

## The Massachusetts Consumer Protection Act/ Chapter 93A Newsletter | **Summer 2020**



### **In this Issue:**

**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 Appeals Court**

*Graziano v. Crow Point Partners, LLC, 2020 Mass. App. Unpub. LEXIS 231*

**Company violated Chapter 93A when it failed to pay full amount of consulting fees and plaintiff awarded double damages and attorneys' fees.**

Plaintiff, an information technology consultant, was hired by defendant, a global investment manager to institutional clients, to help improve defendant's digital marketing. At the beginning of the relationship, plaintiff sent defendant a draft contract under which the company was to give plaintiff a retainer of \$4,500 and to pay him an hourly rate of \$75 per hour. Although the draft contract was never signed, the company paid the requested retainer and raised no objection to the hourly rate. Subsequently, plaintiff performed the work, including additional work requested by the company but was beyond the initial scope. The company left a shortfall of \$40,683.33.

On appeal, the company argued its actions did not violate Chapter 93A because it was disputing, in good faith, the amount of a bill. However, the Appeals Court held the trial court found the company: (1) led plaintiff to believe he would be paid on an hourly basis at the rate of \$75 per hour without ever intending to pay the full amount; (2) claimed, against evidence to the contrary, it never agreed to pay him on an hourly basis; (3) disavowed the draft contract while seeking to rely on the favorable terms included therein; and (4) refused to pay more than it did despite the company's own admission that plaintiff's work was worth substantially more. Given these factual findings, the Appeals Court affirmed the trial court's finding of a violation of Chapter 93A. The Appeals Court also affirmed the trial court's finding the violation warranted a doubling of damages as well as attorneys' fees.

*Meddaugh v. Wgbh Educ. Found., 2020 Mass. App. Unpub. LEXIS 378 (Mass. App. Ct. May 12, 2020)*

**Charitable entity involved in its core purpose is not engaged in “trade or commerce” under Section 11.**

This appeal arose after plaintiff lost her Chapter 93A, Section 11 claims on summary judgment. The underlying dispute concerned plaintiff's contract with defendant to develop a public educational television program based on a series of books plaintiff authored. Although the TV program was successful, the parties disputed whether it made any profits and what royalties were owed, if any, to plaintiff. On summary judgment, the trial court determined that the parties' contractual relationship (as a matter of law) was not subject to Chapter 93A and plaintiff failed to provide evidence that defendant committed any acts that violated Section 11 (other than alleged ordinary breaches of contract). The Appeals Court concluded that the trial court did not err in finding that defendant was a charitable organization engaged in developing a TV program as part of its core mission and, as such, was not engaged in “trade or commerce” within the meaning of Section 11. As a result, the Appeals Court did not address plaintiffs' other argument concerning whether defendant's conduct actually violated Section 11.

*Cance v. Carbone, 2020 Mass. App. Unpub. LEXIS 494 (Mass. App. Ct. June 5, 2020)*

**Negligent misrepresentation, without more, does not violate Chapter 93A.**

This appeal arose after a bench trial in favor of defendant on plaintiff's Chapter 93A claim. The underlying dispute concerned plaintiff's purchase of defendant's condominium. The trial court concluded defendant's representations about the state of the condominium's roof deck were merely negligent misrepresentations and not fraudulent. According to the Appeals Court, as a finding of mere negligence does not violate Chapter 93A, the trial judge's finding defendant did not violate Chapter 93A was rational.

*Gaskins v. Devine, 97 Mass. App. Ct. 1121 (2020)*

**Chapter 93A does not apply to government employees enforcing a government regulation.**

Plaintiff, an inmate who resides at a correctional institute, purchased headphones from the prison commissary. The private company that runs the commissary declined to send plaintiff's broken headphones to the manufacturer, even though the headphones were still under warranty. Plaintiff asked the acting deputy superintendent for permission to send the headphones directly to the manufacturer and was told, while he could send the headphones out, Department of Correction (DOC) regulations aimed at preventing the introduction of contraband into the institution prohibited the receipt of a replacement from the manufacturer as it is not an approved DOC vendor. Plaintiff filed a Superior Court complaint alleging that the defendants' enforcement of the DOC regulation violated Chapter 93A as it deprived him

of his rights under the manufacturer's lifetime warranty. A judge of the Superior Court allowed defendants' motion for judgment on the pleadings, denied plaintiff's request for injunctive relief, and dismissed the complaint without prejudice. The Appeals Court affirmed holding that defendants were not subject to Chapter 93A as they were not engaged in trade or commerce when they enforced the DOC regulation at issue while acting in their capacities as government employees.

