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## Mastering Massachusetts General Laws Chapter 93A—The Massachusetts “Consumer” Protection Act (Part I)

**David G. Thomas**

**Angela Bunnell**

*Greenberg Traurig, LLP*<sup>±</sup>

*A courtroom and boardroom reference guide dedicated to deciphering the Massachusetts  
Consumer Protection Act (Chapter 93A) for attorneys and businesses.*

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<sup>±</sup> Please note that the information provided in these articles does not, and is not intended to, constitute legal advice; instead, all information and content, are for general informational purposes. Readers should contact their own attorneys to obtain advice with respect to any legal matter. The views expressed through these articles are those of the individual authors writing in their individual capacities only, not of their respective employer.

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## I. Introduction

Massachusetts General Laws Chapter 93A—the Massachusetts “Consumer”<sup>1</sup> Protection Act—“is a statute of broad impact” that prohibits “unfair methods of competition” and “unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>2</sup> The Massachusetts Legislature has enacted many statutes, and the Massachusetts Attorney General has promulgated many regulations, declaring what is an “unfair” or “deceptive” act or practice in Massachusetts. Chapter 93A may be enforced *publicly* by the Massachusetts Attorney General or *privately* through civil lawsuits filed by consumers and businesses—including through class-action lawsuits. The standards for prosecuting and defending Chapter 93A claims differ depending on who has been injured and who brings the claims. There are thousands of reported case decisions concerning Chapter 93A. The result is a regulatory and judicial quagmire for the legal and business communities to navigate.

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<sup>1</sup> As Chapter 93A also covers business-to-business disputes (Section 11), the use of the word “consumer” in the common name of the statute is somewhat of a misnomer.

<sup>2</sup> *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693–694 (1975).

This is the first article in a series of articles—four in total—that are organized to help the legal and business communities better understand Chapter 93A. Despite the amount of regulatory and judicial activity under Chapter 93A, the statute has only eleven sections. This first article covers Sections 1-3, which deal with what conduct falls within the scope of Chapter 93A—and what conduct does not. The second article will cover Sections 4-8, which deal with *public* enforcement of Chapter 93A by the Massachusetts Attorney General. The third article will cover only one section—Section 9, which deals with *private* enforcement of Chapter 93A by *consumers*. Section 9 is where much of the legislative, regulatory, and judicial activity occurs. The final article will cover Section 11, which deals with *private* enforcement of Chapter 93A by businesses.<sup>3</sup> In each article, we provide the verbatim statutory text of each section followed by a discussion concerning the applicable section.

## II. The Scope of Chapter 93A (Sections 1-3)

### A. Chapter 93A, § 1—Definitions

Section 1 defines the following terms or phrases (a) “**Person**”; (b) “**Trade**” and “**commerce**”; (c) “**Documentary material**”; and (d) “**Examination of documentary material**.”

#### 1. “**Person**” (Section 1(a))

##### (i). **The Text.**

“**Person**” shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

##### (ii). **Discussion.**

Section 1(a) defines “person” broadly.<sup>4</sup> A public entity, however, will not *ordinarily* fall into this definition particularly if the entity is engaged in its primary public function and not acting in a business capacity.<sup>5</sup> A municipality, however, may be a “person” if

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<sup>3</sup> The second, third, and fourth articles will each cover Section 10, which connects the *public* and *private* enforcement mechanisms of Chapter 93A.

<sup>4</sup> Max-Planck-Gesellschaft Zur Förderung der Wissenschaften E.V. v. Whitehead Inst. For Biomedical Rsch., 850 F. Supp. 2d 317, 330 (D. Mass. 2011).

