CHAPTER 2

Bases for Liability Under Chapter 93A—Principles of Unfairness and Deception

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Scope Note

This chapter explores the bases for finding that a defendant has engaged in "unfair or deceptive acts or practices" for purposes of Chapter 93A. The chapter begins with a discussion of the general principles that apply to this finding, including the relationship between Chapter 93A liability and traditional concerns such as privity and unlawfulness. It continues with analysis of state and federal law on the concepts of unfairness and deception. It concludes by distinguishing the standards that apply to actions brought by consumers under Section 9 from those brought by businesses under Section 11.

§ 2.1 INTRODUCTION

Chapter 93A "'was designed to encourage more equitable behavior in the marketplace and impose liability on persons seeking to profit from unfair practices.'" *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 55 (1st Cir. 1998) (quoting *Linkage Corp. v. Trs. of Bos. Univ.*, 425 Mass. 1, 25 (1997)). As such, it prohibits all unfair or deceptive acts or practices. It does not define unfairness or deception but provides that the courts will be guided by interpretations made by the Federal Trade Commission (FTC) and federal courts of Section 5(a)(1) of the FTC Act (codified as 15 U.S.C. § 45(a)(1)), which also prohibits "unfair or deceptive acts or practices." G.L. c. 93A, § 2(b); *Lee v. Conagra Brands, Inc.*, 958 F.3d 70, 76 (1st Cir. 2020); *cf. Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 396 (2004) ("we need only be guided by, and not strictly adhere to, interpretations of the term 'deceptive' under Federal law"); *Commonwealth v. Amcan Enters., Inc.*, 47 Mass. App. Ct. 330, 335 n.9 (1999) ("Massachusetts courts need not adopt Federal interpretations in their entirety but must only be guided by those interpretations"). Additionally, the statute provides that the attorney general may make rules and regulations interpreting the act. G.L. c. 93A, § 2(c). See § 2.3.5, Attorney General's Regulations, below.

§ 2.2 GENERAL PRINCIPLES

Although courts frequently merge the concepts of unfairness and deception, liability may be based solely on unfairness or deception. *See Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 742–43 (2008); *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 403 Mass. 722, 729 (1989); *Serv. Publ'ns, Inc. v. Goverman*, 396 Mass. 567, 578 (1986); *Barden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41, 46 (D. Mass. 1994); *see also Cherick Distribs., Inc. v. Polar Corp.*, 41 Mass. App. Ct. 125, 128 (1996) ("deception is only one prong of the prohibited conduct under G.L. c. 93A"); *Damon v. Sun Co.*, 87 F.3d 1467, 1484 (1st Cir. 1996) (citing *Mass. Emp'rs Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 42–43 (1995)) (when determining unfairness, "the focus is 'on the nature of the challenged conduct and on the purpose and effect of that conduct'"). See also *Fraser Engineering Co. v. Desmond*, 26 Mass. App. Ct. 99, 102–04 (1988), and *Dujon v. Williams*, 5 Mass. L. Rptr. 456 (Suffolk Super. Ct. 1996), *aff'd sub nom. Dujon v. Kurtz*, 47 Mass. App. Ct. 1112 (1999), both of which analyze claims under both unfairness and deception standards. This chapter describes the judicial decisions that analyze unfairness in § 2.3, Determining Unfairness, and the decisions that address deception in § 2.5, Finding Deception.

§ 2.2.1 Case-by-Case Determination

"[U]nfair or deceptive conduct is best discerned 'from the circumstances of each case.'" *Kattar v. Demoulas*, 433 Mass. 1, 14 (2000) (quoting *Commonwealth v. DeCotis*, 366 Mass. 234, 242 (1974)). This principle has also been recognized in numerous federal cases. *See, e.g., McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109, 117 (1st Cir. 2014); *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 55 (1st Cir. 1998); *Ahern v. Scholz*, 85 F.3d 774, 798 (1st Cir. 1996); *Hanrahran v. Specialized Loan Servicing, LLC*, 54 F. Supp. 3d 149, 154 (D. Mass. 2014); *see also Duclersaint v. Fed. Nat'l Mortg. Ass'n*, 427 Mass. 809, 814 (1998) ("Unfairness under G.L. c. 93A is determined from all the circumstances.") (citations omitted); *cf. Shepard's Pharmacy, Inc. v. Stop & Shop Cos.*, 37 Mass. App. Ct. 516, 520 (1994) ("Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a c. 93A violation is a question of law.") (quoting *Schwanbeck v. Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 414 (1991), *aff'd on other grounds*, 412 Mass. 703 (1992)).

§ 2.2.2 Not Limited by Traditional Concepts

Both state and federal courts have recognized that an analysis of Chapter 93A claims is not dependent on common law principles of tort or contract law. *See, e.g., Kattar v. Demoulas*, 433 Mass. 1, 12–13 (2000); *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 403 Mass. 722, 729 (1989) ("[A] violation of G.L. c. 93A, § 11, need not be premised

on a violation of an independent common law or statutory duty.") (citations omitted); *Patricia Kennedy & Co. v. Zam-Cul Enters., Inc.*, 830 F. Supp. 53, 59 (D. Mass. 1993) (Massachusetts law does not require that plaintiffs prove a separate, independent tort, such as fraud or misappropriation, to satisfy a claim under G.L. c. 93A; "[a] claim under Chapter 93A rises or falls on its own merit"); *see also Hannigan v. Bank of Am., N.A.*, 48 F. Supp. 3d 135, 142 (D. Mass. 2014) (provided it has not been discredited entirely, "a Chapter 93A claim can survive even after a plaintiff's breach of contract and negligence claims have been dismissed"); *cf. Downey v. Chutehall Constr. Co.*, 86 Mass. App. Ct. 660, 669 (2014) (a Chapter 93A claim based solely on alleged defamatory statements "rises or falls on the outcome of the defamation claim"); *Murphy v. Nat'l Grange Mut. Ins. Co.*, No. 13-cv-11363-FDS, 2014 WL 5307671, at *6 (D. Mass. Oct. 16, 2014) (summary judgment as to an underlying contract claim forecloses a derivative Chapter 93A claim). Therefore, a determination of what is unfair or deceptive is neither dependent on traditional tort or contract law concepts, *Linkage Corp. v. Trs. of Bos. Univ.*, 425 Mass. 1, 27 (1997); *Travis v. McDonald*, 397 Mass. 230, 232 (1986), nor limited by preexisting rights or remedies, *Travis v. McDonald*, 397 Mass. at 232; *York v. Sullivan*, 369 Mass. 157, 164 (1975).

The federal district court in Massachusetts reiterated that

> [a] claim under ch. 93A need not be premised on a violation of an independent common law or statutory duty, so long as the complained of conduct is "within at least the penumbra of some common-law, statutory or other established concept of unfairness . . . [or] is immoral, unethical, oppressive, or unscrupulous."

Am. Tel. & Tel. Co. v. IMR Capital Corp., 888 F. Supp. 221, 256 (D. Mass. 1995) (citing *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 403 Mass. at 729). The *AT&T* court, however, did not find liability under Chapter 93A.

In *Patricia Kennedy & Co. v. Zam-Cul Enterprises, Inc.*, 830 F. Supp. 53, 59 (D. Mass. 1993), the court said that a party does not need to allege a separate independent tort such as fraud or misappropriation under Chapter 93A, because "a claim under Chapter 93A rises or falls on its own merit." *Patricia Kennedy & Co. v. Zam-Cul Enters., Inc.*, 830 F. Supp. at 59. Similarly, the U.S. Court of Appeals for the First Circuit has said that under basic Chapter 93A law "[a] party is not exonerated from Chapter 93A liability [simply] because there has been no breach of contract." *NASCO v. Pub. Storage, Inc.*, 127 F.3d 148, 152 (1st Cir. 1997). However, "a breach of contract, standing alone, is not an unfair trade practice under c. 93A. Instead, to rise to a level of a c. 93A violation, a breach must be both knowing and intended to secure 'unbargained-for benefits' to the detriment of the other party." *Zabin v. Picciotto*, 73 Mass. App. Ct. 141, 169 (2008) (citing *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 100–01 (1979); *NASCO v. Pub. Storage, Inc.*, 127 F.3d at 34).

(a) *Beyond Privity*

These "broad new rights" may include the ability to obtain relief under a Chapter 93A judgment based on a breach of contract, even if the parties are not in privity. See *Maillet v. AFT-Davidson Co.*, 407 Mass. 185, 191 (1990) (injured printing press operator could bring suit against the manufacturer for breach of warranty); *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 581 (1982) (buyer of modular home could sue the manufacturer). Similarly, the federal district court in Massachusetts held that, although the buyer of a steam turbine generator could not pursue a Chapter 93A action against its supplier due to a contractual limitation, the utilities that purchased energy from the buyer were not bound by the limitation and still had a cause of action because "an alleged breach of an express warranty [is] . . . a virtual per se violation of [G.L. c. 93A]." *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 756 F. Supp. 620, 628 (D. Mass. 1990) (citations omitted).

In *Danusis v. Longo*, 48 Mass. App. Ct. 254 (1999), tenants brought an action under Chapter 93A against a real estate developer who had conveyed the title of subdivided lots to himself as trustee of a real estate trust. The developer controlled and managed the lots without a license and was therefore in violation of the Massachusetts Manufactured Housing Act, G.L. c. 140, §§ 32A–32S. The court rejected the argument that because the developer had conveyed the property the tenants could no longer sue. "Notwithstanding that conveyance . . . [the developer] controls and manages the seventeen leased lots." *Danusis v. Longo*, 48 Mass. App. Ct. at 263; *see also Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53 (2002) (Chapter 93A claims by indirect purchasers are not barred simply because they do not have standing to pursue their claims under the federal and state antitrust laws); *Kattar v. Demoulas*, 433 Mass. 1, 14 (2000) ("Parties need not be in privity for their actions to come within the reach of c. 93A."). *But cf. Lewis v. Ariens Co.*, 434 Mass. 643, 649 (2001) (a manufacturer of a snowblower did not owe a continuing duty to warn to a second-hand purchaser sixteen years after the product was manufactured); *Briggs v. Boat/U.S., Inc.*, No. 12-11795-DJC, 2014 WL 4662305, at *6 (D. Mass. Sept. 16, 2014) (the plaintiff need not establish privity of contract provided that the parties are engaged in more than a minor or insignificant business relationship); *Swenson v. Yellow Transp., Inc.*, 317 F. Supp. 2d 51, 57 (2004) (although

parties do not need to be in privity, the conduct being challenged must somehow involve a relationship between the plaintiff and the defendant).

In *Baena v. KPMG LLP*, 453 F.3d 1 (1st Cir. 2006), the court took the relationship among the parties into account in invoking the in pari delicto ("in equal fault") doctrine. The court rejected a Chapter 93A claim brought by a bankruptcy trustee against an accounting firm that allegedly aided in an overstatement of a company's earnings. Because the trustee stood in the shoes of the company, the company's senior managers were the "primary wrongdoers" in creating the deception, and the managers' actions could be imputed to the company, the Chapter 93A action was barred by the in pari delicto doctrine, which is "a doctrine commonly applied in tort cases to prevent a deliberate wrongdoer from recovering from a co-conspirator or accomplice." *Baena v. KPMG LLP*, 453 F.3d at 6.

Finally, because "chapter 93A was designed to offer broader and more comprehensive relief to victims of dishonesty than may be available at common law," note that attorneys may be vicariously liable under Chapter 93A for their partners' conduct, even if the attorneys "[were] entirely unaware and . . . entirely uninvolved." *Kansallis Fin. Ltd. v. Fern*, 421 Mass. 659, 672 (1996); *cf. Ray-Tek Servs., Inc. v. Parker*, 64 Mass. App. Ct. 165 (2005) (Chapter 93A generally inapplicable to disputes among partners in joint venture). See generally § 2.5.4(a), When Defendant Is Liable Without Knowing About the Deception, below.

(b) *Recovery for Noneconomic Injuries*

Rejection of traditional concepts also means that a party may recover for personal injuries under Chapter 93A. In *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 191 (1990), the Supreme Judicial Court upheld the trial judge's finding that the defendant-manufacturer of a printing press was liable under G.L. c. 93A, § 9 for physical injuries sustained by an employee after the jury found the manufacturer negligent and in violation of an implied warranty of merchantability. The court upheld the finding partly because G.L. c. 93A, § 9 no longer requires that plaintiffs show a loss of money or property but instead provides a cause of action for "[a]ny person . . . who has been injured." *Maillet v. ATF-Davidson Co.*, 407 Mass. at 190; *see also Doe v. Baxter Healthcare Corp.*, C.A. No. 93–5750, slip op. at 15 (Middlesex Super. Ct. 1997), *aff'd, Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1 (1998) ("In light of my determination that [the defendant] was negligent and breached its implied warranty of merchantability in connection with the silicone breast implants, [the defendants'] liability under G.L. c. 93A would appear to follow as a matter of course.") (citing *Maillet v. ATF-Davidson Co.*, 407 Mass. 185 (1990)). *But see Spinal Imaging, Inc. v. Aetna Health Mgmt. LLC*, Nos. 09-11873-LTS, 12-11521-LTS, 2014 WL 4202498, at *13 (D. Mass. Aug. 21, 2014) (under Section 11 of Chapter 93A, a plaintiff also must establish a loss of money or property caused by the violative conduct). *See also Bellermann v. Fitchburg Gas & Elec. Light Co.*, 475 Mass. 67 (2016) (a Chapter 93A litigant must demonstrate either economic or noneconomic injury; potential harm suffered due to the defendant's inadequate service does not suffice absent a showing of actual injury); *In re ZF-TRW Airbag Control Units Prods. Liab. Litig.*, No. LA ML19-02905 JAK (FFMx), 2022 WL 522484, *81–83 (D. Cal. Feb. 9, 2022) (summarizing Massachusetts cases addressing causation and injury).

