

MASSACHUSETTS SUPREME JUDICIAL COURT

Hershenow v. Enterprise Rent-A-Car Co.

445 Mass. 790 (2005) · Decided January 17, 2006

SUMMARY

The Massachusetts Supreme Judicial Court held that consumers who purchased collision damage waivers containing allegedly unlawful exclusions did not establish an actionable injury under Massachusetts General Laws chapter 93A because their rental vehicles were not damaged and they suffered no loss. The court concluded that a statutory or per se deceptive act must still cause a cognizable loss to support recovery under chapter 93A. It affirmed summary judgment for Enterprise Rent-A-Car, while holding that chapter 90, § 32E 1/2, did not displace chapter 93A remedies.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
WRITING FOR THE COURT	Marshall, C.J.; Cowin, J.; Greaney, J.
JURISDICTION	Massachusetts
DECIDED	January 17, 2006
DISPOSITION	affirmed
PROCEDURAL POSTURE	Consumers appealed from an amended judgment granting the defendants judgment on the pleadings and summary judgment in an action alleging that Enterprise's collision damage waiver provision violated Massachusetts consumer-protection law. The Supreme Judicial Court transferred the case on its own motion.
STANDARD OF REVIEW	The court considered the entire record because the Superior Court considered materials outside the pleadings, and sustained judgment for the defendants on any ground established in the record. Summary judgment was reviewed under Mass. R. Civ. P. 56.
PRECEDENTIAL VALUE	Published precedential opinion of the Massachusetts Supreme Judicial Court
PARTIES	Barry Hershenow, Dana Beaumier v. Enterprise Rent-A-Car Company of Boston, Inc., Enterprise Rent-A-Car Company

TOPICS

- consumer protection
- statutory interpretation
- contracts
- damages
- remedies

PRACTICE AREAS

consumer protection

consumer contracts

statutory interpretation

summary judgment

remedies

QUESTIONS PRESENTED

1. Whether G. L. c. 90, § 32E 1/2, foreclosed private relief under G. L. c. 93A for allegedly noncompliant collision damage waiver provisions.
2. Whether an allegedly per se unfair or deceptive consumer-contract provision establishes an injury under G. L. c. 93A, § 9, without proof that the deception caused a loss.
3. Whether the plaintiffs could recover under G. L. c. 93A when the challenged collision damage waiver terms did not affect them and they suffered no loss.

HOLDINGS

1. The enactment of G. L. c. 90, § 32E 1/2, did not displace existing private remedies under G. L. c. 93A for deceptive practices concerning collision damage waivers.
2. A plaintiff seeking relief under G. L. c. 93A, § 9, must prove that the unfair or deceptive act caused a loss; an act may be per se deceptive under § 2 without being per se an injury under § 9.
3. The plaintiffs could not recover because the allegedly noncompliant CDW terms caused them no economic, noneconomic, or legally cognizable loss.

KEY QUOTATIONS

“proving a causal connection between a deceptive act and a loss to the consumer is an essential predicate for recovery under our consumer protection statute.” (445 Mass. at 790)

“A consumer is not, however, entitled to redress under G. L. c. 93A, where no loss has occurred.” (445 Mass. at 802)

FACTUAL BACKGROUND

Barry Hershenow and Dana Beaumier rented automobiles from Enterprise and purchased optional collision damage waiver protection. Enterprise's form contract purported to invalidate the waiver for any violation of any contract provision, including restrictions broader than those permitted by G. L. c. 90, § 32E 1/2. Neither plaintiff's rental vehicle was damaged, Enterprise never sought recovery from either plaintiff, and neither plaintiff identified an economic or noneconomic loss resulting from the challenged terms.

PROCEDURAL HISTORY

The plaintiffs filed a putative class action under G. L. c. 93A, § 9, challenging collision damage waiver exclusions in Enterprise's rental contracts. The Superior Court entered judgment on the pleadings and summary judgment for Enterprise, concluding that the plaintiffs had no private right of action under G. L. c. 90, § 32E 1/2, or G. L. c. 93A. The Supreme Judicial Court considered the entire record and affirmed on the alternative ground that the plaintiffs suffered no loss caused by the allegedly deceptive provision.