*Laporte v. Vlad*, 97 Mass. App. Ct. 1121 (2020)

**Section 9 claim does not survive as matter of law where plaintiff fails to raise any issue with entrepreneurial or business aspects of medical services provided.**

Decedent was treated in the emergency department multiple times for knee pain. One of the defendants prescribed an anti-inflammatory medication manufactured by a co-defendant. Decedent's knee-related problem persisted, and her leg needed to be amputated. Sixteen months after the amputation, she suffered a cardiac arrest associated with pneumonia and died. Plaintiff, as personal representative of the estate of decedent, filed an action against the attending doctor, the practice, the hospital, and the pharmaceutical company for several counts, including breach of Chapter 93A, Section 9. The trial court held, and the Appeals Court affirmed, the predominant factor of the transaction between decedent and defendants was rendering the medical services, and the anti-inflammatory medication was an incidental transfer of goods made in the course of performing the service. Plaintiff's 93A claim failed as matter of law as plaintiff failed to raise any issue with entrepreneurial or business aspects of the medical service provided.

**Massachusetts Superior Court**

*Ramey v. Beta Bionics*, 2020 Mass. Super. LEXIS 68 (Mass. Sup. Ct. Apr. 22, 2020)

**Section 11 claim fails as it arose out of a joint venture and the parties were not engaged in "trade or commerce."**

Plaintiff alleged defendants fraudulently induced him to create intellectual property in exchange for an equity interest in a corporation formed to commercialize the results of plaintiff's efforts. When the corporation was formed (and plaintiff did not receive equity interests), plaintiff brought a claim under Chapter 93A, Section 11. Defendants moved to dismiss. The court concluded that plaintiff's Section 11 claim was not proper because Chapter 93A does not apply to transactions that are strictly private, such as disputes arising out of a joint venture or arising out of a single entity. In those disputes, according to the court, the parties are not engaged in "trade or commerce" as required by Section 11.

*Baldwin v. Connor*, 2020 Mass. Super. LEXIS 63 (Mass. Sup. Ct. Mar. 24, 2020)

**Inter-company dispute does not implicate Section 11 "trade or commerce" and business context requirements.**

This case concerns claims arising out of the operation of closely-held corporations, of which plaintiffs claimed they were unlawfully frozen out of. Plaintiffs asserted defendants hired an individual to effectuate the freeze out and asserted a Chapter 93A, Section 11 claim and other common law claims. As to the Chapter 93A claim, the court granted defendants' motion to dismiss because plaintiffs failed to plead facts to show the individual hired was acting in trade or commerce under Section 11. According to the court, plaintiffs failed to plead facts plausibly suggesting they engaged in a commercial transaction with another person acting in a business context as the individual at issue had consulted with defendants, not plaintiffs

(and without plaintiffs' knowledge). Also, that the individual worked for the underlying corporations did not amount to a commercial transaction. The court noted that internal business disputes do not amount to engaging in trade or commerce as required to state a claim under Section 11. Finally, the court concluded that working for a company as an employee or contractor is not the conduct of trade or commerce within the meaning of Section 11, even if the work allegedly includes participating in a freeze-out scheme that may violate the majority shareholders' fiduciary duties. The court distinguished cases where a third-party (outside of the internal structure) is involved with the alleged unlawful conduct and noted that such third-party could be liable under Chapter 93A.