The Appeals Court has held that racial harassment could also form the basis for a claim under Chapter 93A. In *Ellis v. Safety Insurance Co.*, 41 Mass. App. Ct. 630, 640 (1996), an insured brought an action against an automobile insurer for a variety of alleged violations of law. The court stated the following:

> Racial harassment in the course of doing business is conduct fairly described as immoral, unethical, or oppressive for the purposes of G.L. c. 93A. The plaintiffs have met the defendants' summary judgment motion with verified allegations of racially discriminatory words and deeds committed in the course of [the insurer's] investigation of an insurance claim. They have thereby shown that a triable issue exists as to whether [the insurer] violated G.L. c. 93A.

Ellis v. Safety Ins. Co., 41 Mass. App. Ct. at 640–41 (citations omitted).

The *Ellis* court also noted that claims of slander, defamation, and invasion of privacy may be actionable under G.L. c. 93A. *Ellis v. Safety Ins. Co.*, 41 Mass. App. Ct. at 641 n.15; *see also Dulgarian v. Stone*, 420 Mass. 843, 853 (1995) ("defamatory statements are actionable under G.L. c. 93A"); *TLT Constr. Corp. v. A. Anthony Tappe & Assocs., Inc.*, 48 Mass. App. Ct. 1, 13 (1999) (same); *Weld v. CVS Pharmacy, Inc.*, 10 Mass. L. Rptr. 217 (Suffolk Super. Ct. 1999) (conduct amounting to a violation of privacy may be actionable under G.L. c. 93A).

(c) *Nontraditional Remedies*

Chapter 93A's reach means that a private party may be able to obtain specific performance in the appropriate cases. In *Greenfield Country Estates Tenants Ass'n v. Deep*, 423 Mass. 81 (1996), tenants brought suit to enforce their statutory right of first refusal to purchase the property on which their manufactured home community (mobile homes) was located. The statute that provided the tenants with the right of first refusal, G.L. c. 140, § 32L(7), also provided that enforcement of compliance and actions for damages should be brought in accordance with Chapter 93A. The Supreme Judicial Court upheld the trial judge's decision granting the tenants the right to purchase the property. *Greenfield Country Estates Tenants Ass'n v. Deep*, 423 Mass. at 88.

§ 2.2.3 Otherwise Lawful Acts Can Be Unfair or Deceptive

"This flexible set of guidelines as to what should be considered lawful or unlawful under c. 93A suggests that the Legislature intended the terms 'unfair and deceptive' to grow and change with the times." *Nei v. Burley*, 388 Mass. 307, 313 (1983). For example, in *Schubach v. Household Finance Corp.*, 375 Mass. 133 (1978), the court rejected the argument that an act or a practice that is authorized by statute "can never be an unfair or deceptive act or practice." *Schubach v. Household Fin. Corp.*, 375 Mass. at 137. The *Schubach* court held that a complaint alleging that the defendant finance company engaged in a practice of intentionally filing collection actions against consumers in inconvenient courts, with the purpose and effect of securing default judgments, stated a cause of action under G.L. c. 93A in light of FTC cease and desist orders directing organizations not to institute collection suits in any county other than that of the debtor's residence or the county in which the contract was entered into.

In *Kattar v. Demoulas*, 433 Mass. 1 (2000), the defendants had been found liable under Chapter 93A for foreclosing on the plaintiff's property in retribution for the plaintiff's refusal to testify in an unrelated matter. The Supreme Judicial Court upheld the judgment for the plaintiff even though the defendants were legally entitled to foreclose on the property. The court determined that "[l]egality of underlying conduct is not necessarily a defense to a claim under [G.L. c. 93A]. . . . Even if the defendants had the right to foreclose, . . . it was clearly unfair . . . to use that right for a reason so obviously against public policy." *Kattar v. Demoulas*, 433 Mass. at 13–14 (citations omitted).

Although a property owner had the legal right to revoke an agent's apparent authority and to keep the owner's position secret, the court in *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. 672 (1986) said that recognition of these rights would be unfair to a tenant who, with full knowledge of the agent and the owner, sold the tenant's business and subleased the property while the owner quietly made other plans for the property. The court explained, "[O]ne may be constrained in the exercise of his [or her] common law rights by considerations of fairness imposed by the statute." *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. at 679; *see Piccicuto v. Dwyer*, 32 Mass. App. Ct. 137, 140 (1992) ("Chapter 93A has established in general, for businesses as well as for consumers, a path of conduct higher than that trod by the crowd in the past.") (quoting *Doliner v. Brown*, 21 Mass. App. Ct. 692, 700 (1986) (Brown, J., concurring)); *see also Dujon v. Williams*, 5 Mass. L. Rptr. 456 (Suffolk Super. Ct. 1996), *aff'd sub nom. Dujon v. Kurtz*, 47 Mass. App. Ct. 1112 (1999) (transferring assets to avoid a judgment "certainly qualifies as 'immoral [and] unethical'"). See the discussion under § 2.3.2, Massachusetts's *PMP Associates* Test, below; see also the dissent in *Hogan v. Riemer*, 35 Mass. App. Ct. 360, 369 (1993).

Bringing a lawsuit in spite of the evidence may also be unfair. *Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am.*, 732 F. Supp. 1209, 1214 (D. Mass. 1990) (citing *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621, 628 (1978)); *Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 857 (1983). Likewise, the court in *Wyler v. Bonnell Motors, Inc.*, 35 Mass. App. Ct. 563 (1993) said, "The 93A judge . . . correctly . . . conclude[d] that instituting criminal proceedings to collect a civil debt was an unfair and deceptive act within the intendment of G.L. c. 93A, § 2." *Wyler v. Bonnell Motors, Inc.*, 35 Mass. App. Ct. at 566–67; *see also Boothroyd Dewhurst, Inc. v. Poli*, 783 F. Supp. 670, 678 (D. Mass. 1991) ("The Court agrees with [the defendant] that if plaintiff instituted its copyright infringement suit knowing that the claim was groundless, and proceeded to send notices of the pending litigation to defendant's potential customers, its conduct would violate chapter 93A."). In *Skinder-Strauss Associates v. MCLE*, 870 F. Supp. 8, 11 (D. Mass. 1994), the court denied the plaintiff's motion to dismiss MCLE's counterclaim that filing suit under copyright law could violate G.L. c. 93A. *But see Ne. Data Sys. v. McDonnell Douglas Comput. Sys.*, 986 F.2d 607, 611 (1st Cir. 1993) ("a claim of 'abuse of process' with nothing more does not state a violation of Chapter 93A").

The Supreme Judicial Court has also held that the existence of an industry-wide practice would not constitute a defense to conduct considered unlawful under G.L. c. 93A. *Commonwealth v. DeCotis*, 366 Mass. 234, 240 (1974). See also *Therrien v. Resource Financial Group, Inc.*, 704 F. Supp. 322, 329 (D.N.H. 1989), which cited to *Schubach* as authority for the statement that "[c]onduct that complies with the federal disclosure requirements still could constitute an unfair or

deceptive practice" under New Hampshire law. But see the "permitted practices" exception of G.L. c. 93A, § 3 and *Bierig v. Everett Square Plaza Associates*, 34 Mass. App. Ct. 354, 367–68 (1993), as well as the cases cited therein.

On the other hand, where an action is no longer illegal, this statutory change may provide ammunition for parties seeking to avoid liability under Chapter 93A. While recognizing that the "absence of a statutory violation does not preclude a finding" of Chapter 93A liability, in *Landis v. Moon*, 1996 Mass. App. Div. 118, the court held that no violation occurred when the landlord raised the rent from $327 per month to $3,700 per month on learning that the landlord's property was not subject to rent control. The court rejected the tenants' Chapter 93A claim, stating the following:

> The test in this case, however, must be whether the charging of a market rent is an unfair or deceptive act or practice in the absence of a rent control statute. . . . The charging of a market rate is not inherently bad or evil, nor can it be said, in the absence of a rent control statute to violate the foregoing definition of "unfair."

Landis v. Moon, 1996 Mass. App. Div. at 120.

§ 2.2.4 Illegal Acts Not Necessarily Unfair or Deceptive

However, the courts have also recognized that illegal acts will not necessarily give rise to a G.L. c. 93A claim. In *Mechanics National Bank of Worcester v. Killeen*, 377 Mass. 100 (1979), the court held that a debtor was entitled to damages for wrongful foreclosure but not to damages under G.L. c. 93A. Similarly, in *Boston Symphony Orchestra, Inc. v. Commercial Union Insurance Co.*, 406 Mass. 7 (1989), the court rejected liability against the insurer, although it found that the insurer relied on an incorrect interpretation of its policy by failing to defend the Boston Symphony Orchestra (BSO) when it was sued by Vanessa Redgrave.

In *Lewis v. Walcott*, 47 Mass. App. Ct. 394 (1999), the court held that "an intentional and willful violation" of a rent control ordinance did not by itself create liability under G.L. c. 93A. The court remanded to the lower court to determine if there were "other facts that are present in addition to the violation." *Lewis v. Walcott*, 47 Mass. App. Ct. at 398.

In *Massachusetts School of Law v. American Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998), the First Circuit considered a suit by the Massachusetts School of Law (MSL) against various parties after it failed to receive American Bar Association (ABA) accreditation. The suit was based in part on letters that the chair of the board of trustees for one defendant, the New England School of Law (NESL), had written objecting to MSL's accreditation. The court commented as follows:

> The . . . correspondence hint[s] that NESL did not wish MSL well, but none of the matters which its representatives discussed with [the ABA consultant] suggest activities so scurrilous as to trigger liability under Chapter 93A. . . . [T]he conduct must at least be within shouting distance of some established concept of unfairness.

Mass. Sch. of Law v. Am. Bar Ass'n, 142 F.3d at 42. The court observed that defendants' conduct "must be not only wrong, but also egregiously wrong—and this standard calls for determinations of egregiousness well beyond what is required for most common law claims." *Mass. Sch. of Law v. Am. Bar Ass'n*, 142 F.3d at 41.

In *Saint-Gobain Industrial Ceramics Inc. v. Wellons, Inc.*, 246 F.3d 64 (1st Cir. 2001), the court held that a commercial supplier liable for breach of warranty was nevertheless not liable under Chapter 93A. Noting that the supplier had disclosed its uncertainty about the intended use of the product, the court found that the company may have been "overly optimistic" in assessing its product's effectiveness, but that this assessment "[was] not one that establishes the requisite deceptive or unfair conduct [necessary] to sustain a Chapter 93A violation." *Saint-Gobain Indus. Ceramics Inc. v. Wellons, Inc.*, 246 F.3d at 75.

In *Anoush Cab, Inc. v. Uber Technologies, Inc.*, 8 F.4th 1, 22 (1st Cir. 2021), the court noted that even if Uber had violated certain city ordinances, such "an unlawful action is not a per se violation of Chapter 93A. . . . A violation of statutory or common law is not 'sufficient' to constitute a 93A violation."

(a) *Good Faith Disputes*

The Supreme Judicial Court and the Appeals Court have said that "ordinary . . . dispute[s] without conduct that was unethical, immoral, oppressive, or unscrupulous" do not indicate unfairness. *Duclersaint v. Fed. Nat'l Mortg. Ass'n*, 427 Mass. 809, 814 (1998) (quoting *Kobayashi v. Orion Ventures, Inc.*, 42 Mass. App. Ct. 492, 505 (1997)). In *Duclersaint*, the plaintiff brought suit after the defendant refused to pay the plaintiff the surplus for property it purchased at a foreclosure

sale. Although the court held that the defendant was obligated to pay the surplus, it also determined that the defendant had not violated Chapter 93A. It stated that

> a good faith dispute as to whether money is owed, or performance of some kind is due, is not the stuff of which a c. 93A claim is made.
>
> . . . . [T]he defendant and the plaintiff had a genuine difference of opinion about whether there was a surplus, making this "an ordinary . . . dispute without conduct that was unethical, immoral, oppressive, or unscrupulous." There is nothing in the record to indicate that the defendant acted unfairly. Moreover, the defendant did not deceive the plaintiff in any way. It simply held a different opinion as to the applicability of [the foreclosure statute] and to the undisputed facts that necessitated the involvement of the court. Therefore, we conclude that the plaintiffs' c. 93A claim is without merit.

Duclersaint v. Fed. Nat'l Mortg. Ass'n, 427 Mass. at 814–15 (citations omitted). Earlier decisions have also followed this view.

The Appeals Court has commented that "mere resistance to a just claim is not the stuff of c. 93A except where made such by statute." *Framingham Auto Sales, Inc. v. Workers' Credit Union*, 41 Mass. App. Ct. 416, 418 (1996). In that case, the court held that the defendant bank had wrongfully dishonored a cashier's check presented to it by the plaintiff car dealer, a holder in due course. The bank refused to honor the cashier's check because the check it had received from the purchaser in exchange for the cashier's check had been dishonored. The court said that the bank,

> like a lamb docilely led to slaughter, can hardly be branded unethical, oppressive, or unscrupulous for attempting at the last to avoid its fate. Missing from [the bank's] resistance was any pernicious purpose collateral to minimizing its victimization at the [purchaser's] hands. There was no ulterior motive, no coercive or extortionate objective.

Framingham Auto Sales, Inc. v. Workers' Credit Union, 41 Mass. App. Ct. at 418.

However, when one business breaches a contract to take advantage of the other party, the courts frequently hold that a Chapter 93A violation has occurred. See § 2.6, Section 11 Distinguished from Section 9, below. In *DEI Systems, LLC v. Scarano*, 83 Mass. App. Ct. 1139 (2013) (unpublished decision; text available at 2013 WL 3233459, at *2), the Appeals Court upheld a Chapter 93A judgment against a defendant who owed money for electrical work and materials but refused to pay the full amount; the jury could have inferred from the evidence that the defendant "had no genuine belief that he owed . . . less than the amounts reflected in [the plaintiff's] bills and . . . was simply attempting to force an unfair compromise."