DISPOSITION

affirmed

CASES CITED

- Aetna Cas. & Sur. Co. v. Continental Cas. Co., 413 Mass. 730, 734-735 (1992)
- Dodd v. Commercial Union Ins. Co., 373 Mass. 72, 77 (1977)
- Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53 (2002)
- Cabot Corp. v. Baddour, 394 Mass. 720, 722-723, 725 (1985)
- Reiter Oldsmobile, Inc. v. General Motors Corp., 378 Mass. 707, 711 (1979)
- Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 35 n.1 (2005)
- Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 801 (1976)
- Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693-698, 703 (1975)
- Baldassari v. Public Fin. Trust, 369 Mass. 33, 44-46 (1975)
- Leardi v. Brown, 394 Mass. 151, 152, 154, 156-160 (1985)
- Haddad v. Gonzalez, 410 Mass. 855, 865-866 (1991)
- Maillet v. ATF-Davidson Co., 407 Mass. 185, 192 (1990)
- Aspinall v. Philip Morris Cos., 442 Mass. 381, 394, 401-402 (2004)
- Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 777 (1980)
- Heller Fin. v. Insurance Co. of N. Am., 410 Mass. 400, 409 (1991)
- Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 66-67 n.20 (2002)

OPINION

MARSHALL, J.

Marshall, CJ.

We consider in this case whether two consumers who rented motor vehicles from the defendants, Enterprise Rent-A-Car Company of Boston, Inc., and Enterprise Rent-A-Car Company (collectively Enterprise), have stated a claim under G. L. c. 93A, § 9 (1), which permits an action by any person who has been “injured” by another’s unfair or deceptive act or practice. The rental customers contend that the collision damage waiver provision (CDW) in Enterprise’s form rental contract violated G. L. c. 93A, because its terms failed to comply with the requirements of G. L. c. 90, § 32E ½, which regulates collision damage waivers in private passenger automobile rental agreements.³ In the alternative, the plaintiffs argue that the CDW was sufficiently unfair or deceptive as to violate Chapter 93A, irrespective of § 32E ½.

We conclude that, because the CDW did not cause the plaintiffs to suffer any loss, they have failed to satisfy the causation requirement of the “injury” provision of G. L. c. 93A, § 9 (1); proving a causal connection between a deceptive act and a loss to the consumer is an essential predicate for

recovery under our consumer protection statute. We affirm the order of a judge in the Superior Court granting summary judgment for the defendants, albeit for different reasons.⁴

1. Facts. The essential facts are not disputed. Enterprise is a national consumer automobile rental company. On February 3, 2001, Barry Hershenow entered into a contract for a one-day rental of a motor vehicle at Enterprise's West Newton branch. *792The rental charge was \$14.99.5 Hershenow purchased optional collision damage waiver protection for an additional \$14.99. In general terms, when a customer purchases CDW, the rental company agrees to waive claims against the customer for any damage to the car during the rental period. Hershenow admits that his rental automobile was not involved in a collision nor otherwise damaged during the rental period.

On July 13, 2001, Dana Beaumier rented an automobile for three days at Enterprise's Somerville branch. The rental charge was \$80. Beaumier too opted for CDW protection, at an additional cost to her of \$47.97. Beaumier also admits that the automobile she rented was not damaged during the rental period.

Enterprise's preprinted form contracts contained numerous specific restrictions on the use of the vehicles.⁶ The collision damage waiver provision provided in pertinent part:

"If Owner offers and Renter agrees to pay an additional fee for DAMAGE WAIVER, renter is relieved of any deductible on renter's policy, and an additional amount, the total of renter's deductible and the additional amount will not exceed \$1,000.00.... Damage Waiver does not apply if the car is stolen, or if renter or driver fails to or refuses to make a report of damages to police or other lawful authorities, or to cover tire chain damages. A violation of any provision of this agreement invalidates Damage Waiver"" (emphasis added).

