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## UPDATE ON CHAPTER 93A

Chapter 93A is the dominant law in Massachusetts governing business litigation. It applies to nearly all business disputes. 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).

In addition, 93A is vague and has a low threshold of proof necessary to establish liability. Finally, 93A is extremely complex in that 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 of the Chapter 93A statute, and the many cases applying it, can make the difference between a tremendous victory for triple damages and attorney's fees or a catastrophic loss for the same. This update is intended to familiarize the reader with some of the recent leading cases that interpret and apply Chapter 93A.

### 1. 93A business plaintiffs must show a higher standard of proof/liability

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.

### 2. A violation of many Federal laws is now an automatic violation of 93A

The First Circuit has ruled that because the Federal Trade Commission Act (FTC Act) is incorporated into 93A, and because the Fair Debt Collection Practices Act (FDCP Act) provides that a violation of its provision is also a violation of the FTC Act, therefore a violation of the FDCP Act is a per se 93A violation. *McDermott v. Marcus, et al* (Dec. 2014). Many other federal statutes are the same; a violation of their terms is also a violation of the FTC Act.

Thus, by this logic, a violation of federal statutes governing antitrust, export trade (unfair methods of competition by competitors even if the acts take place outside the U.S.), consumer financial transactions, packaging of consumer commodities, labeling of clothing, privacy laws and many others. Massachusetts state courts have yet to embrace this concept.

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Michael Gilleran, a partner in the Business Litigation and Intellectual Property groups at Burns & Levinson, is a principal authority on Chapter 93A.

His book, *The Law of Chapter 93A*, 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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### 3. 93A liability under various subject matter

93A can be violated even if no other law is violated – *Baker v. Goldman Sachs* (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* (D. Mass. 2014).

93A violated for driving a competitor out of business through baseless litigation – *Scholz v. Goudreau* (D. Mass. 2013).

93A violated for intentionally delayed payments in hope of an advantageous settlement – *Northern Security Ins. v. R.H. Realty* (2011).

93A violated where dependent vendor is unpaid and then asked to perform more services, which also go unpaid – *Kelleher v. Truran* (2013).

93A violated based on “flagrant” contractual breaches to obtain advantages and to undermine competitor – *Holland v. Jachmann* (2014).

The Attorney General’s 93A regulations, which are highly favorable to consumer plaintiffs, do not apply to disputes between businesses – *Baker v. Goldman Sachs* (D. Mass. 2013).

### 4. Intellectual property and 93A

#### Non-Competes & Trade Secrets

Cases are mixed on whether a departing employee can be liable under 93A for violating a non-compete or misappropriating a trade secret, because 93A generally does not apply to employer-employee disputes. Cases holding that a 93A claim cannot be brought include *Advanced Micro Devices, Inc. v. Feldstein* (D. Mass. 2013), where the 93A claims against former employees for misappropriation of trade secrets were dismissed as they were within the “intra-enterprise” exception to 93A. Cases holding that 93A claims can be brought include *Sentient Jet v. Apollo Jets* (D. Mass. 2014), where the 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.

#### 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 “extra elements.” *Meddaugh v. WGBH Educational Foundation* (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.

#### Trade Dress

The 93A standard for trade dress infringement is the same as the Federal trade dress infringement standard – *Genesis Strategies v. Pitney Bowes* (D. Mass. 2014).

#### Bad Faith IP Litigation

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.

### 5. Scope of 93A

93A applies against professional trust managers – Professional trust managers are engaged in trade or commerce and are therefore subject to 93A. *Agostino v. Federal Deposit* (D. Mass. 2014).

93A may apply against the recipient of a fraudulent transfer of property – *Weiler v. Portfolioscope* (2014).

93A may apply against franchisor that charges excess fees – *Depianto v. Jan-Pro Franchising* (D. Mass. 2014).

93A applies to anticompetitive conduct – *Growers 1-7 v. Ocean Spray* (D. Mass. 2014).

### 6. Defenses to 93A

#### 93A does not apply to “private disputes”

A dispute is private where: (i) services are not offered in a public marketplace; (ii) services are not offered in the ordinary course of a business; or (iii) the misconduct does

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not have an entrepreneurial, commercial or business purpose. The private transaction defense may apply to transactions among shareholders or executives of a close corporation.

**Mere conclusory or unsupported allegations can lead to dismissal of a 93A claim**

No 93A claim can be maintained where the allegations pled are conclusory in nature, or are based on rote recital of the elements of the cause of action, or lack sufficient detail – *A.G. ex rel Maddox v. Elsevier* (First Cir. 2013).

**Mere disputes about contracts do not violate 93A**

Mere breach of contract alone does not violate 93A – *Kelleher v. Truran* (2013). Mere dispute about contract terms does not violate 93A – *Monotype Imaging v. Deluxe Corp.* (D. Mass. 2012).

**Mere misrepresentations in connection with 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 breach of contract. *GMO Trust v. ICAP* (D. Mass. 2012).

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

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

Higher standard of proof/liability applies where plaintiff is a “sophisticated party” – *Boston Cab v. Uber* (D. Mass. 2014).

**More courts hold against the 93A claim where the non-93A claim fails in the same case**

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.

**7. Who decides 93A claim – judge vs. jury**

Plaintiffs with 93A claims 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* (First Cir. 2014).

A judge’s 93A decision can be contrary to a jury verdict on the exact same common law issue – *Klaimont v. Gainsboro* (2013).

**8. Attorney’s fees awarded under 93A**

**Attorney’s 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).

**Attorney’s fees may be awarded to in-house counsel**

Where in-house counsel did substantive work on a trial matter, they may be awarded their attorney’s fees – *Holland v. Jachmann* (2014).

**Conclusion**

As these cases show, every piece of information about Chapter 93A is vital, and a lack of information will lead to failure. Since there is so much at stake when litigating a Chapter 93A claim, it is critical that your attorney have 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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