Both federal and state courts have held that "the simple fact that [the] party knowingly breached [the] contract does not raise the breach to the level of Chapter 93A violation." *Ahern v. Scholz*, 85 F.3d 774, 798 (1st Cir. 1996); *see Ne. Data Sys. v. McDonnell Douglas Comput. Sys.*, 986 F.2d 607, 609–10 (1st Cir. 1993); *Knapp Shoes v. Sylvania Shoe Mfg. Corp.*, 418 Mass. 737, 744–45 (1994); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 100–01 (1979). But see the discussions at § 2.5.2(a), Attorney General's Regulations on Materiality, Including Breach of Warranty, below, for cases where a breach of warranty was considered a per se violation of Chapter 93A, and § 2.6.2, Breaching the Covenant of Good Faith, below.

(b) *Negligence*

Mere negligence may be insufficient to create liability under Chapter 93A without proof that it resulted in an unfair and deceptive act or practice. In *Poly v. Moylan*, 423 Mass. 141 (1996), the Supreme Judicial Court, quoting from the lower court opinion, stated that, "although the defendant [a lawyer] was negligent, he did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Poly v. Moylan*, 423 Mass. at 151; *see also McCann v. Davis, Malm & D'Agostine*, 423 Mass. 558, 561 (1996) ("The jury finding that the defendants' negligence was not the proximate cause of the plaintiff's damage disposes of the G.L. c. 93A claim as well."). Similarly, in *Meyer v. Wagner*, 429 Mass. 410, 424 (1999), the Supreme Judicial Court reiterated that an unfair or deceptive act requires more than a finding of negligence. The court upheld the trial judge's decision that a divorce attorney's alleged malpractice did not violate Chapter 93A but remanded the case on the client's claim of negligence.

In *Bonaccoloto v Coca-Cola Enterprises, Inc.*, No. 97-11710-PBS, 1999 WL 528816 (D. Mass. Feb. 11, 1999), the District Court found that a supplier's failure to repair a leaky water cooler that allegedly injured the plaintiff may be negligent,

but that any such failure was not within the conduct covered by Chapter 93A. *Bonaccoloto v. Coca-Cola Enters., Inc.*, 1999 WL 528816, at *3–4.

Although the bank in *Govoni & Sons Construction Co. v. Mechanics Bank* was liable for wrongful debit of the plaintiff's accounts, the court held that the bank's actions—even if negligent—did not amount to a Chapter 93A violation. *Govoni & Sons Constr. Co. v. Mechs. Bank*, 51 Mass. App. Ct. 35, 51 (2001). The court recognized that the bank's actions violated "reasonable commercial standards" but noted that its procedures "were widely utilized by similar banks in the area." *Govoni & Sons Constr. Co. v. Mechs. Bank*, 51 Mass. App. Ct. at 44, 51; s*ee also Walsh v. Chestnut Hill Bank & Tr. Co.*, 414 Mass. 283, 288 (1993) ("[n]ot every negligent act is unfair or deceptive and thus unlawful") (quoting *Swanson v. Bankers Life Co.*, 389 Mass. 345, 349 (1983)); *Miller v. Risk Mgmt. Found.*, 36 Mass. App. Ct. 411, 419 (1994) ("the company's studied indifference to the [medical malpractice] claims sank below the negligence level"); *Underwood v. Risman*, 414 Mass. 96, 99–100 (1993) (to prove failure to disclose under G.L. c. 93A, the defendant must have knowledge of the facts it has failed to disclose, and "knowing requires more than negligence"). *But see MacGillivary v. W. Dana Bartlett Ins. Agency*, 14 Mass. App. Ct. 52, 61 (1982) (in the absence of further decisional guidance, "a negligent violation by a broker of [a statute] must be taken to constitute a violation of G.L. c. 93A, § 2").

The federal courts have taken a similar approach, stating that "[o]rdinary negligence alone, which does not 'reek of callousness' or 'meretriciousness,' is not the sort of 'truly inequitable marketplace behavior' which Chapter 93A was intended to punish." *Am. Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 256 (D. Mass. 1995) (quoting *VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 624 (1994)); *see also Alves v. Daly*, No. 12-10935-MLW, 2015 WL 3960887, at *2 (D. Mass. June 29, 2015) (holding that while the defendants were negligent and violated provisions of the Barnstable Town Code by failing to ensure a high degree of supervision at their restaurant and by delaying to call the police when a physical altercation ensued, their conduct "did not constitute a violation of Chapter 93A because it did not involve or result in any unfair or deceptive act"); *Am.'s Growth Capital LLC v. PFIP LLC*, 73 F. Supp. 3d 127, 151 (D. Mass. 2014) ("[A] mere act of negligence does not give rise to a Chapter 93A violation; there must be evidence that the negligence was or resulted in an unfair or deceptive act or practice.") (citing *Patterson v. Christ Church*, 85 Mass. App. Ct. 157, 163–64 (2014)); *In re GlassHouse Techs., Inc.*, 604 B.R. 600, 637 (Bankr. D. Mass. 2019) (mere negligence insufficient to establish violation of Chapter 93A).

In *Schwartz v. Rose*, 418 Mass. 41 (1994), the court held that a vendor of land was liable under Chapter 93A for failure to disclose a conservation commission letter to the buyer. *Schwartz v. Rose*, 418 Mass. at 46. The court rejected the argument that the vendor was merely negligent because the trial judge had found the failure to be deliberate. *Schwartz v. Rose*, 418 Mass. at 46. The federal courts have also recognized that "negligence can provide the basis for Chapter 93A liability, so long as it is paired with an unfair and deceptive act or practice—in other words negligence plus rascality equals liability." *Damon v. Sun Co.*, 87 F.3d 1467, 1484 n.10 (1st Cir. 1996) (citing *Squeri v. McCarrick*, 32 Mass. App. Ct. 203, 207 (1992); *Glickman v. Brown*, 21 Mass. App. Ct. 229, 235 (1985); *Briggs v. Carol Cars, Inc.*, 407 Mass. 391 (1990)).

In a few cases, Massachusetts courts have held that a party's negligence was the basis for its liability under Chapter 93A if the negligent actions were unfair or were based on a breach of warranty. For example, in *Golber v. Baybank Valley Trust Co.*, 46 Mass. App. Ct. 256 (1999), the bank's negligent misrepresentation about the financial solvency of the plaintiff's investment supported an award of single, but not multiple, damages under G.L. c. 93A. In *Vanderwiel v. Jones*, 1996 Mass. App. Div. 184, the court upheld the decision that Chapter 93A had been violated by a broker who had told a buyer that a septic inspection was unnecessary because the property was new. The court found this failure to be negligent, unfair, and a violation of Chapter 93A, without being deceptive or fraudulent. *See Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 2–3 (1998) (negligence and breach of implied warranty of merchantability gave rise to Chapter 93A liability); *see also Glickman v. Brown*, 21 Mass. App. Ct. 229, 235 (1985).

§ 2.3 DETERMINING UNFAIRNESS

§ 2.3.1 The FTC's *S&H* Test

The FTC provides guidance to the Massachusetts practitioner in several respects. First, the commission's decisions provide examples of the type of behavior that it considers to be unfair. In *Schubach v. Household Finance Corp.*, 375 Mass. 133 (1978), for example, the court clearly was influenced by the numerous FTC orders that prohibited collection companies from filing suit in a forum distant from the debtor's residence or the location of the execution of the contract. *Schubach v. Household Fin. Corp.*, 375 Mass. at 135–36.

Second, guidance has come from articulated standards of unfairness. When Congress originally created the commission in 1914, it explicitly rejected enacting a statutory definition of "unfair practices." As stated in the House Conference Report, H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914), and quoted in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972), "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. . . . If Congress were to adopt the method of definition, it would undertake an endless task."

In 1964, however, the commission determined that it had reviewed a sufficient number of cases to establish a test for unfairness. This test originally appeared in a Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (July 2, 1964). The statement was cited with apparent approval by the U.S. Supreme Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (*S&H*). In the context of the FTC's prohibition of practices by the green-stamp company, the Court held that the FTC was empowered to proscribe unfair or deceptive practices regardless of its effect on competition. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. at 239. The *S&H* court recognized that the factors the commission would consider in determining whether a practice that is neither in violation of antitrust laws nor deceptive are nonetheless unfair:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness;
> (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or]
> (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

FTC v. Sperry & Hutchinson Co., 405 U.S. at 244–45 n.5 (quoting the Cigarette Statement).

§ 2.3.2 Massachusetts's *PMP Associates* Test

Most Massachusetts cases that have discussed the FTC criteria of unfairness have relied on the *S&H* standard. In *PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593 (1975), the court held that the refusal of the *Boston Globe* to sell advertising space to the plaintiff (who ran an escort service) did not constitute an unfair trade practice. "We rule that the practice in question is not within any recognized conception of unfairness, is neither immoral, unethical, oppressive nor unscrupulous, and would not cause substantial injury to consumers, competitors or other businessmen." *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. at 596; *see also Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 57–58 (2002).

(a) *Liability Based on Unfairness to Consumers*

In actions brought by the attorney general or in consumer actions, the *PMP Associates* test has been frequently used to find liability. Liability based on unfairness was found in the following cases:

- *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 777 (1980) (upholding attorney general's power to enact regulations);
- *Langton v. LaBrecque*, 25 Mass. App. Ct. 463, 464 (1988) (court reversed summary judgment for condominium seller because buyers stated claim against it for terminating their unit "reservations");
- *Glickman v. Brown*, 21 Mass. App. Ct. 229, 235 (1985) (developers' misrepresentation about condition of heating system found to violate Chapter 93A under both Sections 9 and 11); and
- *Piccuirro v. Gaitenby*, 20 Mass. App. Ct. 286, 290 (1985) (real estate broker using position on municipal board of health to obtain approval of defective septic system).

See also Dujon v. Williams, 5 Mass. L. Rptr. 456 (Suffolk Super. Ct. 1996), *aff'd sub nom. Dujon v. Kurtz*, 47 Mass. App. Ct. 1112 (1999) (transferring assets to avoid judgment "certainly qualifies as 'immoral [and] unethical'"); *Schubach v. Household Fin. Corp.*, 375 Mass. 133, 136 (1978) (quoting *S&H*'s recognition that "the FTC had the authority to prohibit conduct that, although legally proper, was unfair to the public"). *But see Barden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41, 46 (D. Mass. 1994) (plaintiff failed to allege facts supporting claim that defendant acted unfairly by publishing a book containing inaccurate factual information).

The Appeals Court has held that racial harassment could form the basis for a claim under Chapter 93A, citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593,

595–96 (1975); and other cases. In *Ellis v. Safety Insurance Co.*, 41 Mass. App. Ct. 630 (1996), an automobile insurer was sued for violations of Chapter 93A and other laws. The court stated that "racial harassment in the course of doing business is conduct fairly described as immoral, unethical, or oppressive for the purposes of G.L. c. 93A." *Ellis v. Safety Ins. Co.*, 41 Mass. App. Ct. at 640. The court also noted that claims of slander, defamation, and invasion of privacy may support a claim under G.L. c. 93A. *Ellis v. Safety Ins. Co.*, 41 Mass. App. Ct. at 641 n.15.

(b) *Liability Based on Unfairness in Business*

In business disputes where a party breaches an implied covenant of good faith and fair dealing, or its conduct constitutes some other established concept of unfairness, liability may accrue under the *PMP Associates* test.

State Cases

In *Linkage Corp. v. Trustees of Boston University*, 425 Mass. 1 (1997), the Supreme Judicial Court relied in part on the *PMP Associates* test to uphold liability against Boston University. The court said that

> [t]he judge was warranted in finding that Boston University's actions in the months leading up to, and after, the termination [of business with Linkage] were unethical and unscrupulous, and [the president's and executive vice president's] conduct, in particular, was unfair, oppressive, and deceptive. The university and its principals repudiated binding agreements and usurped Linkage's business and work force in order to promote a purely self-serving agenda. The result was to end Linkage's vitality as a going concern.

Linkage Corp. v. Trs. of Bos. Univ., 425 Mass. at 27.

In *Stagecoach Transportation, Inc. v. Shuttle, Inc.*, 50 Mass. App. Ct. 812 (2001), the Appeals Court upheld a lower court decision that the defendant violated Chapter 93A by refusing to sign a contract until the plaintiff provided employment benefits to a former employee. *Stagecoach Transp., Inc. v. Shuttle, Inc.*, 50 Mass. App. Ct. at 818–19. The court rejected the defendant's argument that its conduct did not rise to the level of egregiousness required for a Chapter 93A violation. S*ee also Kattar v. Demoulas*, 433 Mass. 1, 12–14 (2000) (defendant's foreclosure of mortgage, which was otherwise lawful, was proper basis for liability under G.L. c. 93A, § 11, since foreclosure was in retribution for plaintiff's refusal to testify in reckless disregard of the truth); *Columbia Chiropractic Grp., Inc. v. Tr. Ins. Co.*, 430 Mass. 60, 61 (1999) (submitting unreasonable or unnecessary medical bills and litigating to recover on those bills violated G.L. c. 93A); *Marshall v. Stratus Pharms., Inc.*, 51 Mass. App. Ct. 667, 676 (2001) ("The allegation that the defendants never intended to pay for the services stated sufficient facts to constitute a claim for relief under [G.L. c. 93A].") (citation omitted).