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

*Alonge v. Saintford, 2020 Mass. App. Div. LEXIS 9 (February 5, 2020)*

**Court found it is an unfair and deceptive act for a landlord to lease premises that, at the inception of the tenancy, contain conditions which amount to a violation of law which may endanger or materially impair the health, safety, or well-being of the occupants.**

Landlord initiated summary process proceeding against tenant seeking repossession of the leased premises and unpaid rent. Tenant filed a counterclaim for breach of the warranty of habitability, breach of the covenant of quiet enjoyment, and Chapter 93A, among other claims. The trial judge found prior to the date the tenant began her tenancy, the apartment "was consistently plagued with rodents, bedbugs, and cockroaches." He also found through inspection reports the landlord was aware, prior to the inception of the tenancy, the bathroom ceiling of the tenant's apartment needed repair. The bathroom ceiling later collapsed on the tenant's son, who needed to be taken to the hospital. Judgment was entered for the tenant on her counterclaims. Landlord appealed, and the Appellate Division affirmed the judgment as to Chapter 93A counterclaim. The Appellate Division held that the trial judge's findings that the landlord breached the warranty of habitability and the covenant of quiet enjoyment also required a finding that the landlord violated G.L. c. 93A. Citing to 940 Code Mass. Regs. § 3.17(1)(a), the Appellate Division noted it is an unfair and deceptive act for a landlord to lease premises that, at the inception of the tenancy, contain conditions which amount to a violation of law which may endanger or materially impair the health, safety, or well-being of the occupants.

*Orion Points W. Inc. v. FJM Enters, 2020 Mass. App. Div. 15 (April 7, 2020)*

**Ongoing deception, misrepresentation, and lies constitute a knowing violation of Chapter 93A entitling plaintiff to treble damages and attorney's fees.**

Plaintiff filed a complaint alleging that it provided one of its employees to the defendant as a potential permanent hire that the defendant, thereafter, hired on a full-time basis resulting in the defendant being required to pay the plaintiff a commission pursuant to their contract. The trial judge entered judgment for plaintiff on breach of contract and Chapter 93A claims. With respect to Chapter 93A claim, the trial judge found "the defendant intentionally deceived and made misrepresentations to the plaintiff when they were inquiring as to the employment status of its referral of the [employee] for permanent hire." Even after the parties negotiated a reduced commission, defendant still had not paid any money to plaintiff. For the court, defendant's "ongoing deception, misrepresentation, and lies" constitute a knowing violation of G.L. c. 93A entitling plaintiff to treble damages and attorney's fees. The Appellate Division affirmed.

## First Circuit Court of Appeals

*Squeri v. Mt. Ida College*, No. 19-1624, 2020 U.S. App. LEXIS 9334 (1st Cir. March 25, 2020)

**College was not engaged in “trade or commerce,” as required by Chapter 93A, Section 2(a), in connection with disruptive school closing.**

Students brought a putative class action under Massachusetts law against Mount Ida College, its Board of Trustees, and others alleging defendants knew Mount Ida was on the brink of insolvency, but concealed this information, instead assuring current and prospective students that Mount Ida was financially stable. The suit raised seven Massachusetts state law claims: breach of fiduciary duty, violation of privacy, fraud, negligent misrepresentation, fraud in the inducement, breach of contract, and violation of Chapter 93A.

The district court granted the defendants’ motion to dismiss the complaint. On the Chapter 93A count, the district court concluded this claim failed because defendants were not engaged in “trade or commerce.” “Rather, the actions they took [in connection with the school closing] were in furtherance of, or at least incidental to, Mount Ida’s core educational mission and so, under state law, ch. 93A did not apply.” The First Circuit affirmed.

*Lee v. Conagra Brands*, No. 17-2131, 2020 U.S. App. LEXIS 14466 (1st Cir. May 7, 2020)

**“100% Natural” claims on vegetable oil product label could deceive consumers into believing product was free of genetically modified organisms, in violation of Chapter 93A.**

Class plaintiff purchased a specific brand of vegetable oil. The oil label advertised that it was “100% Natural.” After learning that the oil contained genetically modified organisms (GMOs), regarded by plaintiff as unnatural, she sued the product manufacturer and distributor alleging that by labeling the oil “100% Natural,” defendants violated Massachusetts’s prohibition against unfair or deceptive trade practices. The district court dismissed the complaint for failure to state a claim because it determined that the label was neither unfair nor deceptive because it conformed to the Food and Drug Administration’s (FDA) labeling policy.

The First Circuit reversed, finding that the FDA has not established the regulatory “safe harbor” that defendants and the district court envisioned. Because the FDA’s statements to date concerning the use of the word “natural” are nonbinding and nonexclusive, the First Circuit held that they would not foreclose a jury from finding that the use of “100% Natural” on labels could deceive consumers into believing that the product was GMO-free. The court also held that plaintiff’s price premium allegations sufficiently stated a Chapter 93A injury.

