

## The Massachusetts Consumer Protection Act/ Chapter 93A Newsletter | Q4 2019/Q1 2020



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**Massachusetts General Laws Chapter 93A is one of the most often used statutes in consumer and business litigation. This GT Newsletter summarizes recent Chapter 93A decisions from Massachusetts state and federal courts. The authors take no position on the merits of the parties' claims and defenses or the courts' reasoning. Rather, the abstracts below focus mainly on the substance of the Chapter 93A aspects of each decision. Not all decisions reported are summarized herein.**

### Massachusetts Superior Court

*McCarter & English v. Pcvue, Inc.*, No. 1984CV01983-BLS2, 220 Mass. Super., LEXIS 17 (Mass. Sup. Ct., Jan. 24, 2020)

#### **Clients' alleged misrepresentations to law firm may give rise to Chapter 93A liability.**

Plaintiff law firm claimed in its lawsuit that it is owed and entitled to collect \$2.3 million in unpaid legal fees from its former clients, and that it also has a contractual right to recover reasonable attorney's fees and costs incurred in the collection action. Plaintiff asserted claims for breach of contract, quasi-contractual relief, intentional fraud, and violation of Chapter 93A.

Defendants filed motions to dismiss. On the Chapter 93A count, the court noted that law firm's allegations of fraudulent promises, in order to "trick" law firm into continuing to provide services, "[stated] plausible allegations of intentional fraud suffic[ient] to state a claim that Defendants engaged in deceptive conduct

that violates Chapter 93A.” Such fraud may overcome the general rule that a mere breach of contract (here the failure to pay for legal services), does not violate Chapter 93A.

*Commonwealth v. Venturecap Inv. Group V*, 1784CV03091-BLS1, 2020 Mass. Super. LEXIS 13 (Mass. Sup. Ct., Jan. 17, 2020)

**Partial summary judgment granted for the Commonwealth where defendants’ sales practice undeniably had the capacity to mislead consumers in their decision to purchase used motor vehicles from defendants in violation of Chapter 93A.**

The Commonwealth of Massachusetts moved for partial summary judgment against defendants for unfairly and deceptively structured sales transactions with consumers that defendants allegedly knew, or should have known, were “doomed to fail.” Defendants ran a used auto sale lot and financed all of their car sales through their own in-house lender, for the identical sales price of approximately \$12,000. The allegedly unfair or deceptive practices included advertising that the dealership only closed deals that were “affordable” and “designed for success” where defendants’ business records demonstrated that consumers who were approved for loans could not or would not likely be able to afford the required monthly payments.

Based on the evidence and the undisputed material facts, the court had no difficulty concluding that defendants violated Chapter 93A by falsely representing to consumers that it only entered into sales transactions that were affordable and designed for customer success, when data collected from the consumer bore little relation to the customer’s actual financial situation and could not reasonably be expected to provide an accurate assessment of the consumers’ ability to purchase a used car.

*Healy v. G/J Towing, Inc.*, SUCV2017-01665-BLS2, 2019 LEXIS 1225 (Mass. Sup. Ct., Dec. 18, 2019)

**Apparent overcharge to motor vehicle owner by towing company could “rise to the level of” Chapter 93A, Section 9 violation.**

Plaintiff alleged that defendants (who operate a towing business in Revere) charged motor vehicle owners towed in Revere more than city ordinance and related statutes allowed, which violated Chapter 93A, Section 9. The court addressed and denied plaintiff’s third motion for class certification, concluding it was based on an overly broad class definition, a lack of commonality, and inadequacy of class counsel.

Although it denied class certification, the court noted that plaintiff appeared to have a meritorious Chapter 93A claim. Pursuant to defendants’ contract with the City of Revere, defendants may have overcharged plaintiff for towing services, based on the discrepancy between what they actually charged plaintiff and what they were allowed to charge motor vehicle owners. According to the court, based on those facts, plaintiff “clearly has a claim against the defendants that could even rise to the level of a c. 93A violation.”