In *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. 672 (1986), the *PMP Associates* criteria formed a basis for liability where a commercial tenant made arrangements for a lease to a replacement tenant in reliance on statements and actions of the landlord's representative. A new owner disavowed these arrangements and refused to execute the lease. Although the owner may have had the legal right to revoke the agent's apparent authority, the court held that such actions were unfair. Applying the *PMP Associates* test, the court stated that "the second factor does not contemplate an overly precious standard of ethical behavior. It is the standard of the commercial marketplace . . . ." *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. at 679. The court held that the defendant-landlord owed an implied covenant of good faith and fair dealing to the tenant. *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. at 681. See *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 476 (1991), and *Massachusetts Employers Insurance Exchange v. Propac-Mass, Inc.*, 420 Mass. 39, 43 (1995), in which breaches of the implied covenant of good faith and fair dealing were also found to violate G.L. c. 93A. *But cf. Frostar Corp. v. Malloy*, 63 Mass. App. Ct. 96, 109 (2005) (the finding of a breach of the covenant of good faith and fair dealing does not compel the finding of a violation of Chapter 93A). See also § 2.6, Section 11 Distinguished from Section 9, below.

State cases that have found liability under the *PMP Associates* test include the following:

- *Heller Fin. v. Ins. Co. of N. Am.*, 410 Mass. 400, 408–09 (1991) (remanded to determine if a first mortgagee misrepresented whether a mortgagor was in default to a prospective second mortgagee);
- *Wang Labs., Inc. v. Bus. Incentives, Inc.*, 398 Mass. 854, 859–60 (1986) (company that relied on inadequate and erroneous information supplied by its employee acted unfairly by terminating contract with plaintiff);
- *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 778–79 (1986) (abuse of process and knowing misstatements found to constitute basis for liability under Section 11);

- *Piccicuto v. Dwyer*, 32 Mass. App. Ct. 137, 139 (1992) (lessor was liable under G.L. c. 93A for its agent's improper and intentional interference with prospective sale of tenants' business);
- *Fraser Eng'g Co. v. Desmond*, 26 Mass. App. Ct. 99, 103–04 (1988) ("[d]efendant's refusal to carry through on his assurance that the plaintiff would be paid from insurance proceeds was both unethical and unscrupulous," violating G.L. c. 93A, § 11);
- *New Kappa City Constr. v. Nat'l Floors Direct, Inc.*, 2011 Mass. App. Div. 249 (defendant not only breached its contract by failing to pay plaintiff but also "sought to avoid payment by making unsubstantiated claims that [the plaintiff's] work was of substandard quality");
- *HRI Servs., Inc. v. LSZ, Inc.*, No. 15-dms-40003, 2016 WL 3088326 (Mass. App. Div. May 6, 2016) (based on the actions of corporate officers, defendant corporation was liable under Section 11 for willfully evading a $10,000 brokerage services fee); and
- *H1 Lincoln, Inc. v. S. Washington St., LLC*, 489 Mass. 1 (2022) (landlords engaged in commercial extortion when they abused their right to approve the tenant's development plan for an automobile dealership by providing pretextual and unreasonable grounds for terminating the lease and using their leverage to coerce the tenant into making concessions not required under the contract).

Federal Cases

The First Circuit has found liability under the *PMP Associates* test in a variety of Section 11 cases, including *Cambridge Plating Co. v. Napco, Inc.*, 85 F.3d 752 (1st Cir. 1996), where the defendant-manufacturer failed to disclose that a crucial part was missing from its wastewater treatment system, failed to honor its warranty, and failed to provide accurate drawings, which resulted in massive financial damages. As the court said, "For want of a $620 part, there was a damages verdict of over $7 million. . . . [The seller's] silence became sufficiently 'unscrupulous' to fall within a 'penumbra . . . of [an] established concept of unfairness.'" *Cambridge Plating Co. v. Napco, Inc.*, 85 F.3d at 756, 770; *see, e.g., Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 54 (1st Cir. 1998).

In *Trent Partners & Associates, Inc. v. Digital Equipment Corp.*, 120 F. Supp. 2d 84 (D. Mass. 1999), the court held that the plaintiffs' claim for breach of the implied covenant of good faith and fair dealing adequately supported their action under Chapter 93A, stating that

> [t]his case . . . does not raise merely a simple breach of contract claim. Rather the plaintiffs have shown a triable issue of fact as to a breach of the implied covenant of good faith and fair dealing in at-will employment contracts. Inherent in this claim is an element of either bad faith and improper motive or a breach of fair dealing in depriving an employee of "reasonably ascertainable future compensation based on his [or her] past services." [*Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 671 (1981).] By their very terms both of these elements clearly fall into "established common law . . . concept[s] of unfairness." [*VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 620 (1994).]

Trent Partners & Assocs., Inc. v. Dig. Equip. Corp., 120 F. Supp. 2d at 106–07.

In *Commercial Union Insurance Co. v. Seven Provinces Insurance Co.*, 9 F. Supp. 2d 49 (D. Mass. 1998), the court found that the defendant had violated Chapter 93A, in part, because it had violated

> the mores of the reinsurance industry, an industry which has operated for centuries on the principles of "utmost good faith," . . . a controlling legal principle in the reinsurance industry. By violating this established principle, Seven Provinces' action fell "within . . . the penumbra of some . . . established concept of unfairness."

Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F. Supp. 2d at 69–70 (citing *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 595–96 (1975)); *see Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 18 (1st Cir. 1985) (withholding of money owed when amount is not in dispute and defendants had ability to pay was, in effect, a form of extortion and a Chapter 93A violation); *Compagnie de Reassurance d'Ile de France v. New England Reinsurance Corp.*, 825 F. Supp. 370, 381 (D. Mass. 1993) (knowingly false representations about underwriting violated Chapter 93A); *see also Patricia Kennedy & Co. v. Zam-Cul Enters., Inc.*, 830 F. Supp. 53, 59 (D. Mass. 1993) (allegations of plaintiff's complaint met *PMP Associates* test).

(c) *Insufficient Evidence of Unfairness in Business*

State Cases

The state courts have cited the *PMP Associates* standard in finding insufficient evidence of unfairness in a number of G.L. c. 93A, § 11 cases, including the following:

- *Bos. Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 14–15 (1989) (although the insurer acted incorrectly in failing to defend the BSO, there was no violation of G.L. c. 93A);
- *Govoni & Sons Constr. Co. v. Mechs. Bank*, 51 Mass. App. Ct. 35, 51 (2001) (bank's actions, which resulted in the wrongful debit of the plaintiff's accounts, resulted from procedures that were "widely utilized by similar banks in the area" and were not "immoral, unethical, oppressive, or unscrupulous" (quoting *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504 (1979)));
- *Industria de Calcados Martini, Ltda. v. Maxwell Shoe Co.*, 36 Mass. App. Ct. 268, 275 (1994) (issuing a stop payment to reject shipment that party subsequently accepts);
- *New Eng. Fin. Res. v. Coulouras*, 30 Mass. App. Ct. 140, 148 (1991) (conduct relating to loan transaction);
- *Madan v. Royal Indem. Co.*, 26 Mass. App. Ct. 756, 764 (1989) (defendant's breach of an oral contract to lease real property to plaintiff-lawyer);
- *Zayre Corp. v. Comput. Sys. of Am., Inc.*, 24 Mass. App. Ct. 559, 569–71 (1987) (business misrepresenting its intentions not to terminate sublease);
- *Doliner v. Brown*, 21 Mass. App. Ct. 692, 697 n.14 (1986) (developer who purchased building not held liable to other developer who was also negotiating for purchase);
- *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504 (1979) (failure to pay for materials and services);
- *Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp.*, 469 Mass. 800, 811 (2014) (insurer not liable where it limited insurance payment based on appropriate business judgment and good faith reliance on medical report); and
- *City of Beverly v. Bass River Golf Mgmt., Inc.*, 92 Mass. App. Ct. 595, 605–06 (2018) (city not liable under G.L. c. 39A, § 11 with regard to its dealings with golf course management company).

In *Atkinson v. Rosenthal*, 33 Mass. App. Ct. 219 (1992), the court rejected liability under G.L. c. 93A, § 11 for breach of a lease. The court distinguished the facts before it from those found in *Anthony's Pier Four* and earlier cases, stating the following:

> There is in those decisions a consistent pattern of the use of a breach of contract as a lever to obtain advantage for the party committing the breach in relation to the other party, i.e., the breach of contract has an extortionate quality that gives it the rancid flavor of unfairness. In the absence of conduct having that quality, a failure to perform obligations under a written lease, even though deliberate and for reasons of self-interest, does not present an occasion for invocation of c. 93A remedies. Conventional damages achieve the goal of compensation, particularly because written leases often, as here, provide that the landlord may recover the legal expenses of pursuit, plus interest at the rate of 12 percent.

Atkinson v. Rosenthal, 33 Mass. App. Ct. at 226; *see Kobayashi v. Orion Ventures, Inc.*, 42 Mass. App. Ct. 492, 505 (1997) (landlord not liable under Chapter 93A for breach of noncompetition clause of lease). *But see Mass. Emp'rs Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 42 (1995) (criticizing phrase "rancid flavor of unfairness" in *Atkinson*, and emphasizing that "the nature of challenged conduct and . . . the purpose and effect of that conduct [are] the crucial factors in making a G.L. c. 93A fairness determination").

Federal Cases

Likewise, federal courts have referenced the *PMP Associates* test in declining to find liability in such cases as *Damon v. Sun Co.*, 87 F.3d 1467 (1st Cir. 1996) and *Industrial General Corp. v. Sequoia Pacific Systems Corp.*, 44 F.3d 40 (1st Cir. 1995). *Cf. A.F.M. Corp. v. Corp. Aircraft Mgmt.*, 626 F. Supp. 1533, 1549–50, 1552 (D. Mass. 1985) (actions based on defamation and interference with contract may be brought under G.L. c. 93A but may be defeated by a claim of qualified immunity).

After reviewing numerous decisions, the federal appellate court in *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47 (1st Cir. 1998) stated the following:

> These developments . . . will require the Massachusetts courts to give greater definition and clarity to the parameters of § 11 liability . . . . Mere failure to pay a bill, standing alone, does not, it appears, give rise to such liability. Where there is a good faith dispute over where payment is actually owed, and that dispute is clearly articulated it also appears there is no Chapter 93A liability. . . . We leave to the development of state law where the lines will be drawn in these "the check is in the mail" type cases.

Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d at 56.

In *Massachusetts School of Law v. American Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998), the court of appeals said that, for defendants to be liable under Chapter 93A, their conduct "must be not only wrong, but also egregiously wrong—and this standard calls for determinations of egregiousness well beyond what is required for most common law claims." *Mass. Sch. of Law v. Am. Bar Ass'n*, 142 F.3d 26, 41 (1st Cir. 1998) (citation omitted). In assessing the activities of one defendant in particular, the court found that they did not "abridge any legal duty or bedrock concept of unfairness, and are not so 'unethical, oppressive, or unscrupulous' as to be actionable under Chapter 93A." *Mass. Sch. of Law v. Am. Bar Ass'n*, 142 F.3d at 42–43 (quoting *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975)).

Likewise, in *Henry v. National Geographic Society*, 147 F. Supp. 2d 16 (D. Mass. 2001), the defendant allegedly violated Chapter 93A by unlawfully reproducing the plaintiff's photographs. National Geographic argued in response that all rights of the plaintiff's rights in the photographs had been conveyed to the magazine. The court concluded that "[r]egardless of the extent of the rights transferred, National Geographic's alleged conduct was not so unscrupulous and intolerable [as] to rise to the level necessary to support a Chapter 93A claim." *Henry v. Nat'l Geographic Soc'y*, 147 F. Supp. 2d at 21.

In *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6 (1st Cir. 1999), the plaintiff brought suit over the defendant's termination of its exclusive sales representative relationship. Citing the *PMP Associates* test, the court concluded that there was no evidence of conduct that would violate Chapter 93A and reiterated that a refusal to deal was not a violation.

In *Anoush Cab, Inc. v. Uber Technologies, Inc.*, 8 F.4th 1, 20–21 (1st Cir. 2021), the U.S. Court of Appeals for the First Circuit reviewed the District Court's finding that plaintiff taxi medallion holders failed to show that Uber violated Chapter 93A upon rolling out its mobile application ridesharing program in the Boston marketplace. After a thorough recounting of the evolution of Chapter 93A jurisprudence, the court noted that the District Court properly applied a standard that was consistent with the *PMP Associates* test and subsequent cases. *Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th at 19–20. The court affirmed the District Court's finding that Uber, in entering the Boston marketplace with its new ridesharing program, had "avoided acting 'unscrupulously' or with the level of 'rascality' necessary to sustain a Chapter 93A claim." *Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th at 21. Specifically, Uber entered the market only after learning that other ridesharing companies were already operating in Boston. *Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th at 20. Also, Uber sought guidance from the Boston mayor's office regarding whether the city intended on enforcing its "taxi rules" on ridesharing companies, which the city ostensibly could have used to penalize and deter companies like Uber from operating within the city. *Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th at 21. Uber also notified the mayor's office regarding a new corporate policy stating that Uber would launch its ridesharing program in cities where there is "tacit regulatory approval." *Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th at 21. The mayor's office responded, "just launch." *Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th at 21. Finally, the First Circuit agreed with the District Court that the fact "[t]hat the City failed to take a definitive regulatory position publicly does not render Uber's response an 'extreme or egregious business wrong.'" *Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th at 21.

§ 2.3.3 Unconscionable Acts May Be Unfair

As discussed above, many Massachusetts cases have relied on the commission's *S&H* test. One of the seminal cases on unfairness, however, *Commonwealth v. DeCotis*, 366 Mass. 234 (1974), did not specifically apply the *S&H* test. The court did recognize the *S&H* public policy concern by quoting Judge Learned Hand's statement that the purpose of the FTC was "in part . . . to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." *Commonwealth v. DeCotis*, 366 Mass. at 242 (quoting *FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd in part*, 302 U.S. 112 (1937)); *see also Columbia Chiropractic Grp., Inc. v. Tr. Ins. Co.*, 430 Mass. 60, 61 (1999) (submitting unreasonable or unnecessary medical bills and litigating to recover on those bills violated G.L. c. 93A).

