

## Chapter 93A Litigation Newsletter | 3rd Quarter 2022



**A summary of Massachusetts state and federal court decisions relating to General Laws Chapter 93A, the Massachusetts Consumer Protection Law, from July 1 to Sept. 30, 2022.**

---

### MASSACHUSETTS STATE COURTS

#### Supreme Judicial Court/Appeals Court

*Trahan v. Pelczar*, No. 21-P-493, 2022 Mass. App. Unpub. LEXIS 566 (Mass. App. Ct., Aug 22, 2022)

***Breach of contract standing alone and litigation tactics insufficient under Chapter 93A; attorney not subject to chapter 93A based on litigation tactics.***

Plaintiff sued defendant for breach of contract and defendant counterclaimed, on which plaintiff prevailed at summary judgment. The Superior Court, however, denied plaintiff's motion to amend to add claims under Chapter 93A against defendant and defendant's attorney. On appeal, the Appeals Court found no abuse of discretion in denying plaintiff's motion to amend, which amended pleading alleged that defendant had intentionally breached a settlement agreement and, with his attorney's assistance, employed litigation tactics to delay the plaintiff's recovery. As the Appeals Court explained, a breach of contract, without more, does not rise to the level of an unfair or deceptive conduct to violate Chapter 93A. Likewise, litigation conduct alone generally is not a sufficient basis for a Chapter 93A claim. Although acknowledging that a course of conduct beginning before litigation might give rise to a claim, defendant here did not engage in a "continuous course of bad conduct" and the "bulk of delays" in the case were caused by plaintiff's own litigation tactics. Finally, the Appeals Court concluded that the proposed Chapter

93A claim against defendant's attorney was futile because plaintiff had no "commercial relationship" with the attorney predating the case, and the attorney's actions during the litigation did not constitute "trade or commerce" within the meaning of Chapter 93A.

---

## MASSACHUSETTS FEDERAL COURTS

### District Court

*Loughlin v. Vi-Jon, LLC*, No. 20-11555-MLW, 2022 U.S. Dist. LEXIS 179408 (D. Mass. Sept. 30, 2022)

***District court finds plausible claim at pleading stage where plaintiff alleged she paid more for a product based on allegedly false labeling.***

Plaintiff brought a putative class action against defendant, under Chapter 93A, alleging defendant had made false representations on a product label. The district court addressed the adequacy of plaintiff's second amended complaint, which the court had ordered plaintiff to file after a hearing on defendant's motion to dismiss plaintiff's first pleading. The district court concluded that plaintiff had sufficiently alleged a Chapter 93A claim because plaintiff plausibly alleged she had purchased defendant's product (hand sanitizer) with the expectation it would kill 99.99% of the germs on her hands as advertised—a bargain she allegedly did not get the benefit of. The district court, relying on *Dumont v. Reilly Foods Company*, 934 F.3d 35 (1st Cir. 2019), concluded that plaintiff had sufficiently alleged an injury in fact by alleging she overpaid for the products due to defendant's alleged wrongful conduct. The district court did not require plaintiff to make allegations about the germs on her own hands to state a plausible claim under Chapter 93A.

*Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, No. 21-11269-FDS, 2022 U.S. Dist. LEXIS 178496 (D. Mass. Sept. 30, 2022)

***District court dismisses Chapter 93A, Section 11 claims because advertisements were not deceptive or unfair.***

Plaintiff brought claims against seven gun manufacturers and wholesalers, alleging illegal trafficking of funds into Mexico. According to the complaint, an increase gun-related violence in Mexico is directly linked to the U.S. ban on assault rifles in 2004, which allegedly led gun manufacturers to increase production of military-style assault weapons favored by criminal organizations. Among the claims brought was a Chapter 93A, Section 11 claim. Defendants moved to dismiss on various grounds, including failure to state a claim upon which relief could be granted. Central to the Chapter 93A claim was the allegation that the subject defendant marketed its guns in way that emphasized the ability of civilians to misuse assault rifles in unlawful, military-style attacks.

