

## Case Details

### Case Details

National ID	318/08
Member State	Germany
Common Name	link
Decision type	Other
Decision date	25/11/2009
Court	BGH (Supreme court)
Subject	
Plaintiff	
Defendant	
Keywords	

### Directive Articles

Distance Selling Directive, [Article 1](#)

### Headnote

- a) If good faith does not oppose it then the consumer has a right of withdrawal under article 312d of the German Civil Code even when the distance selling contract is void.
- b) The right of withdrawal also accrues when the distance selling contract for a rear-view mirror containing a device warning of radars is void, being contrary to public policy (continuation of the decision from 23 February 2005 – VIII civil Chamber 129/04, NJW 2005, 1490).

### Facts

The claimant ordered from the defendant a rear-view mirror for cars containing a device warning of radars for the price of 1,129.31€ plus delivery costs of 8.70€ after having received a call advertising it from an employee of the defendant. On the order form filled out by the claimant was also the pre-formulated sentence: "I have been informed that the devices are banned and that the courts deem the sale of devices warning of radars to be contrary to public policy".

The device was delivered on 9 May 2007 but returned by the claimant on 19 May 2007 asking for the purchase price back. The defendant refused to accept the device and to reconstitute the purchase price.

The claimant seeks an order to have the defendant reconstitute the purchase price and delivery costs (1,138.01€ with interest) as well as restitution of pre-judicial lawyer's fees in the amount of 155.30€ with interest. In addition the defendant's delay in accepting since the 19 May 2007 was to be determined.

At first instance the claim was dismissed. The court of appeal accepted the claim and condemned the defendant to pay 1.138,01€ with interest and determined the delay in accepting, but dismissed the other claims. With his appeal the defendant seeks to have the judgment set aside and the claims dismissed.

### Legal issue

The appeal was dismissed. The claimant had a right to restitution of the purchase price and return of the device against the defendant. This right is not based, however, as was assumed by the court of appeal, on article 812 of the German Civil Code but on article 436 (1) of the German Civil Code in conjunction with articles 433, 312b, 312d, and 355 ff. of the German Civil Code. It is a legal right to restitution based on the provisions on the right of

withdrawal from distance selling contracts. That the contract between the parties is void is not relevant for this. It is a distance selling contract in the sense of article 312b (1) sentence 1 of the German Civil Code. The claimant has exercised her right of withdrawal under article 355 of the German Civil Code in good time. It follows that under articles 357 (1) sentence 1 in conjunction with article 346 (1) of the German Civil Code the claimant has a right to restitution of the purchase price and delivery costs.

That the contract is void being contrary to public policy under article 138 of the German Civil Code is not opposed, in principle, to the right of withdrawal under article 312d (1) of the German Civil Code. No exception may be found in the present case either. A right of withdrawal also exists when the declaration of intent of the contract is invalid. The purpose of the right of withdrawal in a distance selling contract is to give the consumer a right free from material conditions, the exercise of which allows him through simple means to unilaterally withdraw from the contract. He is to have this right in addition to the usual rights arising out of the contract. This follows from paragraph 14 of the Preamble to the Directive 97/7/EC, according to which, the right of withdrawal does not affect the rights of consumers provided by Member States. The consumer therefore has the choice to withdraw from the contract under articles 312d and 255 of the German Civil Code with the consequence of a restitution under articles 346 ff. of the German Civil Code or to transform the contractual relation to one requiring restitution under the principles of unjustified enrichment. Given the consumer protection imperative in distance selling there is no reason to put the consumer at a disadvantage if the contract cannot only be contested but is also void. The protection imperative of the right of withdrawal requires that the consumer have the possibility to withdraw from the contract without having to discuss the question of the contract being void with the professional. The consumer thus has the choice between withdrawal and relying on the contract being void. The possibility of contesting a contract that is void has been recognised for a long time in German law. For the withdrawal from a contract that is void the same applies as for contesting it. Excluding the right of withdrawal on the basis of bad faith under article 242 of the German Civil Code is required, if at all, when the professional appears particularly worthy of protection on the facts (for instance where the consumer deceived him). This situation does not appear on the facts of the case.

The determination of potential exceptions remains open.

#### Decision

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