*Sapir v. Dispatch Techs.*, 1984CV00666-BLS1, 2019 Mass. Super. LEXIS 1218 (Mass. Sup. Ct., Dec. 4, 2019)

**Chapter 93A claim failed as a matter of law because Chapter 93A does not apply to disputes among shareholders of a close corporation.**

Plaintiff alleged that defendants, directors of a closely held corporation, fraudulently induced him to sell back his company shares by misrepresenting to him facts related to the company's operations and financial status. As to plaintiff's claims of negligent misrepresentation, breach of fiduciary duty, Chapter 93A violation, and fraudulent inducement against two of the four defendants, the court granted defendants' motion to dismiss. Plaintiff's Chapter 93A claim failed as a matter of law. Chapter 93A does not apply to disputes arising among shareholders in a close corporation because the relationship between such shareholders is not deemed a "commercial" one where Chapter 93A would apply.

[\*AG v. Facebook, Inc., No. 1984-CV-02597-BLS1, 2020 Mass. Super. LEXIS 6, at \\*1 \(Mass. Super. Jan. 16, 2020\)\*](#)

### **Court enforces Massachusetts attorney general investigatory powers under Chapter 93A.**

In this case, the court addressed a petition to compel defendant to comply with a civil investigative demand (CID) filed by the Massachusetts Attorney General (AG). The AG issued the CID under Chapter 93A, § 6 and petitioned to enforce the CID under Chapter 93A, § 7. The CID was issued in connection with the AG's investigation into whether third-party applications (apps) and app developers improperly acquired or misused the private information of defendant's users. Defendant objected to several requests in the CID based on privilege grounds, which prompted the AG's filing.

The court granted the AG's petition to compel compliance with the CID. In doing so, the court noted that a receiving person who objects to a CID bears a "heavy burden" to show "good cause" why it should not be compelled to comply. In this context, according to the court, "good cause" means that the receiving party must demonstrate that the AG is "act[ing] arbitrarily or capriciously or that the information sought is plainly irrelevant." Based on the court's analysis of the asserted privileges, the court compelled production of some of the information sought by the AG, but allowed the defendant to provide a detailed privilege log concerning specific information withheld so that the AG and the court, if appropriate, could further assess the defendant's privilege claims.

### **Massachusetts District Court/Appellate Division**

[\*Footwear Tech Inc. v. Feelgoodz LLC, 1982CV01178, 2020 Mass. App. Div. LEXIS 1 \(Mass. Sup. Ct., Jan. 21, 2020\)\*](#)

### **A breach of contract intended to secure unbargained for benefits (breach of contract plus) may give rise to Chapter 93A liability.**

Plaintiff, a footwear manufacturer and distributor, alleged it was the intended beneficiary of a contract between defendants, who were also engaged in the footwear business, and that defendants breached the contract by circumventing plaintiff and dealing directly with one another. Plaintiff brought claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Chapter 93A, promissory estoppel, quantum meruit, and unjust enrichment.

Defendants filed motions to dismiss on all counts. As to Chapter 93A, the court declined to dismiss. While acknowledging the longstanding principle that a breach of contract, standing alone, does not violate Chapter 93A, the court noted that 93A liability may attach where "the breach [of contract is]...knowing and intended to secure unbargained for benefits to the detriment of the other party." The court found that plaintiff sufficiently alleged defendants engaged in conduct that went beyond a mere breach of contract. Specifically, defendants allegedly circumvented, froze out, and ultimately terminated their relationship with plaintiff "to further their own pecuniary interests and that plaintiff suffered harm as a result."

## United States District Court for the District of Massachusetts

*Herbert v. Vantage Travel Service, Inc.*, No. 17-CV-10922-DJC, 2020 WL 1190992, at \*1 (D. Mass. March 12, 2020)

### **Airline Deregulation Act did not preempt Chapter 93A because 93A claim did not relate to the price, route, or service of air transportation.**

Plaintiffs filed a class action against defendant alleging breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of common law warranties, negligent misrepresentation and a violation of Chapter 93A, § 9, related to river cruise travel packages that plaintiffs purchased from defendant.

