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Unfair and deceptive practices: business-to-business claims - by Michael Brangwynne

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This is the seventh article in a series on the circumstances that can give rise to a civil lawsuit. Earlier articles in the series can be found on Fletcher Tilton's website under ARTICLES and on the NEREJ website.

A Quick Review of Chapter 93A

In the most recent installment of this series, we discussed the Mass. Consumer Protection Act, which is codified at Mass. General Laws Chapter 93A. Chapter 93A makes it unlawful for a business engaged in commerce in the Commonwealth to commit unfair or deceptive business acts or practices, and grants Massachusetts individuals and businesses a private cause of action to seek damages for such conduct. Last time, we looked at the requirements for claims by consumers under Section 9 of Chapter 93A. In this installment, we focus on business-to-business claims under Section 11.

Distinguishing Business Claims From Consumer Claims: A plaintiff claimant must proceed under Section 11 if the plaintiff is an individual or business that was acting in a business context, and the defendant's objectionable conduct occurred in relation to the plaintiff's business activity. Put another way, Section 11 applies to claims by business entities that have been subjected to unfair or deceptive conduct by other businesses.

Unlike claims by consumers under Section 9, a plaintiff under Section 11 does not need to send a 93A demand letter setting forth his or her claims as a prerequisite to filing suit. As a practical matter, there is nothing to prevent a Section 11 plaintiff from sending a "courtesy" 93A demand letter, and in the author's opinion this is the better practice, particularly where it is not always clear whether the defendant's objectionable conduct occurred in the consumer context or in the business-to-business context.

Although the law is not perfectly clear on this point, plaintiffs asserting a Section 11 business-to-business claim under Chapter 93A will likely be held to a higher standard in establishing unfair or deceptive conduct. The justification relied upon for this higher standard has been the concept that conduct that might be unfair if practiced upon a simple consumer would not be unfair and indeed might be common practice between two businesses. Simply put, a plaintiff seeking relief under Section 11 must demonstrate that the defendant's conduct was unfair or deceptive when considering the business context in which the conduct occurred. For example, it is well established that a simple breach of contract will not support a separate cause of action for violation of Chapter 93A, but a breach committed for a nefarious purpose—such as an intentional breach to force undue concessions from the non-breaching party—will support a claim under Chapter 93A.

Beyond this higher standard, the plaintiff's burden under Section 11 is the same as a plaintiff under Section 9. The plaintiff must prove (1) that the defendant engaged in an unfair or deceptive act or practice; (2) that the plaintiff suffered a loss of money or property; and (3) a causal connection

between the plaintiff's loss and the defendant's unfair or deceptive act or practice.

Damages Under Section 11: Similar to a consumer claim under Section 9, a defendant that is found liable under Section 11 may be responsible for the plaintiff's reasonable attorneys' fees. Section 11 defendants may also be liable for double or treble damages if the plaintiff can establish that the defendant intentionally engaged in the unfair or deceptive conduct.

As discussed in the previous installment of this series, upon receipt of a 93A demand letter, a defendant under Section 9 has an opportunity to avoid multiple damages by responding to the claimant with a reasonable offer of settlement within 30 days. A defendant under Section 11 may not receive a 93A demand letter, but he or she is still afforded an opportunity to avoid multiple damages and attorneys' fees under the statute.

Under Section 11, a defendant may tender a reasonable offer of settlement at the time of answering the complaint. Similar to Section 9, if the tender of the settlement is rejected, and if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the plaintiff, then the court will not award multiple damages and attorneys' fees.

Conclusion: Entire treatises have been devoted to the law of Chapter 93A, so these last two articles have only been intended to provide the reader with a very general overview. Suffice it to say that businesses engaged in trade or commerce in Massachusetts should be familiar with the basic principles surrounding this cause of action and should engage competent counsel in either pursuing or responding to claims under Chapter 93A.

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