<sup>5</sup> Brooks v. Martha’s Vineyard Transit Auth., 433 F.Supp.3d 65, 78 (D. Mass. 2020).

engaged in a business capacity.<sup>6</sup> So too may the United States and its agencies, as well as other countries.<sup>7</sup> The Commonwealth of Massachusetts, however, has not waived its sovereign immunity and therefore cannot be deemed a “person” under Chapter 93A under any circumstances.<sup>8</sup>

An individual, of course, is a “person” and will be subject to Chapter 93A. Directors, officers, and employees may be liable under Chapter 93A in their “individual capacity” even when acting as a director, officer, and employee for an entity.<sup>9</sup> This usually occurs when the individual director or officer controls the entity with knowledge of, or participates in, the wrongful acts.<sup>10</sup> Furthermore, a “person” may be vicariously liable for another person’s wrongful conduct.<sup>11</sup> Chapter 93A encompasses vicarious liability of a principal for the conduct of an agent even if the principal was unaware of the agent’s conduct.<sup>12</sup>

## **2. “Trade” and “commerce” (Section 1(b))**

### **(i). The Text.**

**“Trade” and “commerce” shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible**

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<sup>6</sup> B & R Realty Co. v. Springfield Redevelopment Auth., 708 F. Supp. 450, 457 (D. Mass. 1989); Park Drive Towing, Inc., v. City of Revere, 442 Mass. 80, 86 (Mass. 2004).

<sup>7</sup> Pierce v. Dew, 626 F. Supp. 386, 387–388 (D. Mass. 1986); United States v. U.S. Trust Co., 660 F. Supp. 1085, 1090 (D. Mass. 1986); Republic of Turkey v. OKS Partners, 797 F. Supp. 64, 68 (D. Mass. 1992).

<sup>8</sup> Univ. of Mass. v. Phio Pharms. Corp., 1984-CV-02455-BLS1, 2020 WL 6342956, at \*5 (Mass. Super. Ct. Sept. 24, 2020); *Max-Planck-Gesellschaft Zur Förderung der Wissenschaften E.V.*, 850 F. Supp. 2d at 331.

<sup>9</sup> Capital Allocation Partners, LLC v. Michaud, No. 11-P-1524, 2012 WL 1948596, at \*2 (2012) (Rule 1:28 decision); The Cmty. Builders, Inc. v. Indian Motorcycle Assocs., Inc., 44 Mass. App. Ct. 537, 560 (1998).

<sup>10</sup> Nader v. Citron, 372 Mass. 96, 103 (1977), abrogated on other grounds by *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008); Holland v Jachmann, No. 13-P-280, 2014 WL 1908653, at \*3 (Mass. App. Ct. May 14, 2014) (Rule 1:28 decision).

<sup>11</sup> Kansallis Finance Ltd. v. Fern, 421 Mass. 659, 672 (1996).

<sup>12</sup> *Id.* at 672–73; Ramos v. Int’l Fid. Ins. Co., 87 Mass. App. Ct. 604, 610 (2015).

or intangible, real, personal or mixed, any security as defined in subparagraph (k) of section four hundred and one of chapter one hundred and ten A and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

**(ii). Discussion.**

Although there is a significant amount of case law describing the meaning of the *phrases* “in the conduct of any trade or commerce,” “person who engages in the conduct of any trade or commerce,” and “person who engages in any trade or commerce” (as contained in Sections 2 and 11), the Massachusetts Supreme Judicial Court (MA SJC) has concluded that the definition in Section 1(b) merely recites certain activities that are included within the terms “trade” and “commerce.”<sup>13</sup> The terms are not all inclusive as the definition contains a catch-all clause including “any trade or commerce directly or indirectly affecting the people” of Massachusetts.<sup>14</sup> Ultimately, “trade or commerce” refers to transactions or interactions in a business context, which, in turn, is determined by the facts of each case.<sup>15</sup> The factors considered in determining whether a transaction or interaction occurs in a business context include “the nature of the transaction, the character of the parties and their activities, and whether the transaction was motivated by business or personal reasons.”<sup>16</sup> A classic example of a transaction not falling within the definition of trade and commerce is an individual selling his or her residence.<sup>17</sup> However, the sale of a residence by an individual who had purchased it for renovation and resale and who has sold other properties could meet the definition.<sup>18</sup>

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<sup>13</sup> *Lantner v. Carson*, 374 Mass. 606, 610 n. 4 (1978); *Riseman v. Orion Rsch., Inc.*, 394 Mass. 311, 313 (1985).