The defendants in *DeCotis* were owners of a mobile home park who charged the occupants of the park a resale fee when they sold their mobile homes. The defendants provided no goods or services in exchange for the fee. The court said that the defendants "undertook to impose an arbitrary provision on persons of limited means and limited choice for residences. The defendants were able to collect the resale fees solely because their tenants were in a position in which they had no reasonable alternative but to pay and to agree to pay." *Commonwealth v. DeCotis*, 366 Mass. at 243.

The Supreme Judicial Court rejected the defendants' argument that the fee could not be illegal because such fees were uniformly collected by park operators. In addition, the court rejected the claim that statutory authorization to collect such fees in exchange for selling an occupant's mobile home precluded liability. *Commonwealth v. DeCotis*, 366 Mass. at 240. The court found that the Uniform Commercial Code's prohibition against unconscionable contracts provided a reasonable analogy and that the collection of fees was unconscionable. Consequently, the court held that "[t]he extraction of a resale fee for no services rendered in these circumstances was an unfair act or practice." *Commonwealth v. DeCotis*, 366 Mass. at 243.

The attorney general's regulations also recognize that unconscionable acts may be a violation of Chapter 93A. According to 940 C.M.R. § 3.16(1), "an act or practice is a violation of Chapter 93A, Section 2 if: (1) it is oppressive or otherwise unconscionable in any respect." In *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 779 (1986), a company official misrepresented that he did not have possession of a computer subscription list that induced the opposing party to drop its lawsuit. Citing 940 C.M.R. § 3.16(1), the court said that this was "the type of misconduct that . . . falls within the concept of 'unfair acts' prohibited by G.L. c. 93A." In *Penney v. First National Bank of Boston*, 385 Mass. 715, 720 (1982), the court held that repossession without notice was neither unconscionable nor oppressive under Chapter 93A. For discussions about unconscionability without reference to Chapter 93A, see also *Linkage Corp. v. Trustees of Boston University*, 425 Mass. 1 (1997); W*aters v. Min Ltd.*, 412 Mass. 64 (1992); *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284 (1980); and *Commonwealth v. Gustafsson*, 370 Mass. 181 (1976).

§ 2.3.4 Balancing the Equities

Other Massachusetts cases have focused on a balancing of the equities analysis. This approach has generally favored the defendant (frequently a bank or an insurer) by emphasizing the knowledge or bargaining power of the plaintiff. In *Mechanics National Bank v. Killeen*, 377 Mass. 100 (1979), the court held that the unlawful sale of the plaintiff's collateral was not unfair under G.L. c. 93A. "Balancing the equities in the relationship of the parties, a major factor in determining unfairness under G.L. c. 93A, § 2, we conclude that the bank's conduct was not unfair. We discern neither an overzealous seller taking economic advantage nor a defenseless consumer." *Mechs. Nat'l Bank v. Killeen*, 377 Mass. at 110.

Likewise, in *Swanson v. Bankers Life Co.*, 389 Mass. 345 (1983), the court rejected Chapter 93A liability because of the "equities between the parties," even though it had said that the insurer was negligent in failing to investigate the plaintiff's claim. *Swanson v. Bankers Life Co.*, 389 Mass. at 349–50. "What a defendant knew or should have known may be relevant in determining unfairness. Similarly, a plaintiff's conduct, his [or her] knowledge, and what he [or she] reasonably should have known may be factors in determining whether an act or practice is unfair." *Swanson v. Bankers Life Co.*, 389 Mass. at 349 (citation omitted); *see Linkage Corp. v. Trs. of Bos. Univ.*, 425 Mass. at 26; *New England Fin. Res. v. Coulouras*, 30 Mass. App. Ct. 140, 148 (1991) (court rejected Section 11 liability for borrowers who, "acting under the advice of counsel, knew precisely what they were doing"); *Madan v. Royal Indem. Co.*, 26 Mass. App. Ct. 756, 763–64 (1989) (court rejected plaintiff's claim where plaintiff was "an experienced and successful lawyer" familiar with real estate law and the Statute of Frauds); *see also Pelletier v. Chicopee Sav. Bank*, 23 Mass. App. Ct. 708 (1987) (court rejected unfairness claim against a bank where the inspection report required by the bank failed to disclose structural damage); *Damon v. Sun Co.*, 87 F.3d 1467, 1484 n.9 (1st Cir. 1996) ("Regardless of the level of the parties' sophistication, we apply the well-developed standard for section 11 actions between two persons engaged in business. Of course, their relative levels of sophistication may enter into the fact-based analysis the court carries out in weighing whether a party's act was unfair or deceptive."). The relative positions of the parties were also recognized in *New England Financial Resources v. Coulouras*, 30 Mass. App. Ct. 140 (1991).

However, occasionally "balancing the equities" favors the plaintiff. For example, in *Green v. Blue Cross & Blue Shield of Massachusetts, Inc.*, 47 Mass. App. Ct. 443 (1999), the court held that an insurer violated Chapter 93A by failing to tell the insured how much the insured would need to pay for a covered procedure. The court said the insured's attempts to obtain information should not require the utterance of a secret word ("price") if the nature of the inquiry is reasonably clear. The court stated that

> [i]t has long been established . . . that an insurer has an obligation to act in good faith, [and] to "exercise common prudence. . . . The insurer will not be held to prophesy, but it will not be ex-

> cused for indifference." The Consumer Protection Act . . . was a legislative attempt "to regulate business activities with the view to providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities."

Green v. Blue Cross & Blue Shield of Mass., Inc., 47 Mass. App. Ct. at 447 (citations omitted).

In *Commonwealth v. Chatham Development Co.*, 49 Mass. App. Ct. 525, 526–27 (2000), a major landlord appended a provision to its leases requiring tenants to pay a constable fee if their rent payment was late. The court held that this provision violated Chapter 93A, reasoning that "to say that costs may be assessed by agreement and awarded before the close of proceedings is more than stretch. It is the function of the court, not the litigants, to make that determination on the basis of statutory authority." *Commonwealth v. Chatham Dev. Co.*, 49 Mass. App. Ct. at 527.

In *Industrial General Corp. v. Sequoia Pacific Systems Corp.*, 849 F. Supp. 820, 825–26 (D. Mass. 1994), the court appeared to apply a balancing test that weighed in the plaintiff's favor when it upheld a jury verdict that a builder of computerized voting machines acted unfairly, but not deceptively, by failing to disclose to its supplier that the contractor responsible for paying the supplier was financially unstable. The court focused on the degree of trust and dependence that the supplier had with the builder. Since the builder was responsible for the entire relationship between the parties, "this was not the 'arm's length' transaction as portrayed by [the builder]. . . . [The supplier] . . . was naive, inattentive and altogether too trusting." *Indus. Gen. Corp. v. Sequoia Pac. Sys. Corp.*, 849 F. Supp. at 824–26.

In *NASCO v. Public Storage, Inc.*, 127 F.3d 148 (1st Cir. 1997), the court rejected the defendant's argument that it was not liable under Chapter 93A. The court said that

> PSI's position seems contrary to the intent of chapter 93A. Vulnerable, struggling companies in bad bargaining positions are more likely to need the protection of chapter 93A than robust, successful companies. If we adopt PSI's position, impecunious businesses, unable to pay their bills and trying to sell their assets in order to do so, would be placed on a different footing under chapter 93A than more solvent plaintiffs.

NASCO v. Pub. Storage, Inc., 127 F.3d at 154.

Earlier federal court decisions have also used all three approaches. In *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 684 F. Supp. 1138, 1143 (D. Mass. 1988), the court cited to the *S&H* test and the balancing of the equities test described in *Killeen*, and concluded that cable interception by three tavern owners was unfair. In *Puretest Ice Cream, Inc. v. Kraft, Inc.*, 614 F. Supp. 994, 996–97 (D. Mass. 1985), the court reviewed all three tests to determine whether a party had a right to a jury trial under Chapter 93A.

§ 2.3.5 Attorney General's Regulations

The practitioner should also remember that the attorney general's regulations provide guidance in determining whether a particular practice is unfair. *See* 940 C.M.R. § 3.00. The attorney general's authority to promulgate regulations, which shall have "the force of law," was upheld in *Purity Supreme, Inc. v. Attorney General*, 380 Mass. 762, 775 (1980). In *Purity Supreme*, the court noted that "[s]tates are not forbidden . . . from adopting rules more restrictive than those of the FTC." *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. at 780; *see Brennan v. Carvel Corp.*, 929 F.2d 801, 812 (1st Cir. 1991) ("[i]f valid, the attorney general's regulations pursuant to section 2(c) of Chapter 93A have the 'force of law'") (citing *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762 (1980)).

In *American Shooting Sports Council, Inc. v. Attorney General*, 429 Mass. 871 (1999), the Supreme Judicial Court determined that the attorney general had the authority to promulgate regulations dealing with handguns. The attorney general's regulatory power is not limited to issues of marketing, disclosure, or economic harm but can extend to the sale of a product if the product is defective in ways that the purchaser would not anticipate. *Am. Shooting Sports Council, Inc. v. Attorney Gen.*, 429 Mass. at 882–83. The attorney general is also empowered to apply Chapter 93A to acts and practices otherwise declared unlawful. *Am. Shooting Sports Council v. Attorney Gen.*, 429 Mass. at 876.

As recognized by the Appeals Court in *Commonwealth v. Amcan Enterprises, Inc.*—a case dealing with deceptive business solicitations—"Massachusetts courts need not adopt Federal interpretations in their entirety but must only be guided by those interpretations. Thus, the Attorney General may adopt regulations that are more restrictive than the rules adopted by the Federal Trade Commission, as long as they are not inconsistent with those rules." *Commonwealth v. Amcan Enters., Inc.*, 47 Mass. App. Ct. 330, 335 n.9 (1999).

One of the standards of unfairness discussed in *Commonwealth v. DeCotis*, 366 Mass. 234 (1974), is articulated in 940 C.M.R. § 3.16(1). The regulation states that "[w]ithout limiting the scope of any other rule, regulation or statute, an act or practice is a violation of Chapter 93A, Section 2 if . . . [i]t is oppressive or otherwise unconscionable in any respect." *See Waters v. Min Ltd.*, 412 Mass. 64, 67 (1992); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 778 (1986); *see also Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284 (1980) (discussing unconscionability).

Acts or practices that fail to comply with existing statutes, rules, regulations, or law meant for the protection of the public's health, safety, and welfare are prohibited by 940 C.M.R. § 3.16(3). This regulation has been applied in several contexts. For example, in *MacGillivary v. W. Dana Bartlett Insurance Agency*, 14 Mass. App. Ct. 52, 60–61 (1982), the court held that an insurance agent's failure to procure an insurance policy from a licensed insurer, in violation of a criminal statute, was a violation of G.L. c. 93A pursuant to 940 C.M.R. § 3.16(3), although the defendant's actions were not otherwise unfair. *See also Klairmont v. Gainsboro Rest., Inc.*, 465 Mass. 165, 170 (2013) (the defendant restaurant's violations of the building code leading to the death of a patron was held a violation of Chapter 93A); *Guenard v. Burke*, 387 Mass. 802, 809 (1982) (held lawyer-defendant's reliance on a contingent fee arrangement that violated a Supreme Judicial Court rule to be an unfair or deceptive act or practice as a matter of law); *Piccuirro v. Gaitenby*, 20 Mass. App. Ct. 286, 290 (1985) (defendant's failure to comply with the regulations of the environmental code in sale of vacant land was held also a violation of Chapter 93A, pursuant to 940 C.M.R. § 3.16(3)).

Note, however, that even if the plaintiff establishes a statutory violation subject to 940 C.M.R. § 3.16(3) and, thus, an unfair or deceptive act for purposes of Chapter 93A, relief may be denied if the plaintiff fails to establish another essential element of a Chapter 93A claim. *See, e.g.*, *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109, 120 (1st Cir. 2014) ("the Massachusetts Attorney General's regulatory authority to 'make rules and regulations' interpreting Chapter 93A, § 2(a) . . . does not extend so far as to permit her to allow a plaintiff to show that a defendant has violated an independent statute in lieu of satisfying Chapter 93A's substantive requirements of showing [both that] the complained-of act was [unfair or deceptive] *and* that it occurred in trade or commerce") (citing *Klairmont v. Gainsboro Rest., Inc.*, 465 Mass. at 174); *see also Hebert v. Vantage Travel Serv., Inc.*, No. 17-cv-10922-DJC, 2021 WL 2516076, at *2 (D. Mass. June 18, 2021) ("where, as here, regulations set out that an act or practice is per se unfair or deceptive, a plaintiff still must satisfy other elements of the Chapter 93A claim (e.g., causation and injury)").

In a 2006 decision, the Supreme Judicial Court—distinguishing the earlier case of *Leardi v. Brown*, 394 Mass. 151 (1985) (illegal lease terms impeding the exercise of tenants' rights)—emphasized that to sustain a cause of action under Chapter 93A, § 9, the unfair or deceptive act of the defendant must have caused the plaintiff some kind of "loss—whether that loss be economic or non-economic." *Hershenow v. Enter. Rent-A-Car Co. of Bos.*, 445 Mass. 790, 802 (2006). The plaintiffs in *Hershenow* rented cars from a car rental company using lease forms with collision damage waiver provisions that failed to conform to the requirements of G.L. c. 90, § 32E½, but the plaintiffs failed to show that they had experienced an injury as a result of the company's practice. "[P]roving a causal connection between a deceptive act and a loss to the consumer," the court stated, "is an essential predicate for recovery under our consumer protection statute." *Hershenow v. Enter. Rent-A-Car Co. of Bos.*, 445 Mass. at 791; *accord WHDH-TV v. Comcast Corp.*, No. 16-10494-RGS, 2016 WL 2858780, at *8 (D. Mass. May 16, 2016); *see also Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 503 (2013) (declining to follow *Leardi* to the extent that it could be read to allow recovery for an invasion of legal rights alone; the plaintiff must prove that there is "a distinct injury or harm that arises from the claimed unfair or deceptive act").

