

October 2015

LEADING CASES ON CHAPTER 93A

Nearly all business disputes in Massachusetts are governed by Chapter 93A. The winning plaintiff under Chapter 93A is entitled to an automatic award of its attorney's fees, and may be awarded up to three times its actual damages. Neither of these enhanced damages is possible under regular Massachusetts law.

It can be challenging to apply 93A because it is vague and has a low threshold of proof necessary to establish liability. Additionally, 93A is extremely complex. It has many inclusions, exclusions, permutations and penumbras, and there are tens of thousands of decided cases creating precedent dealing with the law.

The slightest advantage in knowledge can make the difference between a tremendous victory for triple damages and attorney's fees or a catastrophic loss for the same. Here are the recent leading cases that interpret and apply Chapter 93A.

1. Higher 93A Standard Between Businesses

A higher standard applies where both parties are businesses and sophisticated commercial players. – *Ora Catering v. Northland Ins.* (D. Mass. 2014); *Boston Cab v. Uber* (D. Mass. 2014)

2. Differing Federal Versus State Standards for 93A Liability

Massachusetts state courts apply the coercion or leveraging test, while many Federal courts still apply the "rascality" test or "eyebrow" test. – *Ora Catering v. Northland Ins.* (D. Mass. 2014)

Massachusetts state courts require that a violation of other law or regulations must still be shown independently to be unfair or deceptive under 93A. However, Federal courts now hold that a violation of many Federal laws is an automatic or per se violation of 93A. – *McDermott v. Marcus, et al* (First Cir. 2014)

3. 93A Standard and Misrepresentation

Although many cases hold that a statement that has the "capacity to mislead" is a 93A violation, recent authority holds that test cannot be right because it is a mere test of causation without regard to whether the representation was in any way culpable. – *Baker v. Goldman Sachs* (First Cir. 2014)

A negligent misrepresentation cannot give rise to 93A liability unless it is "extreme" or "egregious." – *Baker v. Goldman Sachs* (First Cir. 2014)

Well-intentioned bad advice or opinion cannot give rise to 93A liability. – *Baker v. Goldman Sachs* (First Cir. 2014)

Statements which are accurate cannot be unfair or deceptive. – *Ortiz v. Examworks* (Mass. 2015)

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His book, *The Law of Chapter 93A*, published by the largest legal publisher Thompson Reuters Westlaw, is a leading source for attorneys and is frequently cited by Massachusetts appellate courts.

Michael writes annual supplements for the book. He also frequently writes articles on 93A for *Massachusetts Lawyers Weekly* and on similar laws in other states for the *American Bar Association Journal* and its related publications.

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4. 93A Standard and Contract

Mere breach of contract alone does not violate 93A. – *Baker v. Goldman Sachs* (First Cir. 2014)

Mere misrepresentations in connection with a breach of contract do not violate 93A. There will be no 93A liability for a breach of contract, even if the breach is accompanied by misrepresentations, if there are no other damages besides those stemming from the breach of contract.

The plaintiff in a business case must prove a distinct injury due to the unfair or deceptive practice apart from a mere contract breach or tort. – *Auto Flat Car Crushers v. Hanover Ins.* (Mass. 2014)

Contract breaches must be “egregious” to qualify as a 93A violation. – *Baker v. Goldman Sachs* (First Cir. 2014)

5. Intellectual Property and 93A

Non-competes and Trade Secrets

Non-competes and trade secret cases are mixed on whether a departing employee can be liable under 93A for violating a non-compete or misappropriating a trade secret, since 93A generally does not apply to employer-employee disputes. Cases holding that 93A claims can be brought include *Sentient Jet v. Apollo Jets* (D. Mass. 2014), 93A claims against former employees for breach of non-compete agreements were not dismissed even though defendants argued that the 93A claim arose out of the employment relationship.

Cases holding that a 93A claim cannot be brought include *Advanced Micro Devices, Inc. v. Feldstein* (D. Mass. 2013). 93A claims against former employees for misappropriation of trade secrets were dismissed as they were within the “intra-enterprise” exception to 93A.

Copyright

Even though the Copyright Act clearly preempts other related law, a 93A claim premised on copyright infringement can still be brought if it alleges an “extra element.” – *IvyMedia Corp v. iLIKEBUS* (D. Mass. 2015)

Patent

93A claims against alleged infringers can be brought if they allege an “extra element,” such as misconduct in the marketplace; 93A claims against patent holders for bad faith enforcement and publication of their patents are not preempted by the Patent Act.

Trade Dress

The 93A standard for trade dress infringement is the same as the Federal trade dress infringement standard. – *Bern Unlimited v. The Burton Corp.* (D. Mass. 2015)

False claim of IP rights plus litigation to stifle competition – A 93A claim can be brought against a claimed holder of intellectual property rights who in bad faith brings suit against competitors to stifle competition.