With respect to plaintiffs' Chapter 93A claim, the threshold issue the court determined was whether the claims were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713, *et seq.* The court held that the defendant was an "indirect air carrier" under the Deregulation Act because it was in the business of booking flight transportation as part of its tour packages. The court held plaintiffs' Chapter 93A claim did not relate to the price, route, or service of air transportation and therefore, the claim was not preempted by the Deregulation Act.

The court analyzed the merits of plaintiffs' three Chapter 93A violations: (1) the defendant misrepresented on its website that it owned and operated the *MS River Voyager*, which violated 940 C.M.R. §§ 15.03(2), 15.04(2)(b) & 3.16(2) and was otherwise deceptive; (2) after the *MS River Voyager* was unable to continue the trip, defendant failed to offer plaintiffs their choice of alternatives enumerated under 940 C.M.R. § 15.06; and (3) the disclaimer provision was not "clear and conspicuous" and therefore, unfair and deceptive. The court noted that the first two bases created a *per se* violation of Chapter 93A.

As to the first violation, the court held that the plaintiffs failed to show that the alleged misrepresentation that the *MS River Voyager* was not owned by the defendant caused the plaintiffs their injury as required under G.L. c. 93A § 9. As to the second violation, the court held there was a disputed material fact as to whether the defendant provided "all services" purchased by plaintiffs and denied the parties' cross motions for summary judgment. As to the third violation, the court granted the defendant summary judgment because plaintiffs failed to show that the disclaimer provision violated Chapter 93A.

*Conley v. Roseland Residential Trust, C.A. No. 18-10629-WGY, 2020 U.S. Dist. LEXIS 38275 (D. Mass. March 5, 2020)*

### **Class certification denied and summary judgment granted for defendants where plaintiffs suffered no injury or loss.**

Plaintiff alleged that defendants (a landlord and his billing contractor) wrongly charged plaintiffs (and a class of similarly situated individuals) for gas and water utilities for nearly four years due to unlawful sub-metering systems. Plaintiffs alleged that this system did not comply with Massachusetts regulations, resulting in negligent misrepresentation by defendants and a violation of Chapter 93A. The court denied class certification, as plaintiffs were not typical and did not adequately represent the class as representative plaintiffs had no claim of actual pecuniary damages.

The court also granted defendants' motion for summary judgment, as plaintiff suffered no injury from the sub-metering arrangement. Specifically, the court determined that plaintiffs failed to explain how an accidental, technical violation of the regulation became an unfair or deceptive act within the meaning of

Chapter 93A. As simple negligence does not ordinarily implicate Chapter 93A, and as the practice in this case did not cause the consumer separate identifiable harm arising from the violation of the regulation, there was no injury, rendering plaintiffs' claims unsuccessful.

[\*Walsh Constr. Co. v. Demtech\*, No. 17-cv-11082-LTS, 2020 U.S. Dist. LEXIS 36361 \(D. Mass. March 3, 2020\)](#)

### **More than a breach of warranty needed to adequately plead Chapter 93A, § 11 violation.**

Plaintiff brought a civil action against a subcontractor under multiple claims, including for breach of warranty and Chapter 93A, § 11. Plaintiff sought to recover damages it was contractually required to pay to its client for property damage caused by the subcontractor. The court held that the allegation that defendant had breached a contractual warranty was insufficient to sustain a Chapter 93A, § 11 claim. Under Massachusetts law, plaintiff needed to show some additional conduct by the defendant that "would render the breach repugnant to the milieu of the commercial marketplace." The court also rejected plaintiff's argument that defendant violated Chapter 93A, § 11 by disclaiming liability, as nothing in the record suggested that defendant's disclaimer was unfair or deceptive.

[\*Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co.\*, 2020 U.S. Dist. LEXIS 33552, \\*1, 2020 WL 949885 \(D. Mass Feb. 27, 2020\)](#)

### **Court considers complexity of Chapter 93A claims in determining attorneys' fees in class action settlement.**

Plaintiffs in the underlying putative class action alleged that defendant "engaged in unfair and deceptive practices by overcharging clients for foreign currency exchange transactions." Plaintiffs' claims raised a novel theory of liability under Chapter 93A. The parties reached a class action settlement and moved the court for an award of approximately \$75 million in attorneys' fees, or approximately 25% of the common fund, which the court approved.