Hershenow was distinguished in *Iannacchino v. Ford Motor Co.*, 451 Mass. 623 (2008). In contrast to the plaintiffs in *Hershenow*—who would have been harmed only if the car rental company sought to enforce the improper waiver provisions following an accident—the plaintiffs in *Iannacchino* alleged that they had purchased vehicles that failed to comply with federal safety regulations. If one accepts the plaintiffs' allegations as true, they had thus "paid for more (viz., safety regulation-compliant vehicles) than they received." *Iannacchino v. Ford Motor Co.*, 451 Mass. at 886. "Such an overpayment," the court found, "would represent an economic loss—measurable by the cost to bring the vehicles into compliance—for which the plaintiffs could seek redress under G.L. c. 93A, § 9." *Iannacchino v. Ford Motor Co.*, 451 Mass. at 886–87; *cf. Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250 (1st Cir. 2010) (distinguishing the car owner plaintiffs in *Iannacchino* from a plaintiff who had purchased and entirely used up an allegedly unsafe canine heartworm medication without the dog suffering any ill effects).

Practice Note

In addition to applications of 940 C.M.R. § 3.16(3), note that a number of statutes in the Commonwealth include provisions expressly stating that a violation of the statute constitutes a violation of Chapter 93A. An example is found in *Reddish v. Bowen*, 66 Mass. App. Ct. 621 (2006), where failure to comply with a zoning setback requirement was found to be a violation of a "building law" for purposes of G.L. c. 142A, § 17(10),

> which states that such a violation "shall constitute an unfair or deceptive act under the provisions of [Chapter 93A]." *Reddish v. Bowen*, 66 Mass. App. Ct. at 629; *accord Williams v. Perrault*, 82 Mass. App. Ct. 1117 (2012) (unpublished decision; text available at 2012 WL 4936612).

Neither Chapter 93A nor 940 C.M.R. § 3.16(3) applies to claims subject to the medical malpractice statutes, G.L. c. 231, §§ 60B–60E. *Darviris v. Petros*, 442 Mass. 274, 282–83 (2004). Because the legislature has expressly covered the field of medical malpractice, extending the attorney general's rulemaking power to include medical malpractice claims within the scope of 940 C.M.R. § 3.16(3) "would undermine the careful policy choices articulated by the Legislature." *Darviris v. Petros*, 442 Mass. at 283. Chapter 93A is applicable to medical care providers only to the extent that an allegation concerns an entrepreneurial or business aspect of their practice. *Darviris v. Petros*, 442 Mass. at 279–80.

In *Danusis v. Longo*, 48 Mass. App. Ct. 254, 263 (1999), the court held that tenants of a manufactured housing complex (mobile home park) could sue a real estate developer under Chapter 93A. The developer was in violation of the Massachusetts Manufactured Housing Act, G.L. c. 140, §§ 32A–32S, by controlling and managing the lots without a license; under the terms of the act, a failure to comply with its provisions constitutes a violation of Chapter 93A. G.L. c. 140, § 32L(7).

It has been noted, however, that since every unlawful act is not unfair or deceptive, "[t]he scope of [940 C.M.R. § 3.16(3)] is unclear." *Reiter Oldsmobile, Inc. v. Gen. Motors Corp.*, 378 Mass. 707, 710–11 (1979). In *Reiter*, the court rejected the plaintiff's claim for relief under Section 11 for a violation of a franchise agreement because G.L. c. 93B provided the exclusive remedy, despite the language of 940 C.M.R. § 3.16(3). *See also MacGillivary v. W. Dana Bartlett Ins. Agency*, 14 Mass. App. Ct. 52, 59 (1982).

In *Lemrise v. Koska*, C.A. No. 93–00243, 1996 WL 496961 (Mass. Super. Ct. Aug. 2, 1996), the purchaser of a home sued the builder for problems with the septic system and asserted that the builder had violated 940 C.M.R. § 3.16(2) and (3). *Lemrise v. Koska*, 1996 WL 496961, at *1–2. The court rejected the claim under 940 C.M.R. § 3.16(3) because the builder's failure to comply with the sanitary codes was barred by the statute of repose, G.L. c. 260, § 2B, which limits actions brought for damages arising out of negligent design of improvement to property. *Lemrise v. Koska*, 1996 WL 496961, at *2–3. However, the court permitted the plaintiff to pursue an action under 940 C.M.R. § 3.16(2) for failing to disclose a fact that may have influenced the buyers not to enter into the transaction. *Lemrise v. Koska*, 1996 WL 496961, at *4. The statute of repose did not prevent this action, the court said, because the builder was also a seller of the property. *Lemrise v. Koska*, 1996 WL 496961, at *4.

In *Duclersaint v. Federal National Mortgage Ass'n*, 427 Mass. 809 (1998), the Supreme Judicial Court rejected the argument that a violation of a foreclosure statute was a per se violation of Chapter 93A. *See also Rosseau v. CitiMortgage, Inc.*, 87 Mass. App. Ct. 1117 (2015) (unpublished decision; text available at 2015 WL 1880320) (no deception found on the part of the foreclosing mortgagee). In these cases, neither the Supreme Judicial Court nor the Appeals Court discussed the attorney general's regulations. However, acts that violate the FTC Act, the Federal Consumer Credit Protection Act, or any other federal consumer protection statutes within the purview of Section 2 are prohibited by 940 C.M.R. § 3.16(4). The general regulations also cover misrepresentations, door-to-door sales, and landlord-tenant issues, among other things. *See* 940 C.M.R. § 3.17; *see also Spaulding v. Young*, 32 Mass. App. Ct. 624, 627 (1992); *Squeri v. McCarrick*, 32 Mass. App. Ct. 203, 207 n.11 (1992).

The attorney general has specific regulations covering a broad range of services, including

- nursing homes, 940 C.M.R. § 4.00;
- motor vehicles, 940 C.M.R. § 5.00;
- retail advertising, 940 C.M.R. § 6.00;
- debt collection, 940 C.M.R. § 7.00;
- health care insurers, 940 C.M.R. § 9.00;
- the sale of travel services, 940 C.M.R. § 15.00;
- manufactured housing community regulations, 940 C.M.R. § 10.00;
- handgun sales, 940 C.M.R. § 16.00;
- sales and distribution of cigarettes and smokeless tobacco products, 940 C.M.R. § 21.00; and
- sales and distribution of cigars, 940 C.M.R. § 22.00.

§ 2.4 REGULATIONS OF THE DIVISION OF BANKS AND LOAN AGENCIES

In addition to the attorney general's regulation of debt collection, 940 C.M.R. § 7.00, the Division of Banks and Loan Agencies revamped its regulations applicable to debt collectors and third-party loan servicers. 105 C.M.R. § 18.00. The regulations in Title 105 apply to firms in the business of collecting debts and servicing loans and, generally, not to creditors themselves or attorneys collecting debts on behalf of a client. 105 C.M.R. § 18.02. Creditors and attorneys remain subject to the attorney general's regulations, 940 C.M.R. § 7.00.

§ 2.4.1 The 1980 FTC Unfairness Statement—Unjustified Consumer Injury

The court's recognition in *Commonwealth v. DeCotis*, 366 Mass. 234 (1974), that unfairness may result where a consumer cannot avoid the injury, and the court's balancing of the equities analysis in *Mechanics National Bank of Worcester v. Killeen*, 377 Mass. 100 (1979), foreshadowed a December 17, 1980, FTC policy statement on unfairness (referred to as the "unfairness statement"). The unfairness statement, which was set forth in a letter to Senators Ford and Danforth in response to a congressional request to define unfairness, articulated a "more detailed" standard than the *S&H* test. The text of this letter is reprinted in H.R. Rep. No. 156, Pt. 1, 98th Congress, 1st Sess. 33–40 (1983) and (1969–1983 Transfer Binder) Trade Reg. Rep. (CCH) ¶ 50,421 at 55,947–51, and appended to *In re International Harvester Co.*, 104 F.T.C. 949, 1070–76 (1984). It is also available at https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

The FTC said in the unfairness statement that "unjustified consumer injury" is the primary focus of the FTC Act and the most important of the three *S&H* criteria. *In re Int'l Harvester Co.*, 104 F.T.C. at 1073. The FTC stated that "[t]o justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." *In re Int'l Harvester Co.*, 104 F.T.C. at 1073.

The unfairness statement provided that the injury should not be speculative and would generally involve monetary harm or unwarranted health or safety risks. An injury may be sufficiently substantial if it does a small harm to a large number of people or if it raises a significant risk of concrete harm. *In re Int'l Harvester Co.*, 104 F.T.C. at 1073 n.12. The FTC said it was aware of the trade-offs that are necessary because most business practices entail a mixture of economic and other costs and benefits for consumers, and it would not find a practice unfair unless it is "actually injurious in its net effects." *In re Int'l Harvester Co.*, 104 F.T.C. at 1075.

The third factor—whether consumers could reasonably have avoided the injury—recognizes that "certain types of sales techniques may prevent consumers from effectively making their own decision." *In re Int'l Harvester Co.*, 104 F.T.C. at 1074. Practices that "undermine an essential precondition to a free and informed consumer transaction and, in turn . . . a well-functioning market" are properly banned as an unfair practice. *In re Int'l Harvester Co.*, 104 F.T.C. at 1074.

Comparing the 1980 unfairness statement to *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the commission said that whether the action violates public policy (the first *S&H* standard) is primarily used as a means of providing additional evidence of the degree of consumer injury. *In re Int'l Harvester Co.*, 104 F.T.C. at 1075. The second *S&H* element—whether the conduct was unethical or unscrupulous—was largely duplicative because such conduct will injure consumers or violate public policy. *In re Int'l Harvester Co.*, 104 F.T.C. at 1076. "The Commission wishes to emphasize the importance of examining outside statutory policies and established judicial principles to help . . . ascertain whether a particular form of conduct does in fact tend to harm consumers." *In re Int'l Harvester Co.*, 104 F.T.C. at 1076.

In *In re International Harvester Co.*, 104 F.T.C. 949 (1984), the commission first applied the unfairness statement standards. The FTC reviewed the company's failure to notify consumers of the hidden defect of "fuel geysering" in its gasoline-powered tractors. If the fuel cap became dislodged or was removed when the tractor became hot, fuel vapors and liquid fuel could shoot out of the tank, spraying the operator or the tractor with gasoline, which might ignite. *In re Int'l Harvester Co.*, 104 F.T.C. at 950. At the time of the FTC action, at least eleven people had been burned and one had been killed by this "fuel geysering." *In re Int'l Harvester Co.*, 104 F.T.C. at 950.

The FTC said that the failure to disclose this serious injury was unfair. *In re Int'l Harvester Co.*, 104 F.T.C. at 1064. Although only a small number of people suffered the injury, it was "substantial" because of the potential serious physical harm. *In re Int'l Harvester Co.*, 104 F.T.C. at 1064. The commission also discussed the second criterion—whether the benefits of disclosure outweighed the burdens—noting that "[t]his inquiry is particularly important in the case of pure omissions. Since the range of such omissions is potentially infinite, the range of cost-benefit ratios from actions to force

disclosure is infinite as well." *In re Int'l Harvester Co.*, 104 F.T.C. at 1064–65. However, this criterion was also satisfied because "the public has realized no benefit from Harvester's non-disclosure that is at all sufficient to offset the human injuries involved." *In re Int'l Harvester Co.*, 104 F.T.C. at 1065. Although Harvester subsequently spent almost $3 million to give effective warnings, the commission said that the "expenses were not large in relation to the injuries that could have been avoided." *In re Int'l Harvester Co.*, 104 F.T.C. at 1065.

The FTC also reviewed the third criterion, whether the injury was one that consumers could not reasonably avoid. Although operators had been told not to remove the fuel cap from a hot tractor, the FTC said that the third criterion was satisfied because "[w]hether some consequence is 'reasonably avoidable,' depends, not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps." *In re Int'l Harvester Co.*, 104 F.T.C. at 1066.

The commission then explained the difference between analyzing an unfairness case and analyzing a deception case, stating the following:

> In the assessment of unfairness . . . we conduct a full cost-benefit analysis, in which we weigh the consumer benefits of disclosures against their likely costs, and so there is less risk of an overbroad result. We can therefore take a more inclusive view of the information that must be disclosed under this approach.

In re Int'l Harvester Co., 104 F.T.C. at 1062. For a discussion of deception by Harvester, see the FTC's Position on Deception after 1983.

Federal Trade Commission Circuit Court decisions have also used the standards articulated in the unfairness statement. In *American Financial Services Associates v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (*AFS*), the court upheld the FTC's promulgation of the Credit Practices Rule. The court said that the rule fell within the commission's unfairness authority pursuant to the unfairness statement and was consistent with congressional policy and prior FTC precedent. *Am. Fin. Servs. Assocs. v. FTC*, 767 F.2d at 972. The court rejected the association's attempt to limit the FTC's unfairness jurisdiction to conduct involving deception, coercion, or the withholding of material information. *Am. Fin. Servs. Assocs. v. FTC*, 767 F.2d at 982.