## United States District Court for the District of Massachusetts

*Bassett v. Jensen*, 2020 U.S. Dist. LEXIS 82431 (D. Mass. May 11, 2020)

**Landlord could proceed under Section 9 because she was not engaged in “the conduct of trade or commerce” in renting her home.**

Plaintiff rented her home to defendant, who used the home as a set for pornographic videos and housing cast and crewmembers. Among various other common-law claims, plaintiff asserted a Chapter 93A, Section 9 claim. Defendant sought summary judgment on the Section 9 claim by arguing plaintiff, who

acted as a landlord in the subject transaction, could not proceed under Section 9 because she was engaged in “the conduct of trade or commerce.” The court disagreed because plaintiff did not own another residence and rented the home when she was not there out of financial necessity. According to the court, the rental was a personal transaction and not a business transaction and, therefore, plaintiff could proceed under Section 9 considering that defendant was engaged in the conduct of trade or commerce (renting of a home to shoot pornographic films).

*Alenci v. Hometown Am. Mgmt.*, 2020 U.S. Dist. LEXIS 85837 (D. Mass. May 15, 2020)

**Section 9 claim does not pass scrutiny at the pleading stage absent plausible conduct violating other state laws protecting consumers.**

This putative class action arose out of alleged unlawful charges for community water to plaintiff and various other residents of a manufactured housing community. Plaintiff based the Chapter 93A, Section 9 claim on alleged violations of the Massachusetts Sanitary Code and various other regulations. However, according to the court, plaintiff’s complaint did not plausibly allege violations of the underlying laws or provide the facts to support unfair or deceptive acts in connection with the billing practices. Absent such facts—particularly violations of other state laws—plaintiff’s complaint failed to state any viable Chapter 93A claims.

*Feeney Bros. Excavation LLC v. Morgan Stanley & Co. LLC*, 2020 U.S. Dist. LEXIS 86756 (D. Mass. May 18, 2020)

**Breach of the of the covenant of good faith and fair dealing or negligent misrepresentation saves Section 11 claim from early dismissal.**

Plaintiff brought claims against its investment advisor who, according to plaintiff, wrongfully recommended a third-party administrator for plaintiff’s 401(k) plan. Although not specified in the decision, in addition to common-law claims for negligent misrepresentation and breach of the implied covenant of good faith and fair dealing, plaintiff asserted a claim under Chapter 93A, Section 11. In denying defendants’ motion to dismiss, the court explained that “liability under Chapter 93A need not be based on extreme or egregious behavior but may instead be based on other causes of action, such as a breach of the covenant of good faith and fair dealing or negligent misrepresentation.”

*Marti v. Schreiber, No. 4:18-40164-TSH*, 2020 U.S. Dist. LEXIS 66309 (D. Mass. April 15, 2020)

**Debt collection efforts did not violate Chapter 93A where class action plaintiff failed to plead a distinct injury caused by alleged deceptive act.**

Plaintiff brought a putative class action against defendants alleging they violated the Fair Debt Collection Practices Act (FDCPA) and Chapter 93A, by sending collections letters that failed to identify the current creditor on her alleged debt.

The district court granted the Defendants’ motion for summary judgment on all counts. On the FDCPA count, the collection letter at issue sufficiently identified plaintiff’s current creditor, so plaintiff’s FDCPA claims (all of which are premised on the alleged failure to identify her current creditor) failed as a matter of law. As for the Chapter 93A claim, the district court concluded that this claim failed because it too was premised on the failure to identify the creditor, but the district court held that even if defendants failed to sufficiently identify plaintiff’s creditor, “the Court would still grant Defendants’ motion as to [the chapter

93A claim] because plaintiff has not offered any evidence of a compensable injury or loss.” Specifically, she failed to plead that she suffered a distinct injury or harm that arises from the claimed unfair or deceptive act itself. Statutory damages cannot substitute for the requirement that a plaintiff prove injury and causation in a Chapter 93A claim.