Pursuant to this last sentence, a violation of any provision of the Enterprise rental contract would purportedly cancel the CDW. This provision is contrary to the requirements of G. L. c. 90, § 32E ½, which permits rental companies to cancel *793CDW only as specifically listed in the statute. See § 32E ½ (C) (5).⁷ Additionally, as applied to the CDW, many restrictions that Enterprise imposed on the use of its vehicles were inconsistent with other provisions of § 32E ½. For example, § 32E ½ (C) (5) (e), permits CDW exclusion for damage incurred while an authorized driver "is driving outside the United States or Canada, unless expressly authorized in the rental agreement," but Enterprise's form contract provided for exclusion if the vehicle was driven outside Massachusetts without Enterprise's written consent. See note 6, *supra*, (subsection \f).⁸ Enterprise characterizes its contract provisions that are contrary to the Massachusetts statute as a "mistake."

*792"13. VIOLATIONS OF THE CONTRACT. A violation of the contract shall exist if the car is used or driven:

"(a) In violation of any term or condition of this agreement.... (f) Outside the state of rental without written consent of Owner.... (h) If renter or driver leaves the car unlocked or fails to secure the keys, (i) Other than [on] a paved public highway, private road or driveway.... (j) In a reckless or imprudent manner.... (k) Or if renter misrepresents facts to Owner pertaining to rental, use, or operation of the car."

*793 On November 21, 2001, the plaintiffs wrote to Enterprise pursuant to G. L. c. 93A, § 9, on their own behalf and on behalf of a class of other Massachusetts renters whom they sought to represent.⁹ The letter demanded that Enterprise cease including the “illegal” CDW exclusions in future rental contracts, cease relying on those exclusions to deny CDW protection, and refund all CDW payments to each purported class member, with interest. Enterprise responded that the contracts complied with G. L. c. 90, § 32E ½. It nonetheless agreed to modify its rental agreements and remove the challenged language that a “violation of any provision of this agreement invalidates Damage Waiver.” They noted that the automobiles at issue had sustained no damage. Thus, asserted Enterprise, even if its CDW provision contained impermissible exclusions, “the only customers who could have been injured would have been those who dam*794 aged the rented cars and against whom Enterprise refused to waive its claims based on a reason not allowed [under Massachusetts law].”

On November 21, 2001, the plaintiffs also filed this action in the Superior Court. Before the issue of class certification was addressed, Enterprise moved for judgment on the pleadings and for summary judgment. Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). Mass. R. Civ. P. 56, 365 Mass. 824 (1974). The plaintiffs also moved for summary judgment. A judge in the Superior Court ruled in favor of Enterprise on both motions, and judgment entered on August 6, 2003.¹⁰ The judge concluded that no private right of action exists under G. L. c. 90, § 32E ½, and that there is no right to bring a separate action for any violation of that statute under G. L. c. 93A. He entered judgment on the pleadings for the defendants. The judge also entered summary judgment for the defendants “because there is no claim for private right of action under [G. L. c. 90, § 32E V2] or under [G. L. c. 93A],” noting that he was not ruling “on the merits of the motion.” The plaintiffs appealed. We transferred the case here on our own motion.

2. Discussion. As noted, the Superior Court judge did not rule “on the merits” of Enterprise’s motion for summary judgment. The judge did not, however, exclude any of the evidence submitted by Enterprise in support of the motion that was beyond the pleadings, and the amended judgment states that the judge considered the pleadings, depositions, answers to interrogatories, admissions, and affidavits. We therefore consider the entire record on appeal. Mass. R. Civ. P. 12 (c). We will sustain the judge’s ruling entering judgment for Enterprise if it is sound on any ground established in the record. *Aetna Cas. & Sur. Co. v. Continental Cas. Co.*, 413 Mass. 730, 734-735 (1992).