Applying the three-tiered test, the *AFS* court found that the use of security interests in household goods and wage assignments resulted in a significant risk of substantial economic harm and a potential deprivation of consumers' legal rights. *Am. Fin. Servs. Assocs. v. FTC*, 767 F.2d at 975. The court also found that the prohibition would have a marginal impact on the availability of credit, which was overshadowed by the greater risk of permitting such security interests and wage assignments. *Am. Fin. Servs. Assocs. v. FTC*, 767 F.2d at 976. Finally, the court agreed that consumers could not reasonably avoid the prohibited practices because they cannot shop and bargain and that default is usually caused by forces beyond a debtor's control. *Am. Fin. Servs. Assocs. v. FTC*, 767 F.2d at 976.

In *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988), the court also relied on the Unfairness Statement and *AFS* to uphold the FTC's finding that Orkin had acted unfairly by unilaterally increasing the annual maintenance fees of more than 200,000 termite-control contracts. Orkin's advertisements assured consumers that the annual renewal fees would not increase. *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1357. Consumers were also told that, as long as they paid their annual fee, a guarantee remained in effect for the lifetime of their structure. Five years after making such promises, Orkin notified its customers that fees would be raised a minimum of $25 or 40 percent. *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1358. The Eleventh Circuit rejected Orkin's claim that a "mere breach of contract" that does not involve deception or fraudulent behavior is outside the FTC's unfairness jurisdiction. *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1363. The court agreed that there was "substantial" injury because Orkin's breach generated more than $7 million in revenues it was not entitled to receive. *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1365. As the commission noted, although the actual injury to individual consumers may be small, "this does not mean that such injury is not 'substantial.'" *Orkin Exterminating Co. v. FTC*, 849 F.2d at 1365.

§ 2.4.2 Application of the 1980 FTC Unfairness Statement in Massachusetts

In *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 192 (1990)—the only Massachusetts decision (or one of only relatively few) to refer to FTC cases issued since the unfairness statement—the plaintiff was injured by the defendant's printing press. Although the court did not discuss the unfairness analysis, it noted that the failure to warn of a defective or dangerous condition was treated as "unfair" in *In re Int'l Harvester Co.*, 104 F.T.C. 949 (1984). *Maillet v. ATF-Davidson Co.*, 407 Mass. at 192 (citing *In re Int'l Harvester Co.*, 104 F.T.C. at 1064–67).

Connecticut courts have recognized the substantial injury test. For example, in *Web Press Services Corp. v. New London Motors, Inc.*, 533 A.2d 1211 (Conn. 1987), the court upheld the finding that a dealer did not violate the Connecticut Unfair Trade Practices Act (CUTPA) when it told a consumer that a used vehicle was "excellent" and in "mint" condition. The court said that $300 for repairs was "not substantial," since it equaled 3.7 percent of the car's cost. *Web Press Servs. Corp. v. New London Motors, Inc.*, 533 A.2d at 1214; *see also McLaughlin Ford, Inc. v. Ford Motor Co.*, 473 A.2d 1185, 1192 (Conn. 1984) (court upheld the rejection of a dealer's claim of unfair competition against a manufacturer who awarded a dealership to its competitor, finding it was reasonable to conclude that plaintiff's loss was outweighed by continuing benefits to consumers from competition).

Other Connecticut cases continue to use the *S&H* test, especially the public policy component. For example, in *Halloran v. Spillane's Servicenter, Inc.*, 587 A.2d 176, 183 (Conn. Super. Ct. 1990), the court held that a towing company violated CUTPA by requiring full payment for towing and storage before returning illegally parked cars to their owners. *See, e.g., A-G Foods, Inc. v. Pepperidge Farm, Inc.*, 579 A.2d 69 (Conn. App. Ct. 1990).

The Connecticut federal district court reviewed the standards applicable in CUTPA cases in *Aurigemma v. Arco Petroleum Products Co.*, 734 F. Supp. 1025, 1028 (D. Conn. 1990), and again cited to the *S&H* test. The court, however, thereafter quoted from *McLaughlin Ford, Inc. v. Ford Motor Co.*, 473 A.2d 1185, 1192 n.15 (Conn. 1984), and said, "All three criteria do not need to be satisfied: a practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Aurigemma v. Arco Petroleum Prods. Co.*, 734 F. Supp. at 1029. The court found the defendant's failure to comply with the FTC franchise disclosure requirements a violation of CUTPA. *Aurigemma v. Arco Petroleum Prods. Co.*, 734 F. Supp. at 1031–32; *see also Atl. Richfield Co. v. Canaan Oil Co.*, 520 A.2d 1008, 1011–13 (Conn. 1987) (discussing both tests).

§ 2.5 FINDING DECEPTION

This section discusses case law that has construed the element of deception in Chapter 93A claims.

§ 2.5.1 Tendency or Capacity to Deceive Does Not Require Reliance

General Laws Chapter 93A prohibits all deceptive acts or practices, as well as those that are unfair. Deceptive conduct under G.L. c. 93A has a distinctly different meaning than unfairness. *Puretest Ice Cream, Inc. v. Kraft, Inc.*, 614 F. Supp. 994, 997 (D. Mass. 1985). The Supreme Judicial Court has said that "an act or practice is deceptive if it possesses 'a tendency to deceive.'" *Leardi v. Brown*, 394 Mass. 151, 156 (1985) (quoting *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979)). "The tendency or capacity to deceive" standard can be found throughout the attorney general's regulations. *See* 940 C.M.R. §§ 3.04 (deceptive pricing), 3.05 (deceptive claims), 3.05(1), 3.09 (door-to-door sales), 3.10 (career schools). However, a person who acts in accordance with an earnestly held interpretation of a document or the law does not engage in deception. *Nissan Autos. v. Glick*, 62 Mass. App. Ct. 302, 312 (2004).

Since plaintiffs need to prove only that the defendants' actions had a "tendency or capacity to deceive," they do not need to show actual reliance. For example, in *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 690–91 (1975), the plaintiff alleged that the dealership failed to honor its promises to repair the defects in the car it sold to the plaintiff and failed to disclose various defects in the car. Distinguishing the Chapter 93A cause of action from those for deceit and fraud, the court said, "[I]n the statutory action proof of actual reliance by the plaintiff on a representation is not required." *Slaney v. Westwood Auto, Inc.*, 366 Mass. at 703; *see also Dalis v. Buyer Adver., Inc.*, 418 Mass. 220, 225 (1994) (citing *Slaney* for the proposition that "[u]nlike a traditional common law action for fraud, consumers suing under c. 93A need not prove actual reliance on a false representation").

In *International Fidelity Insurance Co. v. Wilson*, 387 Mass. 841 (1983), a Section 11 case, an insurance company brought an action against a contractor and others for deceptive acts that induced it to issue an indemnity bond. The defendants argued that the plaintiff had not met its burden of proof. The court said that

> [the defendants'] argument breaks down at several points. First, they appear to argue that a cause of action under G.L. c. 93A is restricted by the traditional limitations of the common law actions for fraud and deceit; the argument focuses on the adequacy of [the plaintiff's] proof of actual reliance. This focus is inappropriate. This court has rejected the proposition that a plaintiff must show proof of actual reliance.

Int'l Fid. Ins. Co. v. Wilson, 387 Mass. at 850; *accord Fraser Eng'g Co. v. Desmond*, 26 Mass. App. Ct. 99, 104 (1988) ("Nor is proof of actual reliance on a misrepresentation required so long as the evidence warrants a finding of a causal

relationship between the misrepresentation and the injury to the plaintiff.") (citations omitted); *Glickman v. Brown*, 21 Mass. App. Ct. 229, 236 (1985) ("To succeed on a claim under either § 9 or § 11 the plaintiffs need not offer evidence of reliance.") (citation omitted); *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536, at *14 (Mass. Super. Ct. Feb. 24, 2016) (implied misrepresentation of "less harmful" and "safer" on "light" cigarette packaging found to reasonably be expected to deceive the general public for purposes of establishing deceptive conduct under Chapter 93A without regard to whether plaintiffs actually relied on such labeling); *see also Heller Fin. v. Ins. Co. of N. Am.*, 410 Mass. 400, 409 (1991) ("We note that, while Heller need not show actual reliance on the misrepresentation, the evidence must warrant a finding that a causal relationship existed between the representation and the injury.") (citations omitted).

The FTC has also utilized the tendency- or capacity-to-deceive standard. *See FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) ("the misrepresentations were of a kind usually relied upon by reasonable and prudent persons"); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989) ("the tendency of the advertising to deceive must be judged by viewing it as a whole" (citations omitted)); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) (collecting cases) (where advertisements for Anacin and other analgesics deceptively claimed the products' superiority, the court stated, "[T]he Commission need not buttress its findings that an advertisement has the inherent capacity to deceive with evidence of actual deception"); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979) (in response to deceptive use of letters by a debt collection agency, the court stated that "[p]roof of actual deception is unnecessary to establish a violation" and that "[m]isrepresentations are condemned if they possess a tendency to deceive"); *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) ("Advertising capable of being interpreted in a misleading way should be construed against the advertiser.") (citation omitted); *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 860 (D. Mass. 1992) ("the FTC need not prove subjective reliance by each customer" to hold an individual liable for deceptive representations).

In *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977), the court reviewed an FTC order dealing with the misrepresentations of gas mileage. The manufacturer argued that the advertisements referring to "small cars" could reasonably be interpreted to refer only to six-cylinder engines and not V-8 engines. The court disagreed, stating that "[i]t is a well settled principle that advertisements may be deceptive if they have a tendency and capacity to convey misleading impressions to consumers even though other nonmisleading interpretations may also be possible." *Chrysler Corp. v. FTC*, 561 F.2d at 363 (citation omitted). For FTC cases after 1983, see the discussion of cases in § 2.5.5, The 1983 FTC Deception Statement, below. In *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312 (2018), the court stated that

> [a] person may violate G.L. c. 93A through false or misleading advertising. "Our cases . . . establish that advertising need not be totally false in order to be deemed deceptive in the context of G.L. c. 93A . . . . The criticized advertising may consist of a half-truth, or even may be true as a literal matter, but still create an overall misleading impression through failure to disclose material information."

Exxon Mobil Corp. v. Attorney Gen., 479 Mass. at 320 (quoting *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 394–95 (2004)) (footnote omitted).

In *Healy v. G/J Towing, Inc.*, No. SUCV2017-01665-BLS2, 2019 WL 7756274 (Mass. Super. Ct. Dec. 18, 2019), the plaintiff filed a putative class action alleging that the defendant, an automobile towing business, charged costs and fees to owners of towed motor vehicles in excess of the amount allowable pursuant to the local city ordinance and related statutes. The plaintiff alleged that the business practices of the defendant company violated G.L. c. 93A. The court denied the plaintiff's motion for class certification but emphasized that the plaintiff had a colorable G.L. c. 93A claim, reasoning that the defendant's assessment of towing fees in excess of the city's requirements could rise to the level of a G.L. c. 93A violation.

§ 2.5.2 Materiality

Since reliance does not need to be proven, a practice is deceptive "if it 'could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted.'" *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 777 (1980) (quoting *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37, 51 (1979)); *accord Weiner v. Rushmore Loan Mgmt. Servs., LLC*, 424 F. Supp. 3d 163, 169 (D. Mass. 2019); *see Duclersaint v. Fed. Nat'l Mortg. Ass'n*, 427 Mass. 809, 814–15 (1998) (finding no liability under Chapter 93A); *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37, 51 (1979) (motion to dismiss action against gas company for allegedly subverting rates denied); *Fraser Eng'g Co. v. Desmond*, 26 Mass. App. Ct. 99, 102–04 (1988) (defendant-developer's agent remained silent when a subcontractor's agent told plaintiff it would be paid out of insurance funds, and defendant subsequently refused to make such payments);

Mongeau v. Boutelle, 10 Mass. App. Ct. 246, 248 (1980) (broker misrepresented acreage and failed to disclose an encumbrance).

Thus, in most cases, materiality can be inferred. In *Grossman v. Waltham Chemical Co.*, 14 Mass. App. Ct. 932, 933 (1982), where the defendant was held liable for failing to disclose insect damage in its home inspection report, the court said, "The defendant's claim of lack of proximate cause is without merit . . . [because] the judge found that plaintiff 'may not have purchased' the property had he known about the . . . infestation." *Grossman v. Waltham Chem. Co.*, 14 Mass. App. Ct. at 933 (citations omitted). *But see Hogan v. Riemer*, 35 Mass. App. Ct. 360, 365 (1993) (borrower's failure to object to unexpected loan terms, at closing or during the three-day rescission period, precluded a finding that the lender violated Chapter 93A).

Materiality cannot simply be assumed, however. In *Mayer v. Cohen-Miles Insurance Agency, Inc.*, 48 Mass. App. Ct. 435 (2000), the court held that an insurer's failure to disclose that an insurance policy had a two-year suicide contestability clause was not material, since the purchaser was primarily motivated by cost. The court upheld the denial of recovery to the beneficiary after the purchaser committed suicide fifteen months after buying the policy. *See also Discover Realty Corp. v. Stephen T.*, 49 Mass. App. Ct. 535, 537–38 (2000) (with respect to whether the defendant's misrepresentation violated G.L. c. 93A, court remanded for clarification on issues of materiality, causation, and detriment).

(a) *Attorney General's Regulations on Materiality, Including Breach of Warranty*

The attorney general's regulations provide guidance as to what is "material." The regulations specify that material claims are

> claims relating to the construction, durability, reliability, manner or time of performance, safety, strength, condition, or life expectancy of such product, or financing . . . or the utility . . . or the ease with which such product may be operated, repaired, or maintained or the benefit to be derived from the use thereof.