<sup>14</sup> *Lantner*, 374 Mass. at 611.

<sup>15</sup> *Feeney v. Dell, Inc.*, 454 Mass. 192, 212 (2009); *St. Paul Fire and Marine Ins. Co. v. Ellis & Ellis*, 262 F.3d 53, 66–67 (1st Cir. 2001).

<sup>16</sup> *All Seasons Servs., Inc. v. Comm’r of Health & Hosp. of Boston*, 416 Mass. 269, 271 (1993); *Lantner*, 374 Mass. at 608 (“93A is not available where the transaction is strictly private in nature and is in no way undertaken in the ordinary course of a trade or business.”).

<sup>17</sup> *Lantner*, 374 Mass. at 612.

<sup>18</sup> *Schaumberg v. Friedman*, 72 Mass. App. Ct. 52, 56–57 (2008).

### **3. “Documentary Material” (Section 1(c))**

#### **(i). The Text.**

“Documentary material” shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

#### **(ii). Discussion.**

There is no known reported case law discussing this definition. The term “documentary material” appears only in Section 1(d) (in the definition of the phrase “Examination of Documentary Material”) and Section 6 (which concerns the examination of books and records by the Massachusetts Attorney General’s Office (MA AGO)).

### **4. “Examination of Documentary Material” (Section 1(d))**

#### **(i). The Text.**

“Examination of documentary material”, [sic] [shall include] the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material.

#### **(ii). Discussion.**

There is no known reported case law discussing this definition. The phrase appears only in Section 6 (which concerns the examination of books and records by the MA AGO). Section 6 allows the MA AGO to “take testimony under oath concerning” violations of Section 2, “examine or cause to be examined any documentary material . . . relevant to such” violations, and “require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material.”<sup>19</sup> The definition in Section 1(d) is consistent with Section 6.<sup>20</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> MASS. GEN. LAWS ch. 93A, § 6(1).

## **B. Chapter 93A, § 2—Unfair practices; legislative intent; rules and regulations**

Section 2 provides an overall legislature declaration that Massachusetts deems certain conduct in certain settings unlawful. Section 2 also articulates legislative intent and conveys authority on the MA AGO to further define what may fall into the scope of Chapter 93A.

### **1. Legislative Declaration (Section 2(a))**

#### **(i). The Text.**

**Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.**

#### **(ii). Discussion.**

Chapter 93A is a statute of “broad impact”<sup>21</sup> and, as embodied in Section 2(a), reaches acts or practices that fall “within at least the penumbra of some common-law, statutory, or other established concept of unfairness . . . [are] immoral, unethical, oppressive, or unscrupulous . . . [and] cause[] substantial injury to consumers,”<sup>22</sup> or those engaged in business transactions with other businesses.<sup>23</sup> What is unfair or deceptive is determined on a case-by-case basis.<sup>24</sup> A court’s analysis does not depend on traditional concepts or preexisting rights and remedies.<sup>25</sup> What is unfair or deceptive is intended “to grow and change with the times.”<sup>26</sup>

Chapter 93A does not define the phrases “unfair methods of competition” or “unfair or deceptive acts or practices.” That is because, as explained by the MA SJC,

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<sup>21</sup> *Slaney*, 366 Mass. at 693–694; *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813, 825 (2014) (“General Laws c. 93A is a ‘broad remedial’ statute; ‘the Legislature’s manifest purpose’ in enacting it was to deter misconduct, and to ‘encourage vindictive lawsuits.’”).

<sup>22</sup> *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975); *see also* *Walsh v. TelTech Sys., Inc.*, 821 F.3d 155, 160 (1st Cir. 2016).

<sup>23</sup> *Manning v. Zuckerman*, 388 Mass. 8, 12 (1983).

<sup>24</sup> *Kattar v. Demoulas*, 433 Mass. 1, 13–14 (2000).

<sup>25</sup> *Travis v. McDonald*, 397 Mass. 230, 232 (1986).