Class counsel and the media subsequently raised questions regarding the reliability of the attorneys' fees submitted for purposes of calculating the lodestar amount and, as a result, the court vacated the fee award. Having vacated the \$75 million fee award, the court then decided a reasonable and appropriate award *de novo*. In doing so, the court considered, among other things, the complexity and risk associated with testing a novel theory of liability under Chapter 93A.

[\*Portier v. Neo Tech. Sols.\*, No. 3:17-cv-30111-TSH, 2019 U.S. Dist. LEXIS 227494 \(D. Mass. Dec. 31, 2019\)](#)

### **Chapter 93A does not apply to claims by an employee against an employer.**

Plaintiffs brought a putative class action suit against their employer, claiming that defendants negligently disclosed the employees' Form W-2 information, including their Social Security numbers, to an unauthorized third party. Plaintiffs argued defendants violated Chapter 93A, Section 9 by failing to encrypt plaintiffs' social security numbers and by unreasonably delaying the notice of the data breach as required by G.L. c. 93H and the regulations promulgated thereunder. The court did not reach the issue of whether Chapter 93H could constitute a Chapter 93A violation. Rather, the court dismissed the case because Chapter 93A does not apply to claims made by an employee against an employer regardless of the substance of the alleged Chapter 93A violation.



*C-Mart Herald St., Inc. v. AmTrust Fin. Servs., No. 19-cv-10051-IT, 2020 U.S. Dist. LEXIS 11233, 2020 WL 375937 (D. Mass., Jan. 23, 2020)*

**Insurance contract two-year limitations period gives way to longer four-year period for Chapter 93A/176D claims.**

Plaintiff alleged that defendant's predecessor in interest (an insurance company) engaged in unfair claim settlement practices in violation of Chapter 176D, and thus was liable under Chapter 93A, Section 9. Specifically, plaintiff alleged that, in denying the claim, the insurance company failed to address a provision of the policy that appeared expressly to cover plaintiff's loss, failed to procure an expert report that addressed the real likely cause of the incident, and attributed the loss to pre-existing conditions without a suitable basis for doing so. Plaintiff also alleged that the insurance company declined coverage to force plaintiff into litigation, and out of a concern for the insurance company's financial condition.

Defendant moved to dismiss on various grounds, including based on a two-year limitation period contained in the insurance policy. The court, denying defendant's motion to dismiss, held that because the plaintiff's claims were grounded in Chapters 93A and 176D, the two-year statute of limitations provision in the policy gave way to the four-year statute of limitations in Chapter 256, Section 5A for consumer protection claims. The complaint was timely since it was filed within four years of when the plaintiff was on notice that the Chapters 93A and 176D violations had occurred.

*Jones Lang LaSalle New Eng., LLC v. 350 Waltham Associates, LLC, No. 17-cv-11784-IT, 2020 WL 419516, at \*1 (D. Mass. Jan. 27, 2020)*

**Proposing a potentially unenforceable contractual term to void paying brokerage commission can give rise to a Chapter 93A, Section 11 violation.**

Plaintiff, a real estate broker, brought suit seeking a brokerage commission in connection with amendments to a commercial lease between defendant and plaintiff's client. The complaint included a claim for a violation of Chapter 93A, Section 11 for alleged misrepresentations by defendants regarding negotiation and payment of the brokerage commission. Defendants argued the lease provision requiring a "standard" commission was unenforceable for lack of "meeting of the minds," because the provision was too indefinite. Defendants also argued there is in fact no "standard" brokerage commission rate for the area where the property is located. The court, denying defendants' motion for summary judgment as to the Chapter 93A violation, held that material disputes of fact existed because a jury could find that defendants sought to reach an agreement without paying the brokerage commission by proposing a term that defendants viewed as unenforceable, which could violate Chapter 93A, Section 11.