The plaintiffs here advance two theories for recovery under G. L. c. 93A, § 9. First, they argue that Enterprise’s violation of G. L. c. 90, § 32E ½, constituted a “per se” violation of G. L. c. 93A, § 9. In support of this argument, they point to 940 *795 Code Mass. Regs. § 3.16 (3) (1993), which provides that an act or practice is a violation of § 2 of G. L. c. 93A, if it fails to comply with consumer protection statutes, rules, regulations, or laws.¹¹ Second, they contend that Enterprise’s CDW was “unfair and deceptive” within the meaning of G. L. c. 93A, independent of any noncompliance with G. L. c. 90, § 32E ½.¹²

Before we turn to the plaintiffs’ arguments, we address the defendants’ predicate argument that a

violation of G. L. c. 90, § 32E ½, may not be enforced in a private action under G. L. c. 93A.¹³ The defendants maintain that, because G. L. c. 90, § 32E ½ (E), provides for civil fines and a public enforcement action brought by the Commonwealth, private relief for violations of that statute is not available. The plaintiffs counter that the absence of a private remedy in § 32E ½ does not demonstrate a legislative intent to preclude consumer claims under G. L. c. 93A, and that the two statutes form a “complementary,” rather than an “irreconcilable,” scheme.

We do not perceive a conflict between the two statutory schemes, nor do we perceive any clearly expressed legislative intent that G. L. c. 90, § 32E ½, displace entirely any existing private remedies for deceptive practices concerning collision damage waivers in private passenger automobile rental agreements. Section 32E ½ was enacted in 1990, one year after a report by the National Association of Attorneys General (NAAG) detailed nationwide “abuses” in the car rental industry, including the industry’s use of “high pressure sales tactics” to *796persuade consumers to purchase collision damage waivers. See Final Report and Recommendations of the National Association of Attorneys General Task Force on the Car Rental Industry Advertising and Practices, 56 Antitrust & Trade Reg. Rep. S-1, S-3, S-5, S-15 (Special Supp. Mar. 16, 1989). NAAG reported that some rental companies had sold damage waivers that were “so unreasonably restricted as to be worthless,” and that “[c]or rental contracts [were] not a useful source of information on either the extent of the consumer’s liability or CDW.” Id. at S-14. NAAG recommended that State Legislatures enact statutes to address these abuses. The Massachusetts Legislature promptly did so.¹⁴ These events lead us to conclude that the Legislature’s intent was to supplement, not curtail, existing consumer protections.

We infer that the absence of a private right of action in the 1990 legislation “stemmed from the Legislature’s knowledge that such a consumer right of action already existed pursuant to [G. L.] c. 93A, § 9, rather than from a desire to bar such actions.” *Dodd v. Commercial Union Ins. Co.*, 373 Mass. 72, 77 (1977) (G. L. c. 176D, which prohibits unfair or deceptive acts in the insurance industry, did not exclude application of G. L. c. 93A). See *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53 (2002) (Antitrust Act, G. L. c. 93, §§ 1-14A, did not infringe on scope of G. L. c. 93A). Contrast *Cabot Corp. v. Baddour*, 394 Mass. 720, 722-723, 725 (1985) (Uniform Securities Act intended to provide comprehensive regulation of securities field, and distinguishing *Dodd v. Commercial Union Ins. Co.*, supra, where absence of private actions established that insurance field not comprehensively regulated); *Reiter Oldsmobile, Inc. v. Gen*797eral Motors Corp.*, 378 Mass. 707, 711 (1979) (G. L. c. 93B, which addresses unfairness in dealings in the automotive industry, provided specific private remedies for violation, so no relief available under G. L. c. 93A). The enactment of G. L. c. 90, § 32E ½, does not foreclose the availability of remedies under G. L. c. 93A.