<sup>26</sup> *Nei v. Burley*, 388 Mass. 307, 313 (1983).

“[s]uch a definition would be impossible, because. . . [t]here is no limit to human inventiveness in this field.”<sup>27</sup> Rather, as expressly provided in Sections 2(b) and 2(c), the Massachusetts Legislature contemplated that those terms would be defined by the courts in actions brought under Sections 4, 9, and 11, as well as by the regulatory rulemaking authority granted to the MA AGO.<sup>28</sup> Moreover, although not expressly stated in Section 2, the Massachusetts Legislature has plenary authority to declare other acts or practices unfair or deceptive under Chapter 93A through legislative enactment, which the legislature has done in various instances.<sup>29</sup> In particular, the legislature has exercised that authority and declared violations of various statutes to be concomitant violations of Chapter 93A, Section 2, including, without limitation:

1. MASS. GEN. LAWS ch. 90, § 7N1/4 (Lemon Law)
2. MASS. GEN. LAWS ch. 93, § 49 (Debt Collection)
3. MASS. GEN. LAWS ch. 93, § 70 (Mortgages)
4. MASS. GEN. LAWS ch. 93H, § 6 (Data Breaches)
5. MASS. GEN. LAWS ch. 140D, § 34 (MA Truth-In-Lending)
6. MASS. GEN. LAWS ch. 183C, § 18 (Predatory Home Loan Practices)
7. MASS. GEN. LAWS ch. 159C, § 13 (Telemarketing)

Generally, to constitute an “unfair method of competition,” the conduct must go beyond a “competitor's lack of courtesy, generosity, or respect.”<sup>30</sup> The Massachusetts Legislature expressly instructed courts to “be guided” by the Massachusetts Antitrust Act (MASS. GEN. LAWS ch. 93) when interpreting what may be an unfair method of competition under Section 11.<sup>31</sup> As explained by the MA SJC, that does not mean that any antitrust violation automatically would violate Section 2; but rather, any Chapter

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<sup>27</sup> *Kattar*, 433 Mass. at 13 (quoting *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 503 (1979)).

<sup>28</sup> MASS. GEN. LAWS ch. 93A § 2.

<sup>29</sup> *E.g.*, MASS. GEN. LAWS ch. 142A § 17 (Regulations of Home Improvement Contractors and Subcontractors); MASS. GEN. LAWS ch. 93 §§ 50–67 (Regulations of Consumer Reporting).

<sup>30</sup> *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 650–51 (2003).

<sup>31</sup> *Ciardi v. F. Hoffmann La Roche, Ltd.*, 436 Mass. 53, 62–63 (2002).



93A claim brought on behalf of antitrust violations must be consistent with the principles of the Chapter 93—the Massachusetts Antitrust Act.<sup>32</sup>

Conduct need not violate a statute to run afoul of Chapter 93A, as Chapter 93A is *sui generis* and created “new substantive rights and, in particular cases, makes conduct unlawful which was not unlawful under the common law or any prior statute.”<sup>33</sup> Unfairness and deception are not limited to “traditional” tort and contract law principles.<sup>34</sup>

However, the phrase “in the conduct of trade or commerce” means that the conduct must occur in a business context.<sup>35</sup> In other words, Chapter 93A does not apply to transactions that are purely private in nature or those that are “in no way undertaken in the ordinary course of a trade or business.”<sup>36</sup> For example, general employment disputes (at least those between an employer and current employee), partnership disputes, and close-corporation disputes typically fall outside of Chapter 93A’s reach.<sup>37</sup> Chapter 93A, however, may apply to claims brought by an employer against a former employee for conduct that occurred after the employment relationship terminated or against the former employee’s new employer.<sup>38</sup>

## **2. Legislative Intent and Guidance (Section 2(b))**

### **(i). The Text.**

**It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to**

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<sup>32</sup> *Id.* at 63.

<sup>33</sup> *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 240 (1st Cir. 2013) (citing *Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733 (2008)).

<sup>34</sup> *Nei*, 388 Mass. at 312–13.

