



CELEBRATING
55 YEARS

nerej

A brief overview of Massachusetts Chapter 93A - by Matthew Welnicki

March 25, 2022 - Spotlights



Matthew Welnicki

The Massachusetts Consumer Protection Act, General Laws Chapter 93A, is an example of a state-specific consumer protection law that plaintiffs use in a wide range of circumstances – either as a supplement to contract or tort claims or an independent cause of action. The consequences of violating Chapter 93A can be serious. Defendants are exposed to potential triple damages and attorney’s fees; the Chapter also allows for equitable relief.

Chapter 93A broadly prohibits the use of “unfair or deceptive acts or practices” in trade or commerce. For property owners, this can include breaches of express or implied lease obligations. It can also include violations of codes, regulations, and statutes designed to protect the public. See *Klairmont v. Gainsboro Restaurant, Inc.*, 465 Mass. 165 (2013). For contractors and developers, breaches of warranties can trigger Chapter 93A liability, *Giannasca v. Everett Aluminum, Inc.*, 13 Mass. App. 208 (1982). Anyone involved in a real estate-related transaction must be mindful that breaching a contract or engaging in deceptive behavior can expose them to this additional liability, especially if the conduct is perceived to have been motivated by gaining an unfair business advantage. See *H1 Lincoln, Inc. v. South Washington Street, LLC*, 179 N.E.3d (Mass. SJC 2022). There are, however, some limits and defendants accused of Chapter 93A should always consider whether the broad reach of the Chapter extends to the conduct in question.

Chapter 93A can apply even if the claimant itself is engaged in trade or commerce. Sections 9 and 11 respectively cover claims brought by individuals and business entities. The “unfair or deceptive” standard applies to both. Some courts might appear to give greater leeway in Section 11 cases, but others have retreated somewhat from the vague language requiring “rascality” that would “raise an eyebrow” in the rough and tumble world of business. The nature of the conduct, the parties’ relative bargaining power and expectations, and all other circumstances must be considered. See *Baker v. Goldman, Sachs & Co.*, 771 F.3d 37 (1st Cir. 2014) (discussing the evolution of language used to describe the standard). Extortionate conduct is often the hallmark of a Chapter 93A case. See *H1 Lincoln*, supra. Additionally, the courts will evaluate whether a party’s conduct was willful or knowing. An adverse finding in this regard can be the trigger for an award of multiple damages (double or treble).

An extremely important feature of Chapter 93A is its 30-day demand requirement for Section 9 claims. This prerequisite to suit allows a target business to make a reasonable offer of settlement that either resolves the matter or at least insulates it from multiple damages. Section 11 does not include a demand requirement, but a defendant can try to limit its exposure to single damages by making an appropriate and reasonable tender of settlement with its answer to the complaint.

A business should not ignore such a letter even if the claims appear frivolous. Instead, it should carefully assess the allegations made, conduct an appropriate investigation, and provide a response. There is no firm set of requirements that a Chapter 93A response must follow. While ignoring the demand is usually the worst tactic, a poorly-considered response can also be risky. A thoughtful, and well-articulated response (even if it is short or does not extend a settlement offer) conveys the message that the business is taking the matter seriously and is in a strong position to

defend if needed. The appropriate response should move the business towards its end goal, whether settlement or a building a defense. If more information is needed, the response should request it.

Thus, a business should focus not only on the negative aspects of receiving a demand. The process can afford it with an opportunity to obtain pre-suit information. It can be a vehicle for settling a matter early before both sides incur substantial attorney's fees or become entrenched in their positions. It can be the catalyst for addressing matters privately and changing problematic practices before a public lawsuit is filed. And it can provide an occasion to confidently state strong defenses that might dissuade a potential litigant.

A final brief point must be made with respect to Chapter 93A as it pertains to insurers. Entities engaged in the business of insurance are subject to an additional statutory and regulatory scheme, violations of which can prompt Chapter 93A liability. Insurers, therefore, must be especially careful, even when demand letters are sent to their insureds. Insureds need to be mindful of notice and coverage issues associated with demands.

The nuances of Chapter 93A are important. But an essential point businesses must remember is to take any demand letters serious. In doing so, the business can avoid traps and stop bad situations from becoming worse. Moreover, the business can often find ways to use the demand process to its advantage.

Matthew Welnicki is a partner at Kenney & Sams, Boston and Southborough, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540