Having considered the applicability of G. L. c. 93A, we turn now to the plaintiffs’ claims, and consider first whether they have been “injured” within the meaning of G. L. c. 93A, § 9 (1). This court has consistently recognized that, to warrant an award of damages under G. L. c. 93A, there

must be a “causal connection between the seller’s deception and the buyer’s loss.” *Kohl v. Silver Lake Motors, Inc.*, 369 Mass. 795, 801 (1976). See *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 695-696 (1975) (G. L. c. 93A, § 9, permits action by one who suffers loss “as a result of” unfair or deceptive act). The requirement of a causal connection between deception and loss was not affected by 1979 legislative changes to G. L. c. 93A, which we shall now describe.

In 1975, this court held that G. L. c. 93A, § 9, then in effect, required a plaintiff to prove a loss of “money” or “property,” holding that a claim of severe emotional distress was not actionable under the statute.¹⁵ *Baldassari v. Public Fin. Trust*, 369 Mass. 33, 44-46 (1975) (*Baldassari*). Two years later, the court ruled that G. L. c. 93A, § 9, permitted only those in privity with an insurer to bring a claim under the statute. *Dodd v. Commercial Union Ins. Co.*, *supra* at 79-81. In reaction to those two holdings, the Legislature amended G. L. c. 93A, § 9 (1), as appearing in St. 1979, c. 406, § 1, to provide for a private right of action to any person “who has been injured by another person’s use or employment of any method, act or practice declared to be unlawful [under G. L. c. 93A].” See *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 565 n.12 (2001) (1979 amendment was, in part, legislative response to *Dodd v. Commercial Union Ins. Co.*, *supra*); *Leardi v. Brown*, 394 Mass. 151, 158 (1985) (*Leardi*) (1979 amendment was, in part, legislative response to *Baldassari*).¹⁶

The relevant 1979 amendments thus clarified that the Legislature intended to permit recovery when an unfair or deceptive act caused a personal injury loss such as emotional distress, even if the consumer lost no “money” or “property.” See, e.g., *Haddad v. Gonzalez*, 410 Mass. 855, 865-866 (1991) (following 1979 amendment to G. L. c. 93A, § 9, severe emotional stress was cognizable loss); *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 192 (1990) (following 1979 amendment, § 9 applicable to product liability cases involving personal injury). Nothing in the statutory language or the legislative history suggests that the 1979 amendments eliminated or altered the requirement of a causal connection to a loss. See *Kohl v. Silver Lake Motors, Inc.*, *supra*; *Slaney v. Westwood Auto, Inc.*, *supra* at 698. See also Greaney, Consumer Protection Law, 65 Mass. L. Rev. 88, 89 (1980) (“Despite the breadth of the [1979] amendment, some limitation will occur by the requirement that the plaintiff still establish causation”). We have recently reaffirmed that, in enacting and then amending G. L. c. 93A, § 9, the Legislature intended that “causation is a required element of a successful G. L. c. 93A claim.” *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 401 (2004).

The plaintiffs do not directly address the issue of causation, arguing simply that under *Leardi*, any misrepresentation of legal rights in a consumer contract is a “per se injury” and that no more is needed to establish injury under G. L. c. 93A, § 9. We disagree. A misrepresentation of legal rights in a consumer contract may indeed be per se “unfair” or “deceptive” under § 2 of G. L. c. 93A. See 940 Code Mass. Regs. § 3.16 (3).¹⁷ But a plaintiff seeking a remedy under G. L. c. 93A, § 9, must demonstrate that even a per se deception caused a loss. *Leardi* *799 is not to the contrary, as we shall explain.¹⁸