<sup>35</sup> *Wheatley v. Mass. Insurers Insolvency Fund*, 465 Mass. 297, 301–02 (2013).

<sup>36</sup> *Lantner*, 374 Mass. at 608; *Manning*, 388 Mass. at 13.

<sup>37</sup> *Szalla v. Locke*, 421 Mass. 448, 451 (1995) (collecting cases) (“It is well established that disputes between parties in the same venture do not fall within the scope of G.L. c. 93A, Section 11.”).

<sup>38</sup> *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 172–73 (1991); *Peggy Lawton Kitchens, Inc. v. Hogan*, 18 Mass. App. Ct. 937, 939 (1984).

**section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.**

**(ii). Discussion.**

Based on the express legislative intent in Section 2(b), Massachusetts courts (and regulators and practitioners) look to interpretations of Section 5(a)(1) the Federal Trade Commission Act (**FTCA**) (codified at 15 U.S.C. § 45(a)(1)) when construing what amounts to unfair competition or an unfair or deceptive act or practice.<sup>39</sup> These interpretations include those of federal courts and the Federal Trade Commission (**FTC**) itself.<sup>40</sup> As the intent only seeks guidance, these interpretations are not binding on Massachusetts courts, but are instructive.<sup>41</sup> Nevertheless, Massachusetts has “wholly incorporated” the FTCA into Chapter 93A,<sup>42</sup> and as such, unfair or deceptive conduct that violates the FTCA likely constitutes a violation of Chapter 93A, Section 2.<sup>43</sup>

**3. Massachusetts Attorney General Regulations (Section 2(c))**

**(i). The Text.**

**The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.**

**(ii). Discussion.**

Rules and regulations promulgated by the MA AGO under Chapter 93A cannot be directly inconsistent with the FTC and the interpretations of the FTCA by federal courts.<sup>44</sup> Conversely, mere silence by the FTC or the federal courts will not bind the

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<sup>39</sup> MASS. GEN. LAWS ch. 93A § 2(b).

<sup>40</sup> *Id.*

<sup>41</sup> *White v. R.M. Packer Co., Inc.*, 635 F.3d 571, 587 n.13 (1st Cir. 2011) (quoting *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 497 (1st Cir. 2009)).

<sup>42</sup> *Slaney*, 366 Mass. at 695 n. 8.

<sup>43</sup> *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109, 122 (1st Cir. 2014).

<sup>44</sup> *Klaimont v. Gainsboro Rest., Inc.*, 465 Mass. 165, 175 n. 17 (2013).

MA AGO to silence on the same issue.<sup>45</sup> If appropriately enacted in form and substance, the MA AGO regulations have the force of law.<sup>46</sup> However, the MA AGO cannot exercise its powers under this section to pass a regulation that goes beyond the scope of Section 2 or conflicts with Chapter 93A’s legislative scheme.<sup>47</sup> The MA AGO is not cloaked with the authority to make violation of an independent statute or code a *per se* violation of Chapter 93A, Section 2 absent a “showing the complained-of act was *both* unfair and deceptive *and* that it occurred in trade or commerce.”<sup>48</sup> Many regulations promulgated by the MA AGO under Section 2(c) are contained in 940 C.M.R. §§ 3.00–34.00, although there are others in other regulatory schemes.<sup>49</sup>

### C. Chapter 93A, § 3—Exemptions

Section 3 contains an express exemption, which carves out certain permissible conduct from the reach of Chapter 93A. Section 3’s exemption is in addition to any preemption by federal law.

#### (i). The Text.

**Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States. For the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions.**

#### (ii). Discussion.

Section 3’s exemption applies when a statute or regulatory scheme *affirmatively permits the practice* that is alleged to be unfair or deceptive.<sup>50</sup> The rationale behind the exemption is to make sure businesses are not subjected to liability when relying on

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<sup>45</sup> *Id.*

<sup>46</sup> *Clark v. Leisure Woods Ests., Inc.*, 89 Mass. App. Ct. 87, 94 (2016); *Purity Supreme, Inc. v. Att’y Gen.*, 380 Mass. 762, 775 (1980).