The district court dismissed the Chapter 93A claim because Chapter 93A only prohibits statements that are actually false or misleading, and plaintiff alleged the subject defendant committed that violation by stating that the guns do exactly what they were advertised to do. Although, according to the court, the advertising may have been distasteful, it was not false, misleading, or deceptive within the meaning of Chapter 93A. With respect to general unfairness, the district court concluded that plaintiff had failed to identify any common-law or statutory authority that the advertisements violated. Again, according to the

court, although the advertisements may have been distasteful, they were not unlawful, immoral, unethical, oppressive, or unscrupulous.

Finally, the district court concluded that the alleged unfair or deceptive conduct did not occur primarily and substantially in Massachusetts, as required to state a claim under Section 11. Specifically, although the advertisements may have originated in Massachusetts, the complaint clearly suggested that the advertisements and marketing practices were intended to be circulated abroad and were received and acted upon in Mexico. In addition, the situs of plaintiff's losses was entirely in Mexico.

*In Re TelexFree Sec. Litig.*, No. 4:14-md-02566-TH, 2002 U.S. Dist. LEXIS 56964 (D. Mass. Aug. 31, 2022)

***Attorneys are not subject to Chapter 93A, Section 11 when not acting in a “business context.”***

Plaintiffs brought action against the estate of a deceased lawyer who provided legal and business advice to an entity accused of operating a Ponzi-scheme. The estate moved to dismiss the complaint, which included a Chapter 93A, Section 11 claim for failure to state a claim against the estate. The district court granted the motion because, although attorneys can be liable under Chapter 93A, an attorney must have been acting in a business context to be deemed to be engaged in the conduct of any trade or commerce, as required by Chapter 93A. In the subject pleading, plaintiffs did not allege having any direct contact with the attorney; therefore, the allegations were insufficient to state a claim against the estate under Chapter 93A.

*Wortman v. Logmein, Inc.* No. 18-11475-GAO, 2022 U.S. Dist. LEXIS 154807 (D. Mass., Aug. 29, 2022)

***Chapter 93A’s class certification standards do not apply in federal court.***

Plaintiffs brought a putative class action against defendants, alleging that defendants renewed cloud-based subscriptions services at higher prices than initially agreed to—in violation of Chapter 93A, Section 9. Plaintiffs moved to certify a class, which motion the district court denied as not meeting the requirements of Fed. R. Civ. P. 23. In doing so, the district court concluded it would not be proper to impute injury to each class member by inference because Chapter 93A requires proof of an identifiable injury distinct from the alleged unfair or deceptive practice itself. In addition, although the district court viewed Chapter 93A, Section 9 as having a more lenient standard than Rule 23, it concluded that the standards under Rule 23—a procedural rule—clearly governed class certification in federal court.

*Skyview Fin. Co. LLC v. Kearsarge Trading LLC*, Civil Action 20-cv-11666-PBS, 2022 U.S. Dist. LEXIS 126496 (D. Mass., July 18, 2022)

***Breach of contract without more does not violate Chapter 93A.***

Plaintiff brought a Chapter 93A, Section 11 action against defendant arising out of an alleged breach of a contract to purchase Solar Renewable Energy Credits (SRECs). Defendant moved for summary judgment on the Chapter 93A claim. According to the district court, a breach of contract without more does not violate Chapter 93A, even if the breach is knowing and based on a plausible, but incorrect interpretation of the contract. A breach will give rise to a Chapter 93A claim if there is some level of bad faith or, for example, if the breaching party acted with an ulterior motive or with a coercive or extortionate objective.

As none of the additional factors were present on the record, the court granted summary judgment for defendant.

## Contributors

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

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

**Courtney R. Foley**  
Associate  
+1 617.310.5232  
foleyc@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. <sup>~</sup>Houston. Las Vegas. London. <sup>\*</sup>Long Island. Los Angeles. Mexico City. <sup>+</sup>Miami. Milan. <sup>»</sup>Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Francisco. Seoul. <sup>™</sup>Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. <sup>^</sup>Tokyo. <sup>\*</sup>Warsaw. <sup>-</sup>Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Newsletter is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. <sup>~</sup>Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>\*</sup>Operates as a separate UK registered legal entity. <sup>+</sup>Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>»</sup>Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>∞</sup>Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. <sup>^</sup>Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. <sup>▫</sup>Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <sup>~</sup>Greenberg Traurig's Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2022 Greenberg Traurig, LLP. All rights reserved.*