As previously discussed, in the wake of the 1979 amendments to G. L. c. 93A, and the legislative overruling of *Baldassari*, it was abundantly clear that a person was “injured” under G. L. c. 93A, § 9, when an unfair or deceptive act caused loss of money, loss of property, or personal injury. Then in *Leardi*, this court considered whether, in light of the 1979 amendment, the term “injury” now encompassed another form of loss, “the invasion of any legally protected interest of another.” *Id.* at 159, quoting Restatement (Second) of Torts § 7 (1965). (The court specifically noted that *Leardi* was an appeal that “involves the interpretation of a recent amendment to G. L. c. 93A.” *Id.* at 152.) In that case, a residential landlord had included statutorily noncompliant provisions in standard apartment leases with his residential tenants. The terms of the lease misled the tenants as to the landlord’s statutory obligation to maintain the premises in habitable condition. *Id.* at 156-158. For example, the lease terms provided that the rented premises “shall be conclusively presumed” to be in “good, tenantable order” unless the tenant notified the landlord of any unlawful conditions within two days of occupancy. *Id.* at 157. That provision was contrary to the State sanitary code. The court concluded that the statutorily noncompliant leases could be the basis for injury under G. L. c. 93A. *Id.* at 158-160.¹⁹

Leardi thus established that, in the wake of the 1979 amendment to G. L. c. 93A, § 9, a claim of “injury” now encompassed “the invasion of any legally protected interest of another,” *id.* at 159, just as it now encompassed severe emotional stress, see *Haddad v. Gonzalez*, *supra*, or personal injury, see *Maillet v. ATF-Davidson Co.*, *supra*. What *Leardi* did not do was to eliminate the required causal connection between the deceptive act and an adverse consequence or loss. In *Leardi*, the requisite causal connection was established: confronted by uninhabitable conditions, the illegal lease terms would deter tenants from exercising their legal rights on pain of loss of their tenancy. Stated differently, the illegal lease terms acted as a powerful obstacle to a tenant’s exercise of his legal rights. If a tenant challenged uninhabitable conditions by withholding rent, for example, he faced immediate eviction. The mere existence of statutorily prohibited lease provisions placed all tenants in a worse and untenable position than they would have been had the leases complied with the requirements of Massachusetts law.²⁰

In marked contrast, the statutorily noncompliant terms in Enterprise’s automobile rental contracts did not and could not deter the plaintiffs from asserting any legal rights. Nor did the plaintiffs experience any other claimed economic or noneconomic loss. The CDW made neither rental customer worse off ⁸⁰¹during the rental period than he or she would have been had the CDW complied in full with the requirements of G. L. c. 90, § 32E ½.²¹ Assuming that the Enterprise CDW was per se unfair and deceptive because it did not comply with § 32E ½, see 940 Code Mass. Regs. § 3.16 (3), the plaintiffs have nevertheless failed to establish that the “per se” deception caused a loss. For that reason, there can be no recovery under G. L. c. 93A, § 9 (1).

The absence of any causal connection between the deception and any loss readily distinguishes this case from *Aspinall v. Philip Morris Cos.*, *supra*, our most recent consideration of the “injury” aspect of G. L. c. 93A. There, deceptive advertising to the contrary, the members of the plaintiff

class purchased “light” cigarettes that, in most instances, delivered as much or more tar and nicotine as regular cigarettes. *Id.* at 402. As the deceptive advertising “could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted,” causation was established. *Id.* at 394, quoting *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 777 (1980) (citations omitted).

Under the plaintiffs’ theory of “injury,” any consumer contract, oral or written, that violates the requirement of law in any respect, i.e., is noncompliant with any statute, rule regulation or court decision, automatically constitutes an “injury” under G. L. c. 93A (is an injury per se) entitling the plaintiff to recover statutory damages, attorney’s fees, and costs, even though the plaintiff cannot demonstrate that the illegal contract (the invasion of a legally protected interest) causes any loss. There is nothing to suggest that the Legislature ever intended such a result,²² it is contrary to the regulation promulgated by *802the Attorney General, see note 11, *supra*, and this court has never sanctioned that view.

Every consumer is, of course, entitled to the full protection of law. If any person invades a consumer’s legally protected interests, and if that invasion causes the consumer a loss — whether that loss be economic or noneconomic — the consumer is entitled to redress under our consumer protection statute. A consumer is not, however, entitled to redress under G. L. c. 93A, where no loss has occurred. To permit otherwise is irreconcilable with the express language of G. L. c. 93A, § 9, and our earlier case law.

The judge’s amended order granting summary judgment for the defendants is affirmed.

