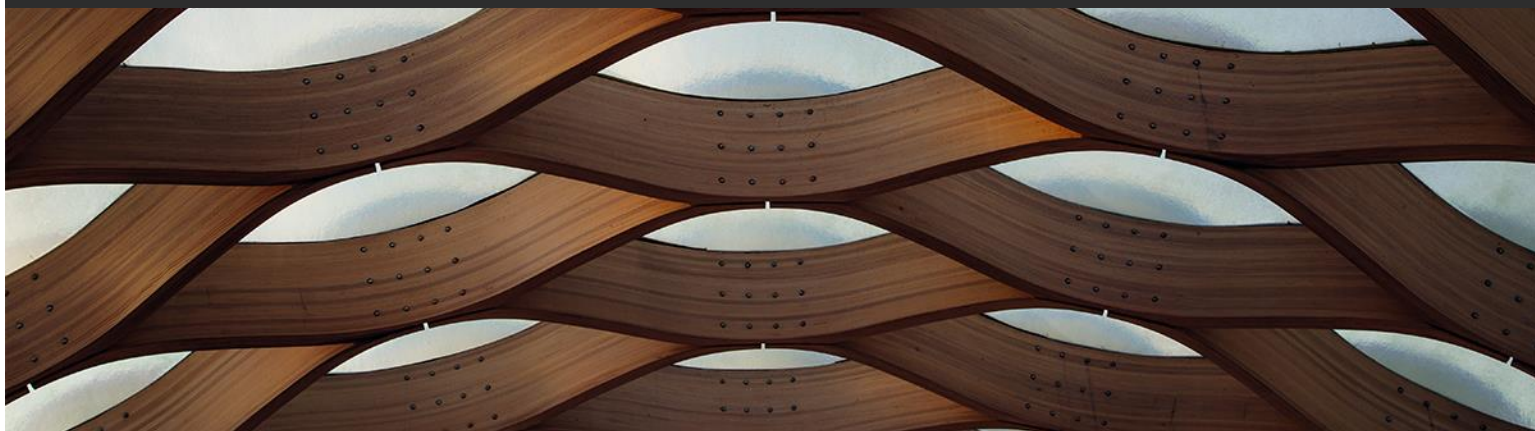


Advisory | Class Action Litigation



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Responding to Consumer Demand Letters Under the Massachusetts Consumer Protection Act (Chapter 93A)

The Massachusetts Consumer Protection Act (Chapter 93A, Section 9) prohibits a business from engaging in unfair or deceptive acts or practices. Chapter 93A litigation usually is time consuming, expensive, and exposes a company to *mandatory* multiple damages (if the act or practice was a knowing and willful violation of Chapter 93A) and attorneys' fees. These provisions provide a consumer's counsel significant leverage when litigating and attempting to settle Chapter 93A claims – particularly when brought in a class-action setting. Chapter 93A, however, affords a business an opportunity to gain that leverage back and limit exposure to the statute's mandatory multiple damages and fee shifting provisions as well as foster more meaningful settlement discussions, if appropriate. Taking advantage of this opportunity, which occurs usually only once and before the litigation begins, can be beneficial for a company.

Specifically, a consumer's claims most often start with a Chapter 93A demand letter, which the consumer must send before initiating any litigation. The demand letter must identify the claimant, describe the alleged unfair or deceptive acts and injury suffered, and give a company 30 days to provide a written response and tender a reasonable settlement, if appropriate. A company's opportunity to respond should not be taken lightly because, among other things, a company has an affirmative obligation to investigate the facts and law and determine whether the company should tender a reasonable settlement in response to the demand letter. Failure to investigate may evidence bad faith, which can expose the company to multiple Chapter 93A liability (even if the underlying unfair or deceptive practice was not knowing or willful).

Also, if a company receiving a demand letter tenders a settlement that is later found to be reasonable in relation to the injury actually suffered, Chapter 93A *requires* the court to limit the consumer's recovery *to the relief tendered in the response*. Also, a reasonable settlement offer will limit a prevailing consumer's recovery of attorneys' fees to only those fees incurred *prior to* rejecting the settlement tender. Most times, this would prevent a consumer from recovering attorneys' fees from the filing of the complaint through trial, which likely will be the period in which most of the fees will be incurred in the litigation. This statutory limitation holds true *even if* the consumer ultimately (i) prevails on summary judgment or at trial and (ii) proves the company engaged in knowing or willful unfair or deceptive acts or practices.

If the consumer's demand letter contains a demand for relief on behalf of a class of similarly situated consumers, a company arguably may not be obligated to tender a settlement to the putative class until the class has been certified.¹ In turn, after a class is certified, a company would be able to make a reasonable settlement offer to the certified class to obtain the damages and fee-limiting benefits of Chapter 93A. However, where a putative class and damages are reasonably ascertainable at the time of the initial demand, there exists case law indicating that a company should make a settlement offer to redress the injury of the putative class with the company's response to obtain the damages and fees limitations.²

Consequently, the importance of a proper investigation and response to a Chapter 93A demand letter cannot be overstated. A company should have procedures in place to investigate the claims in a demand letter and determine whether or not it will make a settlement offer in response to the letter with the 30-day statutory response period. These procedures can be incorporated easily into a company's existing litigation response and readiness protocol. Ultimately, a company that conducts a thorough investigation will likely be in a better position to assess whether it should make a settlement offer in response to a demand letter and take full advantage of the pre-litigation opportunity to limit damages and fees afforded by Chapter 93A.

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¹ See *Richards v. Arteva Specialties S.A.R.L.*, 66 Mass. App. Ct. 726, 733 (2006); *Meaney v. OneBeacon Ins. Group, LLC*, No. 07-1294-BLS2, 2009 WL 884613, at *6–7 (Mass. Super. Ct. Feb. 25, 2009). Cf. *Suk Jae Chang v. Wozo LLC*, No. 11-10245-DJC, 2012 WL 1067643, at *8 (D. Mass. Mar. 28, 2012) (holding defendant's settlement offer to only the lead plaintiff did not deprive the putative class of standing in Chapter 93A suit because it "was clearly insufficient to remedy the [alleged] classwide injury").

² See *Richards*, 66 Mass. App. Ct. at 725 n.9; *Hermida v. Archstone*, 950 F. Supp. 2d 298, 310 (D. Mass. 2013).

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