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RECOVERY OF PUNITIVE DAMAGES, CIVIL PENALTIES, AND ATTORNEYS' FEES ALLOWED UNDER THE KANSAS CONSUMER PROTECTION ACT

In *Equitable Life Leasing Corp. v. Abbick*, 243 Kan. 513, 757 P.2d 304 (1988), the Supreme Court of Kansas held that a dentist who had obtained a computer system through a lease/purchase agreement was entitled to damages for violations of the Kansas Consumer Protection Act ("the Act"), Kan. Stat. Ann., §§ 50-601 to 50-644 (1988), and for breach of contract and common law fraud when the seller refused to accept a return of the defective system.

Background

In a third party action, Marion C. Abbick ("Abbick"), a practicing dentist, brought suit against Moore Business Systems ("Moore"), alleging that the computer system he bought from Moore had not lived up to Moore's representations. When Moore first contacted Abbick in 1982, it claimed that it was experienced in the management of dental practices, and that it could recommend a computer system to Abbick which could increase Abbick's productivity and profits, as well as produce accurate and timely financial records. When Abbick expressed his skepticism, Moore represented that the system could be returned if it did not work out.

Abbick relied on Moore's representations, and made a down payment of \$1,185 on a computer system. Abbick financed the transaction through a lease/purchase agreement with Equitable Life Leasing Corporation ("Equitable") as buyer/lessor. Several problems eventually arose with the system, resulting in substantial disruption of Abbick's dental practice, loss of hundreds of hours, and confusion of financial records. Moore refused the return of the system, and Abbick ceased making payments. Equitable then sued Abbick based on the lease/purchase agreement, and Abbick brought a third party claim against Moore. Equitable's claim against Abbick was settled, leaving Abbick's suit against Moore for the trial court's consideration.

The jury found that Moore had breached the contract by refusing to take back the computer system and awarded Abbick \$1,185 in actual damages. The trial judge upheld the verdict, but imposed a civil penalty of \$2,000 against Moore in lieu of the actual damages award pursuant to § 50-634(b) of the Act. The trial court also awarded Abbick attorneys' fees pursuant to § 50-634(e) of the Act. Finally, the trial court upheld the jury's award of \$15,000 in punitive damages against Moore.

Kansas Supreme Court: Election of Remedies Not Required

Moore's initial argument on appeal to the Kansas Supreme Court was that Abbick's claims under the Act and his claim for common law fraud were inconsistent. Therefore, the trial court had erred in refusing to require Abbick to elect his remedy. The supreme court rejected this reasoning stating that an election of remedies is required only when claims are inconsistent, such as when one claim alleges what another denies, or when the allegations are mutually repugnant.

Abbick's statutory claim was made under § 50-627(b)(6) of the Act, which provides that it is unconscionable for a supplier to make a misleading statement of *opinion* on which the consumer is likely to rely to his or her detriment. The court held that Abbick's statutory claim was not inconsistent with his common law fraud claim because the common law fraud claim was based on a misrepresentation of fact. Further, the court observed that a 1985 amendment to the Act clearly provides that a plaintiff who brings a claim under the Act does not forfeit any common law rights.

The court similarly rejected Moore's contention that Abbick's claims for breach of contract and fraud were inconsistent. Moore claimed that Abbick was bound by the terms of the contract because he had failed to seek a rescission of the contract and therefore had elected to affirm the contract. By electing to affirm the contract, Abbick was bound by the terms of the contract and could not prove reliance on a misrepresentation, which is an essential element of fraud. The court dismissed this argument, reasoning that Abbick had attempted to return the system

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thereby seeking a rescission of the contract, but that Moore had refused to accept it.

Trial Court Had Properly Awarded Punitive Damages and Attorneys' Fees

The court next discussed Moore's contention that the trial court erred in awarding punitive damages for fraud because the jury had made no finding of actual damages for fraud. The court affirmed the punitive damage award, noting that the consideration of a punitive damages claim under the Act was one of first impression. In its discussion, the court first stated the applicable rule of law: a breach of contract claim standing alone does not call for punitive damages, but punitive damages are allowed if an independent tort, such as fraud, is proven. A corollary to this rule is that punitive damages may not be awarded in the absence of actual damages, on the basis that the law does not punish conduct, however willful and wanton, which does not cause injury. The jury found that Moore had breached its promise under the contract that it would take back the system if Abbick could not use it, and the jury in fact awarded Abbick actual damages of \$1,185. The court held that because the breach of contract was grounded upon fraudulent inducement, and actual damages were awarded, punitive damages also were proper.

Next, the court summarily rejected Moore's argument that the trial court's award of a \$2,000 civil penalty in addition to the jury's award of punitive damages constituted a double penalty against Moore in violation of due process. Moore cited cases in which the courts had held that the legislature intended treble damage awards to be punitive, therefore treble damage awards could not be supplemented by an additional punitive damages award. Section 50-801(b) of the Kansas Statutes Annotated provides for treble damages for certain acts prohibited in Chapter 50. Moore contended that because the Kansas Consumer Protection Act is found in Chapter 50, treble damages could be awarded

for violations of the Act. Moore argued that because treble damages might be awarded, additional punitive damages were not proper. The court held, however, that § 50-801 covered acts relating to the restraint of trade, but did not cover the practices prohibited by the Act.

The court observed that although the Act does not provide for treble damages, it does provide for a recovery of actual damages or a prescribed civil penalty, whichever is greater. Under § 50-636(a) of the Act, the maximum civil penalty which may be awarded is \$2,000. The trial court had awarded Abbick the \$2,000 maximum civil penalty in lieu of the \$1,185 jury award for actual damages.

Finally, the court reasoned that the statutory purpose for the civil penalty is to encourage enforcement of the act by consumers acting as "private attorney general[s]." 757 P.2d. at 307. The civil penalty provision is remedial rather than punitive, and its purpose is to encourage aggrieved consumers with small claims to file suit. The court also noted that a comment to the Act specifically provides that nothing in the statute itself limits other remedies provided by law. Because the jury had found that Abbick had relied on a fraudulent promise of future events, an independent tort existed with elements different from those which constituted a violation of the Act. For all these reasons, the court held that the additional punitive damage award was proper.

Moore's final argument, that attorneys' fees had been awarded improperly to Abbick, was also rejected by the court. The fee award and the punitive damage award were not duplicative as Moore contended, because the purpose of a fee award is to compensate while the purpose of a punitive damage award is to deter and punish. The Kansas Supreme Court concluded that the trial court had properly exercised its discretion in awarding attorneys' fees.

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