So ordered.

General Laws c. 90, § 32E ½, inserted by St. 1990, c. 440, § 1, mandates, *inter alla*, certain disclosures to consumers who are offered a collision damage waiver (CDW) by a private passenger automobile rental company. For example, § 32E ½ (B) (1) provides that any CDW must notify consumers that their personal automobile insurance may already cover damage to a rental car. The statute also limits exclusion from the protection of a CDW to eight specific circumstances. § 32E ½ (C) (5). The statute provides for punishment of any violation by fines and for the assessment of civil penalties “in an action brought on behalf of the commonwealth.” § 32E ½ (D).

We acknowledge the amicus briefs filed by the New England Legal Foundation and jointly by Hertz Corporation and Avis Rent A Car System, Inc.

The record contains no explanation as to how Enterprise calculated its rental charges.

Relevant restrictions included the following:

General Laws c. 90, § 32E ½ (C) (5), provides that “only the following may be excluded from the protection of the [CDW],” and then lists eight specific exclusions, e.g., “damage or loss caused

intentionally, willfully or wantonly by an authorized driver.”

Enterprise’s agreement did not comply with the requirements of G. L. c. 90, § 32E ½, in other respects, including: Enterprise’s form contract invalidated CDW if, at any time during the rental period, the renter failed to lock the automobile’s doors or drove on an unpaved road. The Enterprise contract also invalidated CDW if the automobile was driven in an “imprudent” manner. See note 6, *supra*. None of these circumstances is within the statutorily permitted exclusions to CDW. See § 32E ½ (C)(5).

The plaintiffs sought to represent all individuals renting automobiles from Enterprise in Massachusetts who purchased CDW using the same form rental contract that governed the two individual plaintiffs, and who did not “file claims” because their rental cars were returned undamaged. The judge took no action on the motion for class certification.

An amended judgment entered on March 10, 2004. The amended judgment explicitly identifies both named defendants, but is otherwise unchanged in all relevant aspects from the original judgment.

Title 940 Code Mass. Regs. § 3.16 (3) (1993), states in pertinent part:

“[A]n act or practice is a violation of [G. L. c.93A, [§] 2, if:... (3) It fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public’s health, safety, or welfare promulgated by the Commonwealth... intended to provide the consumers of this Commonwealth with protection....”

On appeal, the plaintiffs concede that they do not assert any claims directly under G. L. c. 90, § 32E ½, “because it contains no private remedies.” Any claim under § 32E ½ itself is therefore waived. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). See *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 35 n.1 (2005).

In *Roberts v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 438 Mass. 187, 191 n.8 (2002), we noted that it was unnecessary in that case to reach the issue “whether G. L. c. 90, § 32E V2, contains a private right of action and, if not, whether by logical extension, the Legislature has precluded a claim under G. L. c. 93A for the same behavior.”

Initially, the 1990 Legislature considered two bills, 1990 House Doc. No. 3272 and 1990 House Doc. No. 3273. The former would have required every motor vehicle rental agreement containing a CDW to include a notice informing customers that the CDW coverage may duplicate coverage provided by their own automobile insurance, and would have further required the Commissioner of Insurance to preapprove the form of each motor vehicle rental contract containing a CDW. 1990 House Doc. No. 3273 would have permitted a rental car company to hold a customer liable for damages to a rental vehicle only in specifically enumerated instances. A substitute bill, 1990 Senate Doc. No. 1885, which modified and combined aspects of both previous bills, was passed

by the Legislature in December, 1990, and signed by the Governor on December 28, 1990. St. 1990, c. 440.

General Laws c. 93A, § 9 (1), as amended through St. 1978, c. 478, § 45, provided in relevant part: “Any person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property [as a result of] an unfair or deceptive act or practice... may... bring an action... for damages” (emphasis added).

The legislative history of the 1979 amendment includes a notation from the Governor’s Chief Legal Counsel that the statutory change “allows for mental suffering in 93A cases,” an obvious reference to *Baldassari v. Public Fin. Trust*, 369 Mass. 33 (1975) (*Baldassari*).