<sup>47</sup> *Klaimont*, 465 Mass. at 175 n.17; *Darviris v. Petros*, 442 Mass. 274, 281–82 (2004).

<sup>48</sup> *McDermott*, 775 F.3d at 120 (emphasis in original).

<sup>49</sup> *E.g.*, 209 C.M.R. § 40.00.

<sup>50</sup> *Aspinall v. Philip Morris Cos.*, 453 Mass. 431, 434–35 (2009).

activity permitted by law.<sup>51</sup> The transaction or act must fall squarely within a statute or regulatory scheme.<sup>52</sup> However, the mere existence of a regulatory statute or scheme does not preclude the applicability of Chapter 93A.<sup>53</sup> Affirmatively permitting an act may be express or implied.<sup>54</sup>

Section 3 expressly places the burden of proof on the alleged wrongful actor and the exemption is “an affirmative defense that must be asserted in the pleadings and proved at trial.”<sup>55</sup> Whether an alleged wrongful actor can meet its burden is dependent on the underlying regulatory scheme and the alleged unfair or deceptive act at issue.<sup>56</sup>

In addition, Chapter 93A may be preempted if other state or federal laws govern the conduct at issue. Again, this is different from Section 3’s exemption. For example, the MA SJC has concluded that MASS. GEN. LAWS c. 93B (which “regulates business practices between motor vehicle manufacturers, distributors and dealers”) preempts Chapter 93A.<sup>57</sup> Also, in the foreclosure context, where the unfair or deceptive conduct alleged is based on predatory lending, a claim under Chapter 93A may be preempted

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<sup>51</sup> *Rini v. United Van Lines, Inc.*, 903 F. Supp. 224, 231 (D. Mass. 1995), *rev’d on other grounds*, 104 F. 3d 502 (1st Cir. 1997).

<sup>52</sup> *Bierig v. Everett Square Plaza Assoc.*, 34 Mass. App. Ct. 354, 368 (1993); *Cablevision of Boston, Inc. v. Pub. Improvement Comm’n of the City of Boston*, 38 F. Supp. 2d 46, 61 (D. Mass. 1999).

<sup>53</sup> *Rini*, 903 F. Supp. at 232; *DePasquale*, 29 Mass. App. Ct. at 662.

<sup>54</sup> *Fleming v. Nat’l Union Fire Inc. Co.*, 445 Mass. 381, 390 (2005); *DePasquale v. Ogden Suffolk Downs, Inc.*, 29 Mass. App. Ct. 658, 662–63 (1990).

<sup>55</sup> *Fleming*, 445 Mass. at 389; *see also Aspinall*, 453 Mass. at 434; *Com. v. Fremont Inv. & Loan*, 452 Mass. 733, 750 (2008).

<sup>56</sup> *Compare Bierig*, 34 Mass. App. Ct. at 368 (concluding that a landlord could not be liable under c. 93A where Boston Housing Authority regulations permitted him to charge the allegedly unfair rent levels) *with DePasquale*, 29 Mass. App. Ct. at 663 (concluding that 93A claims against a racetrack were not barred by § 3 where G.L. c. 128A, regulating horse racing, neither addressed nor permitted the specific conduct alleged to be unfair).

<sup>57</sup> *Reiter Oldsmobile, Inc. v. Gen. Motors Corp.*, 378 Mass. 707, 711 (1979); *Anawan Ins. Agency, Inc. v. Div. of Ins.*, 76 Mass. App. Ct. 447, 454 (2010).

by the Home Owners Loan Act<sup>58</sup> (**HOLA**).<sup>59</sup> Conversely, where the conduct underlying the Chapter 93A claim is contractual in nature, HOLA likely will not preempt Chapter 93A.<sup>60</sup> Similarly, the Fair Credit Reporting Act<sup>61</sup> (**FCRA**) preempts Chapter 93A claims that are based on reporting consumer credit information.<sup>62</sup> Where a Chapter 93A claim relates to reporting credit information but is based on different conduct such as debt collection practices, the FCRA likely does not preempt Chapter

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<sup>58</sup> 12 U.S.C. § 1461, *et seq.*

<sup>59</sup> *Henning v. Wachovia Mortg., FSB*, 969 F. Supp. 2d 135, 157 (D. Mass. 2013); *In re Currie*, No. 11-17349-JNF, 2013 WL 3379539, at \*5 (Bankr. D. Mass. July 8, 2013).

