requests. It is in the plaintiff's best interest and it is the plaintiff's duty to provide this information as quickly as possible. Just as the defendant has a duty to conduct a reasonable investigation, the plaintiff "has a reciprocal duty to be straightforward and forthcoming in providing the information necessary to the defendant's evaluation of the case." Beckwith v. Campbell, 2009 WL 4894463, *4 (2009) (quoting Parker v. Davollo, 40 Mass. App. Ct. 394, 402 n. 9 (1996) (internal quotations omitted)). Further, such a duty can be found in the requirement that the plaintiff reasonably identify the unfair act or practice complained of. Simas v. House of Cabinets, Inc., 53 Mass. App. Ct. 131, 139 (2001). If the plaintiff refuses to cooperate, the plaintiff may be unable to recover under c. 93A. Beckwith, 2009 WL at 4894463, *4.

In a product liability case, the plaintiff's medical condition is not only the most relevant evidence on damages, but it is also often relevant to determining the manner in which the accident occurred. A full description of the injuries as well as medical documentation of these damages should be provided. In addition, the plaintiff will be hard pressed to support a claim for damages under c. 93A, let alone multiple damages, where she failed to provide the defendant with an explanation of the product defect prior to requiring the defendant to tender a settlement offer. Unlike the bare bones requirements of notice pleading, the c. 93A demand letter cannot rest simply on the boiler plate language found in most complaints. The extent to which the plaintiff will have to provide the details of the defect alleged will depend upon the type of allegation being made. However Massachusetts' courts have made it clear that the plaintiff will

have to provide more than a statement that the product was defective and unreasonably dangerous. See Simpson v. Liberty Mut. Inc. Co., 1994 WL 879589, * 2-3 (1994).

The Massachusetts Appeals Court has noted that "[t]here is no requirement that the demand letter be accompanied by documentation or other proof of the assertions therein made." Whelihan v. Markowski, 37 Mass. App. Ct. 209, 214 (1994). However, the Whelihan Court was quick to point out that, in that case, the defendant was not only in a better position than usual to evaluate the plaintiff's claim because discovery in the underlying negligence claim had been ongoing for almost a year, but that the defendant had nearly all of the information that it ultimately obtained in the case. Id. at 214. Thus, in some cases, the defendant may be in a better position to evaluate the plaintiff's claim upon receipt of the demand letter and then must consider what information may already be available to it before dispatching a request for information it already has.

In many cases, the negotiation process between the plaintiff and defendant concerning additional information requests will be extensive and necessitate multiple communications. As a result, it is extremely important for the defendant to ensure that all requests for information are documented. For example, if the plaintiff verbally refuses to provide certain information necessary to investigate the claim, the defendant should confirm the conversation in writing. Time constraints will be especially problematic if plaintiff's counsel will not grant the courtesy of an extension and any such denial of a reasonable extension of time should be documented. The defendant's primary concern throughout this process is to create a documented record of its reasonable and diligent investigation of the plaintiff's allegations and the subsequent tender of settlement or denial. This documentation will assist the defendant in showing the fact finder at a

future c. 93A hearing, presumably after losing the underlying case in front of a jury, that it acted in good faith during the pre-suit demand letter phase.

D. THE FINAL RESPONSE

Ultimately, the defendant will either have to make an offer or deny the claim. This response should be made in writing and should specifically identify what steps were taken during the investigation. If the defendant has requested information which was not provided, the letter should set forth each such instance and explain the importance of the information not provided. Further, the letter should outline all evidence available to the defendant, all evidence which was not available to the defendant and what conclusions may be drawn from the existence of, or lack of, that evidence. The goal of this letter is to convince the fact finder, if ultimately found liable for breach of warranty, that the offer, or lack thereof, was reasonable based upon the information available to the defendant, *at the time*, after a duly diligent investigation. Summary denials are unlikely to accomplish this goal.

A defendant who has undertaken a thorough investigation will be in a better position approaching trial. There is nothing more frustrating than having to settle a case where liability is tenuous, simply out of fear of a multiple damage award because either no response, or an unreasonable response was made to the demand letter. In addition, a full investigation and good faith negotiation may obviate the need to litigate the case at all. The plaintiff may be convinced that the case is not worth pursuing or the negotiations may result in a settlement that is satisfactory to both sides because the litigation costs pre-suit are minimal. Ultimately, the interests of justice as well as the parties are well served if the demand letter process is treated seriously by both sides and not simply as a "fruitless ceremony."