Where IP claims fail, 93A claim predicated on same elements will also fail. – *Bern Unlimited v. The Burton Corp.* (D. Mass. 2015)

6. Class Actions and 93A

A class claim must still show proof of causation on a class-wide basis and cannot get around the class-wide causation issue by turning it into a question of the mere amount of individual damages for each class member. – *Bellerman v. Fitchburg Gas* (Mass. 2014)

Courts declare that a Massachusetts 93A claim may provide the most consumer friendly vehicle for class actions versus the laws of any other state. – *Bezdek v. Vibram* (D. Mass. 2015)

It is easier to certify a class under 93A than under Rule 23. – *Bellerman v. Fitchburg Gas* (Mass. 2014)

Massachusetts public policy favors 93A class actions. – *Bellerman v. Fitchburg Gas* (Mass. 2014)

7. Insurance and 93A

The First Circuit has held that an insurer cannot be liable under 93A for bad faith insurance claim settlement practices unless the insurer has engaged in egregious settlement misconduct including use of non-payment to leverage a reduced settlement amount. – *Peabody Essex Museum v. U.S. Fire Ins.* (First Cir. 2015)

8. Defenses to 93A

Non-market Transactions

93A does not apply to “private disputes” – a dispute is private where: (i) services are not offered in a public marketplace; or (ii) services are not offered in the ordinary course of a business.

Private transaction defense may apply to transactions among shareholders or executives of a close corporation.

Conclusory Allegations

No 93A claim can be maintained where the allegations pled are: conclusory in nature, based on a rote recital of the elements of the cause of action, lack sufficient detail, or are based on speculation. – *Karle v. Capital One* (D. Mass. 2015); *McLoughlin v. Intoccia* (Mass. App. 2015).

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Attorney General Regulations

The Attorney General's 93A regulations, which are highly favorable to consumer plaintiffs, do not apply to disputes between businesses. – *Baker v. Goldman Sachs* (First Cir. 2014)

More courts hold against the 93A claim where the non-93A claim fails. Although 93A was originally expected to expand plaintiffs' rights, more often now where the related non-93A claim fails courts are also dismissing the 93A claim.

9. Multiple Damages Under 93A

Multiplication Even If Damages Paid

Unless a Chapter 11 business plaintiff strictly observes the provision of 93A for making an offer of settlement with its answer, no later offer, or even outright payment in full, can bar an eventual award of multiple damages against the plaintiff; a later payment, even if in full, is only an offset against an award of multiple damages. – *Auto Flat Car Crushers v. Hanover Ins.* (Mass. 2014)

Multiplication of All Verdicts

A 1989 amendment to 93A requires the multiplication of all jury verdicts based on the same conduct, not just the 93A verdict. – *Hill Financial v. Murphy* (Mass. App. 2015)

Multiplication Against All Defendants

Where several corporate defendants, such as a corporation and its officers, are found jointly and severally liable under 93A, full multiple damages can be collected from each one separately.

10. Choice of Law and Choice of Forum

A 93A claim will survive a motion to dismiss asserting that the cause of action did not arise primarily and substantially in Massachusetts where it alleges that the place of reliance on the 93A conduct and the place of injury or loss were both in Massachusetts, that is, the plaintiff is located in Massachusetts. – *E.G. Conway v. Licata* (D. Mass. 2015)

However, where the 93A claim alleges harm to plaintiff's customers nationwide, the primarily and substantially test will probably not be met.

11. Where Judges Differ From Juries on 93A Issues

A judge's decision on 93A claim can be contrary to a jury verdict on a parallel common law claim with regard to the exact same issue. – *Via Restaurants v. The Occupancy Corp* (Mass. App. 2015)

12. Attorney Fees Awarded Under 93A

Attorney fees awards must be proportional to damages – Recent decisions require generally that a judge's award of attorney's fees to a prevailing 93A plaintiff must be proportional to the 93A judgment amount, whereas older decisions did not require this. – *Shirokov v. Dulap, Grubb & Weaver* (D. Mass. 2014)

13. 93A Claims on Appeal

An appellate court has the power to determine whether a trial court ruling in favor of 93A liability actually falls within the "boundaries" of 93A, as determined by the appellate court, and to overturn the trial court decision if it is outside those boundaries. – *Silva v. Steadfast* (Mass. App. 2015)

Conclusion

As these cases show, every piece of information about Chapter 93A is vital. Since there is much at stake when litigating a Chapter 93A claim, it is critical that your attorney has up-to-the-minute knowledge of developments in the case law.

ABOUT BURNS & LEVINSON:

Burns & Levinson is a Boston-based, full service law firm with more than 125 attorneys in Massachusetts, New York and Rhode Island. The firm has grown steadily and strategically throughout the years, and has become a premier law firm with regional, national and international clientele. Core areas of practice are Business Law, Business Litigation, Intellectual Property, Private Client Legal Services and Real Estate.

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