As noted earlier, the plaintiffs rely on 940 Code Mass. Regs. § 3.16 (3), which defines unfair or deceptive acts or practices and provides that an act that “fails to comply with” existing consumer protection statutes, rules, *799regulations, or laws is a “violation” of G. L. c. 93A, § 2. See note 11, *supra*. Their reliance is misplaced. Our decision today is entirely consistent with that regulation. An act that violates a consumer statute may be *per se* deceptive under G. L. c. 93A, § 2, as the regulation implies. That does not make it *per se* an injury under G. L. c. 93A, § 9, as the plaintiffs argue.

The plaintiffs apparently assume that the availability of statutory damages in the amount of twenty-five dollars, see G. L. c. 93A, § 9 (3), in lieu of actual damages, eliminates the need to prove a loss resulting from a defendant’s deceptive conduct. The statutory damage provision does not supplant the requirement to prove causation under § 9. It merely eliminates the need to quantify an amount of actual damages if the plaintiff can establish a cognizable loss caused by a deceptive act. See, e.g., *Ciardi v. Hoffman-La Roche, Ltd.*, 436 Mass. 53, 66-67 n.20 (2002) (“To the extent that the plaintiff is able to prevail on the issue of liability but is unable to prove actual damages, the Legislature has decided that she is entitled to a specified remedy”).

By describing the facts at issue in *Leardi v. Brown*, 394 Mass. 151, 158 (1988) (*Leardi*), we do not suggest that the holding of that case is limited to *800landlord-tenant actions. See post n.4 (*Greaney, J.*, dissenting).

In *Leardi*, *supra*, the tenants conceded that “no member of the class had ever read, and that the landlord had never attempted to enforce, the offending portions of the lease.” *Id.* at 154. The court noted that the question “is a close one,” but concluded that, “in light of all the circumstances,” the tenant class had been “injured” within the meaning of G. L. c. 93A, § 9. *Id.* at 159.

“Causation” is not, of course, the same as “reliance” and the latter is not an essential element of a G. L. c. 93A claim. See, e.g., *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693-697 (1975). In that case the plaintiff alleged that an automobile dealership failed to disclose various defects in the

automobile it had sold to him and to honor its promise to repair the defects. Distinguishing the G. L. c. 93A cause of action from a common-law action for deceit and fraud, the court noted that, in a G. L. c. 93A action, “proof of actual reliance by the plaintiff on a representation is not required.” *Id.* at 703. See also *Heller Fin. v. Insurance Co. of N. Am.*, 410 Mass. 400, 409 (1991) (while G. L. c. 93A plaintiff “need not show actual reliance on the representation, the evidence must warrant a finding that a causal relationship existed between the misrepresentation and the injury”). In *Leardi*, the plaintiffs did not show actual reliance on the unlawful contract terms; they did however demonstrate the requisite causation.

We reject the dissent’s assertion that the CDW purchased by these plaintiffs was “illusory.” *Post* at 807. There is nothing to suggest that the unlawful language contained in the Enterprise rental contract influenced or affected the renters in any way. The plaintiffs did not demonstrate that Enterprise ever sought recovery for damage to their rental vehicles or any other vehicle rented in Massachusetts. Any concern that the plaintiffs were misled into failing to assert their statutory rights is speculative at best, and premature.

The dissent posits that the Legislature’s silence in the wake of *Leardi*, *supra*, implies that “injury” under G. L. c. 93A, § 9, denotes an invasion of every legally protected interest in the absence of any ascertainable loss or actual injury. *Post* at 810. The Legislature’s silence more likely reflects its agreement with the consumer protection regulations promulgated at that time by the Attorney General: an act that violates a consumer statute is *per se* deceptive under G. L. c. 93A, § 2. That does not make it *per se* an injury under G. L. c. 93A, § 9. See 940 Code Mass. Regs. § 3.16 (3); note 17, *supra*.