*Pittner v. Castle Peak 2012-1 Loan Trust, 2020 U.S. Dist. LEXIS 17922 (D. Mass. Jan. 31, 2020)*

**District court concludes that Chapter 93A claim not subject to judgment on the pleadings because "unfairness" is a question of fact.**

Plaintiff brought claims under Chapter 93A, Section 9 against the owner and servicer of a mortgage on a property purchased by plaintiff. Plaintiff alleged, among other things, that defendants engaged in unfair and deceptive practices in connection with its failure to accept payments he made on the mortgage pursuant to a Chapter 11 bankruptcy plan. In an attempt to resolve this Chapter 93A claim prior to trial, plaintiff filed a motion for judgment on the pleadings under Federal Rule of Procedure 12(c). The district court explained that a "judgment on the pleadings can only be granted when the material facts are

undisputed.” The court held that plaintiff’s Chapter 93A claim is not amendable to judgment of the pleadings because “unfairness of a practice is a matter of fact.”

*Sokhos v. Steward Health Care System, LLC*, 19-11455-RWZ, 2020 U.S. Dist. LEXIS 27091 (D. Mass. Feb. 18, 2020)

**District court allows motion to dismiss where plaintiff’s Chapter 93A claim was preempted by the Employee Retirement Income Security Act of 1974 (ERISA).**

After the death of the insured, the designated beneficiary and estate representative filed suit against Steward Health Care Systems, seeking to collect the life insurance proceeds of the deceased. Steward removed the case to federal court and sought to dismiss all claims, including the Chapter 93A claim, based on a preemption argument. The district court agreed that ERISA explicitly supersedes state laws insofar as the claims may relate to any employee benefit plan under ERISA and are not explicitly exempted by the title. The life insurance plan at issue was established or maintained by an employer, and plaintiff’s claims were prototypical of an alternative enforcement claim by a beneficiary, thus the claims related to the employee benefit plan. Therefore, the claims were preempted entirely by ERISA.

*Kaur v. World Bus. Lenders, LLC*, No. CV 19-11364-WGY, 2020 WL 888015, at \*1 (D. Mass. Feb. 24, 2020)

**Chapter 93A claim was the only claim that prevailed based on a “doomed to fail” theory for a business loan.**

Plaintiffs took out a loan for their small business from World Business Lenders, LLC and Axos Bank, formerly known as Bank of the Internet, with an annual percentage rate interest in excess of 92%. The borrowers used their home as collateral for the personal guaranty-backed business loan. After the borrowers fell into arrears on the business loan payments, World Business initiated foreclosure proceedings on their home. The borrowers alleged that World Business engaged in usury in a business loan transaction that violated G.L. c. 271, § 49(a). The borrowers also claimed that Axos Bank aided in World Business’s usury in violation of section 49(a). The borrowers further claimed that the lenders engaged in two forms of unfair and deceptive business practices: (1) issuing a business loan to the borrowers that was “doomed to fail” in violation of Chapter 93A and (2) a “rent-a-bank” scheme. World Business moved to dismiss the complaint.

The court held that the borrowers’ claims of usury against the lenders failed because World Business had registered with the state attorney general in accordance with G.L. c. 271, § 49(d), which allowed lending institutions to avoid the 20% cap by registering with the state attorney general’s office. The court also held that the borrowers’ allegation that the lenders engaged in a “rent-a-bank” scheme, thus violating Chapter 93A, also failed because the borrowers did not describe any causal nexus between the alleged deception of obfuscating the true source of the business loan and the borrowers’ injury, which appeared to be based on the terms of the loan and the lenders’ decision-making surrounding the contract as opposed to a failure to properly label each party in the loan document. Finally, the court held that the borrowers did allege sufficient facts to permit the inference that the business loan may have been “doomed to fail” in violation of Chapter 93A, Section 2. Specifically, a jury could reasonably infer that World Business should have foreseen an unacceptable probability of the loan’s failure, as World Business targeted its marketing to people with low credit scores. Further, a jury could infer that World Business ultimately made a loan that was the approximate equivalent value to the amount the borrowers paid on their house at a nine-month loan at 92% APR. The court reasoned that the facts in this case concerned a loan that led to a notice of foreclosure on a home, so the “doomed to fail” doctrine from home mortgage cases served as a recognized

or established common law or statutory concept of unfairness relevant to this case. Therefore, this alleged violation of Chapter 93A survived the motion to dismiss.