*Munsell v. Colgate-Palmolive Co.*, 2020 U.S. Dist. LEXIS 88745 (D. Mass. May 20, 2020)

***Plaintiff’s “Natural” Chapter 93A, Section 9 claim survives motion to dismiss.***

This case concerns a claim filed by a consumer based on alleged unfair acts or practices arising out of defendant’s sale of “natural” toothpaste and deodorant products. Plaintiff asserted use of the word “natural” was misleading because the products allegedly contain artificial, synthetic and/or chemically processed ingredients. Defendants moved to dismiss the complaint, including the Chapter 93A claim, for failure to state a claim. Drawing all reasonable inferences in plaintiff’s favor, the court concluded that plaintiff had alleged sufficient facts that, taken as true, stated a Chapter 93A claim. Specifically, the court accepted as true plaintiff’s assertion a reasonable consumer could have been misled by the disclosures on the product label. The court noted this issue would be better addressed in a full record by the fact finding and not by a preliminary motion.

*Monahan Prods. LLC v. Sam’s E.*, 2020 U.S. Dist. LEXIS 88749 (D. Mass. May 20, 2020)

**Defendant blunts Chapter 93A, Section 11 claim on summary judgment by proving the center of gravity of the circumstances giving rise to the claim did not occur “primarily and substantially” in the Commonwealth.**

This case concerns an action for alleged trademark infringement and false advertising, as well as a Chapter 93A, Section 11 claim, arising out of the alleged “gray market” sale of plaintiff’s baby strollers by defendant. The parties cross-moved for summary judgment. With respect to the Chapter 93A claim, as it was undisputed the alleged unlawful conduct was not centered in Massachusetts, the Section 11 claim failed as a matter of law to satisfy the statutory “primarily and substantially” standard. It was defendant’s burden to prove that the conduct occurred outside of the Commonwealth, which burden defendant satisfied and the court therefore entered summary judgment in defendant’s favor.

*Tashjian v. CVS Pharmacy, Inc.*, No. CV 19-11164-TSH, 2020 WL 1931859 (D. Mass. Mar. 13, 2020)

**Chapter 93A claim requires engagement in an unfair and deceptive act *and* loss suffered due to the unfair and deceptive act.**

Plaintiff alleged defendants, among other things, engaged in unfair trade practices when it sent letters to plaintiff’s physician stating that an employee had spoken to plaintiff about diabetes care and that plaintiff wanted him to reach out on his behalf to the physician to determine if it was appropriate for plaintiff to start therapy. Plaintiff alleged he did not have diabetes and never consulted any defendants’ employee about diabetes care nor did he ever request a letter be sent to his physician concerning therapy.

The court found on a motion to dismiss that plaintiff had sufficiently alleged defendants engaged in an unfair or deceptive act by sending these letters to plaintiff’s physician even though the defendants knew plaintiff did not request his physician be contacted. The court explained there were no *per se* Chapter 93A injuries, however, and plaintiff needed to further allege that he suffered some loss from the unfair or deceptive act. In the amended complaint, plaintiff alleged that defendants made a net profit each time

they sent such a letter, which constituted an injury. Accordingly, the court held plaintiff's claim for violation of Chapter 93A survived the motion to dismiss.

*Warren Envtl. v. Source One Envtl., No. 18-11513-RGS, 2020 U.S. Dist. LEXIS 72529 (D. Mass. April 24, 2020)*

**Chapter 93A claim was dismissed where the gravamen of the claims complained of in the first amended complaint did not occur primarily and substantially within Massachusetts.**

Plaintiff alleged three corporate defendants failed to maintain plaintiff's patent in Europe for a proprietary epoxy pumping system. Plaintiff brought claims for breach of contract, breach of the duty of good faith and fair dealing, negligence, violations of Mass. Gen. Laws. Ch. 93A, and interference with contractual relations. Defendants moved to dismiss the Chapter 93A claim, which the court allowed.

The jurisdictional threshold for a Chapter 93A, Section 11 claim is whether the facts, in their totality, establish that "the center of gravity of the circumstances that give rise to the claim is primarily and substantially within the Commonwealth." Here, the misconduct occurred in Europe and the brunt of the effects were felt in Europe. Plaintiff alleged the dominant event giving rise to plaintiff's claims in Massachusetts was the contract was with a Massachusetts-based company. The court determined, however, in the context of the allegations, this was "too slender a reed on which to anchor support for the proposition" the gravamen of plaintiff's claims occurred primarily and substantially in Massachusetts.

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