<sup>60</sup> *Foley v. Wells Fargo Bank, N.A.*, 109 F. Supp. 3d 317, 326 (D. Mass. 2015) (“HOLA does not preempt chapter 93A claims ‘where the purported violation was based on breach of contract.’”); *Sovereign Bank v. Sturgis*, 863 F. Supp. 2d 75, 98 (D. Mass. 2012) (“...given that the breach of contract claim is not preempted [by HOLA], a violation of 93A that is clearly part and parcel of the contract allegation is unlikely to affect lending [and may not be preempted].”)

<sup>61</sup> 15 U.S.C. § 1681, *et seq.*

<sup>62</sup> *Lance v. PNC Bank, N.A.*, No. 15-10250-FDS, 2015 WL 5437090, at \*5 (D. Mass. Sept. 15, 2015) (noting that the defendant’s credit reporting is “exactly the type of conduct that Congress intended to regulate under the FCRA. Accordingly, [plaintiff’s] claim under [Chapter] 93A is preempted.”); *Karle v. Sw. Credit Sys.*, No. CV 14-30058-MGM, 2015 WL 5025449, at \*4 (D. Mass. June 22, 2015), report and recommendation adopted sub nom. *Karle v. Sw. Credit Sys., Ne. Utilities Serv. Co.*, No. 14-30058-MGM, 2015 WL 5031966 (D. Mass. Aug. 25, 2015) (explaining that “the unlawful conduct on which Plaintiff relies as the basis for the FCRA claim, i.e., that [defendant] obtained her credit report without her permission or a permissible purpose, is ‘precisely the kind of conduct that Congress intended to regulate’ ... and thus, any Chapter 93A claim premised on this conduct is preempted.”)

93A.<sup>63</sup> The Copyright Act<sup>64</sup> also preempts Chapter 93A claims where the underlying conduct is “equivalent to a federal copyright infringement.”<sup>65</sup> To avoid preemption, the Chapter 93A claim must have an “extra element” beyond a copyright infringement claim “such as illegally hacking into a database to access copyrighted material or making fraudulent statements and misrepresentations....”<sup>66</sup>

Where Chapter 93A claims “relate to” employee benefit plans, the Employee Retirement Income Security Act’s (ERISA) preemption provision is triggered.<sup>67</sup> Claims relate to ERISA-covered plans if they have connections with and references to such plans.”<sup>68</sup>

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<sup>63</sup> Henderson v. PNC Bank, et al., No. 13-01768, 2014 WL 4068231, at \*1 (Mass. Super. June 16, 2014); Cunha v. LVNV Funding, LLC, No. 13-11418-MLW, 2015 WL 5737134, at \*5 (D. Mass. Sept. 30, 2015) (“To the extent [plaintiff’s] Chapter 93A claim is premised on unfair credit reporting, failure to correct credit information, or failure to investigate a disputed debt, it is pre-empted by the FCRA. To the extent [plaintiff’s] claim is based on other unfair and deceptive debt collection practices, it survives.”).

<sup>64</sup> 17 U.S.C. § 301, *et seq.*

<sup>65</sup> Soft-Aid, Inc. v. Sam-On-Demand, No. 14-10419-LTS, 2016 WL 10919656, at \*11–12 (D. Mass. Aug. 11, 2016); Ivymedia Corp. v. ILIKEBUS, Inc., No. 15-11918-NMG, 2015 WL 4254387, at \*6 (D. Mass. July 13, 2015) (finding that plaintiff’s ch. 93A claim was “based on the same conduct as its copyright infringement claim and are therefore preempted by the Copyright Act.”).