## Massachusetts Appeals Court

*Carpenter v. Mitchell*, No. 19-P-545, 2020 Mass. App. Unpub. LEXIS 156 (Mass. App. Ct., March 10, 2020)

**Appeals Court concludes that a *per se* violation of Chapter 93A, Section 9 does not entitle a consumer to redress absent proof of a distinct injury or harm caused by the unfair or deceptive act or practice.**

The Appeals Court overturned a judgment entered by the Housing Court Department of the Trial Court under Chapter 93A against a landlord (owner). The landlord had failed to comply with the Massachusetts lead paint disclosure laws and mishandled the tenant's last month's rent, which are deemed unfair and deceptive under 940 C.M.R. § 3.17(1)(c), and 4(b). Those state attorney general regulations provide that it is unfair and deceptive for an owner to (i) "[f]ail to disclose to a prospective tenant the existence of any condition amounting to a violation of law within the dwelling unit of which the owner had knowledge or upon reasonable inspection could have acquired such knowledge at the commencement of the tenancy" and (ii) "[f]ail to give to the tenant a written receipt indicating the amount of rent in advance for the last month of occupancy, and a written receipt indicating the amount of the security deposit, if any, paid by the tenant, in accordance with G.L. c. 186, § 15B." However, despite determining that plaintiff had not demonstrated any damages or harm for such failures, the trial judge awarded treble damages and statutory damages. Doing so was reversible error because Chapter 93A, Section 9 requires a causal connection between the unfair act or practice and an identifiable, distinct injury to plaintiff. Accordingly, the Appeals Court vacated the treble and statutory damages award. The Appeals Court preserved the judge's award of attorneys' fees and costs under Chapter 93A.

## First Circuit Court of Appeals

*Capitol Specialty Ins. Corp. v. Higgins*, Nos. 19-1496, No. 19-1609, 2020 U.S. App. LEXIS 7616 (1st Cir. March 11, 2020)

**Consent judgment found collusive; violation of Chapter 176D is not a *per se* violation of Chapter 93A, Section 11.**

The parties cross-appealed rulings by the district court arising from claims related to a two-car collision in which plaintiff was injured. Plaintiff obtained a consent judgment without judicial evaluation in state court with her employer where the employer assigned its claims against its insurer to plaintiff. Plaintiff subsequently sued her employer's insurer alleging unfair claims settlement practices for its acts or omissions under Chapters 93A and 176D. The district court found that the consent judgment was sufficiently collusive as to the insurer to preclude its use as a "judgment." The district court ruled in favor of plaintiff and assessed actual damages of \$1.8 million, which it then trebled for willful and knowing violations of Chapter 176D. The parties appealed these rulings. The court affirmed the district court's rulings, except it reversed and remanded for a calculation of prejudgment interest based on plaintiff's actual damages. The court also determined that there was no error by the district court for failing to rule on plaintiff's assigned claims. There was no evidence of any monetary loss as to the assigned claims and unlike claims brought under Chapter 93A, section 9, Chapter 176D claims brought under Chapter 93A section 11 are not *per se* violations of Chapter 93A.



This GT Newsletter was prepared by members of the firm's Boston office Litigation Group.

## Editors

**David G. Thomas**  
Shareholder  
+1 617.310.6040  
thomasda@gtlaw.com

**Robert A. Sherman**  
Senior Counsel  
+1 617.310.6015  
shermanr@gtlaw.com

## Contributors

**James M. Vant**  
Shareholder  
+1 617.310.6094  
vantj@gtlaw.com

**James P. Ponsetto**  
Of Counsel  
+1 617.310.6073  
ponsettoj@gtlaw.com

**Emily H. Bryan**  
Associate  
+1 617.310.6266  
bryane@gtlaw.com

**Angela C. Bunnell**  
Associate  
+1 617.310.5202  
bunnella@gtlaw.com

**Gustavo Ribeiro**  
Associate  
+1 617.310.6201  
ribeirog@gtlaw.com

**Mian R. Wang**  
Associate  
+1 617.310.6273  
wangm@gtlaw.com

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