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SUMMARY UPDATE ON THE LAW OF CHAPTER 93A

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Standards Governing Business Claims Under 93A

- **Higher standard applies for business plaintiffs.**

More decisions confirm that a business plaintiff must make a higher showing of defendant wrongdoing in order to prevail under 93A than would a consumer plaintiff.

93A Liability Under Various Subject Matter

- **93A can be violated even if no other law is violated.**

Baker v. Goldman Sachs, 2013 WL 2540025 (D. Mass. 2013).

- **Bad faith litigation tactics can violate 93A.**

“While there may be debate concerning whether litigation tactics alone can comprise a Chapter 93A violation, there is no debate concerning whether such tactics can be considered along with egregious, bad faith pre-litigation conduct.” *Small Justice v. Xcentric Ventures*, 2014 WL 1214828 (D. Mass. Mar. 24, 2014).

- **93A violated for driving a competitor out of business through baseless litigation.**

Scholz v. Goudreau, 2013 WL 6909433 (D. Mass. 2013).

- **93A violated for intentionally delayed payments in hope of an advantageous settlement.**

Northern Security Ins. v. R.H. Realty, 78 Mass. App. Ct. 691 (2011).

- **The Attorney General’s 93A regulations do not apply to disputes between businesses.**

Baker v. Goldman Sachs, 2013 WL 2540025 (D. Mass. 2013).

- **Wrongful death.**

Personal injuries, including death, may be recoverable under 93A if they are the result of a violation of another law and if the violation of that law is unfair or deceptive. *Klaimont v. Gainsboro*, 465 Mass. 165 (2013) (creating hazardous conditions in a place of public assembly where the potential for danger, even death, was clear, is a “type of unfair conduct [that] is actionable”).

- **Professional trust managers.**

D’Agostino v. Federal Ins. Co., 2014 WL 858333 (D. Mass. Mar. 3, 2014) (applying 93A “[w]here a professional trust manager sells its services to the public as part of its ordinary course of business”).

- **Unfair insurance claims settlement.**

The Supreme Judicial Court clarified that a willful or knowing failure of an insurance company to settle and pay a claim, where there has been a judgment against the insured and where liability is reasonably clear regardless of the insured’s formal filing of an appeal, can result in an award against the insurer of punitive damages of double or treble the amount of the full insurance claim, not just the interest on the loss of use of the insurance proceeds. *Rhodes v. AIG Domestic Claims*, 461 Mass. 486 (2012). See also *Anderson v. AIG*, Civil Action No. 2003-01212 (Middlesex Super. Ct. Apr. 8, 2014).

Consumer Class Claims Under 93A

■ **Restrictions on standing for class claims.**

Class claimants no longer can satisfy standing requirements under 93A where they allege a loss which is non-continuing, potential or hypothetical. *Tyler v. Michaels Stores*, 464 Mass. 492 (2013) (mere invasion of consumer's legal right is not sufficient; consumer must show "a distinct injury or harm that arises from claimed unfair or deceptive act itself").

■ **Expansion to permit nation-wide 93A class claims.**

More Federal courts – not simply Massachusetts state courts – are permitting nationwide class claims alleging 93A violations against Massachusetts businesses so long as 93A does not present a major conflict with other state laws, otherwise plaintiffs may be arranged into subclasses.

■ **Prospective 93A attorneys fees may be aggregated across an entire class to help meet the \$5 million amount in controversy threshold under the Federal Class Action Fairness Act.**

Baker v. Equity Residential, 2014 WL 554489 (D. Mass. Feb. 12, 2014).

Intellectual Property & 93A

■ **Non-competes & Trade secrets.**

Cases continue to be 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). *Compare Advanced Micro Devices, Inc. v. Feldstein*, 2013 WL 2666746 (D. Mass. 2013) (no 93A claim against former employees for misappropriation of trade secrets, as they were within the "intra-enterprise" exception to 93A) *with Sentient Jet v. Apollo Jets*, 2014 WL 1004112 (D. Mass. Mar. 17, 2014) (93A claims permitted against former employees for breach of non-compete agreements even though defendants argued that the 93A claim arose out of the employment relationship).

■ **Copyright.**

Even though the Copyright Act clearly preempts other related law, a 93A claim premised on copyright infringement may still be brought if it alleges "extra elements." *Meddaugh v. WGBH Educational Foundation*, 2013 WL 3477558 (D. Mass. 2013).

■ **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; mere suit to correct inventorship for an issued patent may not give rise to a 93A claim.

■ **Trademark Licensing.**

Mere dispute about licensing terms between trademark owner and holdover licensee does not give rise to 93A claim. *Monotype Imaging v. Deluxe Corp.*, 2012 WL 3096679 (D. Mass. 2012).

■ **Anticompetitive litigation.**

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.

Defenses To 93A

- **Mere breach of contract alone does not violate 93A.**

Kelleher v. Truran, 84 Mass. App. Ct. 1123 (2013)

- **Mere dispute about contract terms does not violate 93A.**

Monotype Imaging v. Deluxe Corp., 2012 WL 3096679 (D. Mass. 2012)

- **Mere misrepresentations in connection with breach of contract.**

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 breach of contract. *GMO Trust v. ICAP*, 2012 WL 5197545 (D. Mass. 2012).

- **Misrepresentations may have to be “extreme and egregious.”**

Ordinary negligent misrepresentations do not violate 93A, as negligence alone is not enough. *Bryan Corp. v. Chemwerth*, 2013 WL 6489785 (D. Mass. 2013)

- **More courts hold against 93A claim where 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 derivative 93A claim.

Judge v. Jury

- **Plaintiffs with 93A claims, among others, may be entitled to a jury trial on that claim in Federal court, even though there is no right to a jury trial in state court.**

Frappier v. Countrywide Homes, 2014 WL 1688917 (1st Cir. Apr. 30, 2014).

- **A judge's 93A decision can be contrary to a jury verdict on the exact same common law issue.**

Klairmont v. Gainsboro, 465 Mass. 165 (2013).

Attorney's Fees Awarded Under 93A

- **Attorney's fees awards must be proportional to damages.**

Recent decisions require that a judge's award of attorney's fees to a prevailing 93A plaintiff generally must be proportional to the 93A judgment amount, whereas older decisions did not require this relationship. *Shirokov v. Dulap, Grubb & Weaver*, 2014 WL 1271557 (D. Mass. Mar 27, 2014).