<sup>66</sup> President & Fellows of Harvard Coll. v. Certplex, Ltd., No. 15-11747, 2015 WL 10433612, at \*2 (D. Mass. Nov. 25, 2015); Meddaugh v. WGBH Educ. Found., No. MICV201300269F, 2013 WL 3477558, at \*2 (Mass. Super. June 19, 2013) (finding plaintiff’s 93A claim to include an “extra element” and thus not preempted by the Copyright Act because it was “also based on allegations of misrepresentation....”).

<sup>67</sup> 29 U.S.C. §§ 1001, *et seq.*; Spinal Imaging, Inc. v. Aetna Health Mgmt., LLC, No. 12-11521, 2014 WL 1278012, at \*6 (D. Mass. Mar. 26, 2014) (“Chapter 93A claims arising out of a failure to pay benefits under an ERISA plan are preempted.”); Summersgill v. E.I. Dupont De Nemours & Co., No. 13-cv-10279, 2014 WL 1032732, at \*4 (D. Mass. Mar. 18, 2014) (Chapter 93A claim preempted by ERISA where factfinder would be required to “consult the ERISA plan” in order to resolve plaintiff’s claim).

<sup>68</sup> Pingiaro v. Standard Ins. Co., 986 F. Supp. 2d 96, 102 (D. Mass. 2013).

Other federal laws that may preempt Chapter 93A, or certain aspects of Chapter 93A, include, but are not limited to, the Federal Food, Drug, and Cosmetic Act and the Medical Device Amendments of 1976,<sup>69</sup> the National Bank Act,<sup>70</sup> the Labor Management Relations Act,<sup>71</sup> the National Labor Relations Act,<sup>72</sup> and federal admiralty and maritime law.<sup>73</sup>

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<sup>69</sup> 21 U.S.C. § 360, *et seq.*

<sup>70</sup> 12 U.S.C. § 24.

<sup>71</sup> 29 U.S.C. § 185.

<sup>72</sup> 29 U.S.C. §§ 151–169.

<sup>73</sup> *Morris v. Rotolo*, No. MICV201404747, 2014 WL 12618659, at \*2 (Sup. Ct. Jan. 15, 2014); *Duggan v. Medtronic, Inc.*, 840 F.Supp.2d 466, 473 (D. Mass. 2012); *Downey v. Wells Fargo Bank, N.A.*, No. 12-11340-DJC, 2014 WL 3510510, at \*4–5 (D. Mass. July 11, 2014); *Int'l Union of Operating Eng'rs Loc. 98 Health & Welfare Fund v. Bradway Constr., Inc.*, No. 14-CV-10052-MAP, 2015 WL 5822628, at \*8 (D. Mass. Sept. 30, 2015); *Deranamie v. SEIU Loc. 509 et. al.*, 146 F. Supp. 3d 407, 413 (D. Mass. 2015); *MT Baltic Commander Schiffahrtsgesellschaft MBH & Co. KG v. Mass. Port Auth.*, 918 F. Supp. 2d 105, 111 (D. Mass. 2013).

**David G. Thomas** advises on individual and corporate disputes during the entire dispute-resolution life cycle, including through strategic negotiation, mediation, other forms of alternative dispute resolution, and adjudication through trial when needed or required. David has experience with many subject matters, including unfair or deceptive business practices disputes in individual and putative class action settings, including under Massachusetts General Laws Chapter 93A—the Massachusetts Consumer Protection Act. David also works with clients on avoiding disputes proactively by identifying and ameliorating existing or potential dispute risks in business policies and practices.

**Angela Bunnell's** practice focuses on defending companies against unfair or deceptive business practices claims in individual and putative class action settings. She also represents companies and individuals responding to civil investigative demands under various regulatory schemes, including federal and state false claims acts and related enforcement actions brought by federal and state regulatory agencies. Angela also has experience with complex eDiscovery matters, and has been responsible for preservation, collection, review, and production of ESI in state and federal lawsuits. Angela also has experience in representing clients in connection with data security and privacy matters.

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