940 C.M.R. § 3.05(1).

As discussed in § 2.3, Determining Unfairness, above, the FTC now utilizes these standards. The retail regulations refer to "material representations" in 940 C.M.R. § 6.04(1) and (2). Other claims that are material are those relating to pricing (940 C.M.R. § 3.04), "easy credit" (940 C.M.R. § 3.07), and newness (940 C.M.R. § 3.15).

One of the most important regulations relates to a breach of warranty. Section 3.08(2) states that "[i]t shall be an unfair and deceptive act or practice to fail to perform or fulfill any promises or obligations arising under a warranty." 940 C.M.R. § 3.08(2).

A warranty includes both express and implied warranties. Section 3.01 provides, in part, that "[a]n express warranty or any statement in the nature of an express warranty or guarantee includes any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." 940 C.M.R. § 3.01.

Generally, a "breach of warranty constitutes a violation of G.L. c. 93A." *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193 (1990). The court in *Maillet* held that an employee who suffered personal injury could assert a claim under Chapter 93A for breach of the implied warranty of merchantability against the manufacturer of a printing press who had sold the press to his employer. *Accord Alcan Aluminum Corp. v. Carlton Aluminum of New Eng., Inc.*, 35 Mass. App. Ct. 161, 169 (1993) ("[seller] had committed a breach of its implied and express warranties to [buyer], thereby violating G.L. c. 93A, § 2"); *Glyptal Inc. v. Engelhard Corp.*, 801 F. Supp. 887, 899 (D. Mass. 1992) ("Breaches of express and implied warranties constitute a virtual per se violation of [G.L. c. 93A, § 2].") (citation omitted); *see also Am. Shooting Sports Council, Inc. v. Attorney Gen.*, 429 Mass. 871, 877–78 (1999) (attorney general's ability to regulate handguns arises from the authority "to regulate the sale of products that are unsafe or defective in ways that a purchaser cannot foresee"; these products fail to conform to standards of merchantability and, in some cases, standards of fitness for a particular use); *Kyte v. Philip Morris, Inc.*, 408 Mass. 162, 171 (1990) (denying cigarette manufacturer's motion for summary judgment on a Chapter 93A count where plaintiffs' Chapter 93A claim was based on an alleged breach of implied warranty of merchantability).

However, in the case of a business-to-business dispute, the Supreme Judicial Court has held that 940 C.M.R. § 3.08(2) did not apply to a simple breach of warranty of contract entered into by businesses having equal bargaining power and business acumen. *Cf. Walsh Constr. Co. v. Demtech, LLC*, No. 17-cv-11082-LTS, 2020 WL 1027777, at *2 (D. Mass. Mar. 3, 2020) ("[U]nlike a consumer plaintiff under § 9, a plaintiff under § 11 needs to show something more than a

mere breach of warranty to adequately plead a Chapter 93A violation.") (quoting *Utica Nat'l Ins. Grp. v. BMW of N. Am., LLC*, 45 F. Supp. 3d 157, 160 (D. Mass. 2014)).

In *Knapp Shoes, Inc. v. Sylvania Shoe Manufacturing Corp.*, 418 Mass. 737 (1994), the court said:

> [W]e conclude that the portion of [940 C.M.R. § 3.08(2)] at issue was not intended to encompass a contract dispute between businessmen based upon a breach of the implied warranty of merchantability. . . .
>
> . . . .
>
> . . . [W]e do not mean to suggest that the breach of an implied warranty, occurring in a commercial context, can never give rise to liability under G.L. c. 93A. [This issue] . . . must be resolved by reference to general principles of liability under § 11 . . . .

Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. at 745–47 (footnote omitted); *see also Utica Nat'l Ins. Grp. v. BMW of N. Am., LLC*, 45 F. Supp. 3d 157, 160 (D. Mass. 2014) ("unlike a consumer plaintiff under [Section] 9, a plaintiff under [Section] 11 needs to show something more than a mere breach of warranty to adequately plead a Chapter 93A violation"); *cf. Limoliner, Inc. v. Dattco, Inc.*, 475 Mass. 420, 422–28 (2016) (distinguishing *Knapp* in concluding that a business entity could obtain Chapter 93A relief based on the motor vehicle repair and services regulations set forth at 940 C.M.R. § 5.05).

For other cases discussing whether a breach of warranty—express or implied—is a violation of G.L. c. 93A, see the cases cited in *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193 (1990). *See also Giannasca v. Everett Aluminum, Inc.*, 13 Mass. App. Ct. 208, 214 (1982) (failure to fulfill any promise arising under service contract warranty constitutes violation of Section 2).

(b) *FTC Cases on Materiality*

The materiality issue has also been discussed in numerous FTC cases. In *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965), the FTC challenged an ad for shaving cream. The shaving cream and sand were applied to plexiglass, which was then shaved clean with a razor. The announcer said, "[t]o prove Rapid Shave's super-moisturizing power, we put it right from the can onto this tough, dry sandpaper . . . [which] will be shaved off in a stroke." *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 376. The company had actually performed the sandpaper test but was unable to reproduce it for television. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 376, 385. The company argued, among other things, that the representation that the viewer was seeing the actual experiment was not a material factor in a purchaser's decision to buy the product. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 386–87 n.16. The court said, "[T]he public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 387 (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934)).

The court continued:

> [I]t [was not] necessary for the Commission to conduct a survey of the viewing public before it could determine that the commercials had a tendency to mislead, for when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy.

FTC v. Colgate-Palmolive Co., 380 U.S. at 391–92; *see also Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 n.11 (3d Cir. 1982) ("[o]nce the Commission finds deception, it is normally allowed to infer materiality").

Using an approach similar to that articulated in 940 C.M.R. § 3.05(1), FTC cases also infer materiality where a consumer's safety is involved. In *Simeon Management Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978), for example, weight loss clinics had advertised that their treatments were safe and effective. This position was supported by the clinic physicians, although the treatment involved injection of a drug for weight loss that lacked FDA approval. Reviewing the commission's findings, the court said, "[I]n view of the public's belief that the government strictly regulates drugs, the fact that the treatments involve administration of a drug lacking FDA approval for such use may materially affect a consumer's decision to undergo the treatment." *Simeon Mgmt. Corp. v. FTC*, 579 F.2d at 1145; *see also Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 250 (6th Cir. 1973) (manufacturer's representation without scientific support that its tires "stopped 25% quicker" was found unfair and deceptive, in part because the claim involved human safety).

After the FTC issued its 1983 Deception Statement (described in detail in § 2.5.5, below), it said that "certain categories of information [were] presumptively material," including "(1) express claims, (2) implied claims, where the evidence

showed that a seller deliberatively made the implied claim, and (3) claims that significantly involve health, safety, or other areas in which reasonable consumers would be concerned." *Kraft, Inc. v. FTC*, 970 F.2d 311, 322–23 (7th Cir. 1992) (citing *Thompson Med. Co.*, 104 F.T.C. 648, 816–17 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986)); *see also In Re Int'l Harvester Co.*, 104 F.T.C. 1057, 1057 n.22 (1984).

Kraft used a series of advertisements for its cheese slices with pictures of milk being poured into a glass until it reached a five-ounce marking. The voiceover said: "Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow." *Kraft, Inc. v. FTC*, 970 F.2d at 314–15. In reality, after processing, the calcium content of each slice was reduced by 30 percent and was similar to the amount found in other imitation cheese slices.

The FTC said that Kraft had made two deceptive claims. First, the ads implied that the cheese slices contained the same amount of calcium found in five ounces of milk ("the milk equivalency claim"). Second, the ads implied that Kraft's slices contain more calcium than most imitation cheese slices. *Kraft, Inc. v. FTC*, 970 F.2d at 314. The court said that such statements may be deceptive although literally true, because "even literally true statements can have misleading implications." *Kraft, Inc. v. FTC*, 970 F.2d at 322.

To determine the milk equivalency claim, the court referred to Kraft's own surveys showing that 71 percent of respondents rated calcium content as a very important factor in their decision to buy the product and to Kraft's refusal to stop the ads despite repeated warnings to do so. In support of the imitation superiority claim, the commission applied a presumption of materiality after finding evidence that Kraft intended the challenged ads to convey the deceptive message. This determination was buttressed by Kraft's increased sales despite the fact that its prices were higher than other imitation slices. *Kraft, Inc. v. FTC*, 970 F.2d at 323–24.

§ 2.5.3 Types of Deceptive Claims

If parties are able to prove common law misrepresentation, fraud, or deceit, they will probably be able to prove a G.L. c. 93A claim as well. *See Acushnet Fed. Credit Union v. Roderick*, 26 Mass. App. Ct. 604, 608 (1988) ("The facts underlying common law misrepresentation . . . are identical to those which underlie a c. 93A claim founded on misrepresentation."); *Sheehy v. Lipton Indus., Inc.*, 24 Mass. App. Ct. 188, 195 (1987) (defendants liable for deceit or misrepresentation may be liable under G.L. c. 93A); *Nickerson v. Matco Tools Corp.*, 813 F.2d 529, 531 (1st Cir. 1987) ("There is a close relationship between a common law action for fraud or deceit and an action for unfair or deceptive practices under Chapter 93A."); *Puretest Ice Cream, Inc. v. Kraft*, Inc., 614 F. Supp. 994, 997 (D. Mass. 1985) (court found close resemblance between Chapter 93A claim and common law action of deceit in case involving intentional or reckless misrepresentation).

The common law tort of misrepresentation also includes negligent misrepresentation. A negligent misrepresentation may also give rise to a claim under G.L. c. 93A. *See, e.g.*, *Golber v. Baybank Valley Tr. Co.*, 46 Mass. App. Ct. 256, 261 (1999) ("[W]e decided some years ago that 'negligent misrepresentation of fact the truth of which is reasonably capable of ascertainment is an unfair and deceptive act or practice within the meaning of c. 93A, § 2(a).'") (quoting *Glickman v. Brown*, 21 Mass. App. Ct. 229, 235 (1985)).

(a) *Misrepresentation*

The Massachusetts courts have found misrepresentations resulting in liability in numerous consumer-based disputes. *Briggs v. Carol Cars, Inc.*, 407 Mass. 391, 397 (1990) (misrepresentation that vehicle was in good condition violated Section 9); *Brandt v. Olympic Constr., Inc.*, 16 Mass. App. Ct. 913 (1983) (rescript) (real estate developer held liable for representing that land adjacent to purchaser's property would always remain conservation land); *see also Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37, 49 (1979) (misrepresentations about cost of regulated gas violate G.L. c. 93A, § 4); *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688 (1975) (misrepresentations about promises to repair a vehicle); *Glickman v. Brown*, 21 Mass. App. Ct. 229, 235 (1985) (misrepresentations about a heating system violates Chapter 93A under either Section 9 or 11); *Jeffco Fibres, Inc. v. Dario Diesel Serv., Inc.*, 13 Mass. App. Ct. 1029 (1982) (rescript) (misrepresentations about truck's engine).

The courts have also found liability under G.L. c. 93A, § 11 for a variety of misrepresentations. The Supreme Judicial Court has discussed the connection between misrepresentation and Section 11 claims in a variety of cases, including the following:

- *Marram v. Kobrick Offshore Fund*, 442 Mass. 43, 61–62 (2004) (remanded to determine existence of possible negligent misrepresentation claim in securities case);
- *Heller Fin. v. Ins. Co. of N. Am.*, 410 Mass. 400, 409 (1991) (remanded to determine whether a party misrepresented the truth and therefore would have violated G.L. c. 93A);
- *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760 (1986) (imposing liability on business for false representations respecting corporation's wrongful retention and use of a subscription list); and
- *Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841 (1983) (defendants were found liable for, inter alia, misrepresenting their experience as bridge contractors to obtain an indemnity bond).

The Appeals Court has also found in a number of cases that allegations of misrepresentation supported a finding of liability under Section 11. For example, in *Chamberlayne School v. Banker*, 30 Mass. App. Ct. 346, 347 (1991), the court upheld the trial judge's determination that the plaintiff was entitled to damages of $60,000 (before doubling) under G.L. c. 93A, § 11, although the jury found damages of $20,000 on the misrepresentation count on "the same fact pattern." In *Marshall v. Stratus Pharmaceuticals, Inc.*, 51 Mass. App. Ct. 667 (2001), the Appeals Court reiterated that the "tort theory of common law misrepresentation" supported a claim under G.L. c. 93A, § 11, applying this approach to a case where the defendants allegedly induced the plaintiff to provide them with products and services for which they did not intend to pay. *Marshall v. Stratus Pharms., Inc.*, 51 Mass. App. Ct. at 677; *see VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 620 (1994) (misrepresentation about the efficacy of computer software); *Bump v. Robbins*, 24 Mass. App. Ct. 296, 310–12 (1987) (a broker had suffered losses resulting from misrepresentations by the potential seller of the controlling interest in a corporation); *Lynn v. Nashawaty*, 12 Mass. App. Ct. 310 (1981) (seller liable for misrepresenting value of stationery store's inventory to purchaser); *Newly Weds Foods, Inc. v. Superior Nut Co.*, 82 Mass. App. Ct. 1110 (2012) (unpublished decision; text available at 2012 WL 3314007) (manufacturer liable for failing to disclose likelihood that its sesame seed product contained traces of peanut). In *Golber v. BayBank Valley Trust Co.*, 46 Mass. App. Ct. 256 (1999), the Appeals Court found that a bank could be held liable on a negligent misrepresentation claim for providing material, misleading information to an investor regarding the status of a customer's account.

The federal courts have also recognized that misrepresentation claims may be appropriate under Section 11. In *NASCO v. Public Storage, Inc.*, 127 F.3d 148 (1st Cir. 1997), the court stated the following:

> To keep its options open PSI unfairly and deceptively led NASCO to believe that the parties had entered into a binding agreement and the deposit was delayed merely because of administrative inefficiencies. All the while PSI actually withheld the deposit because it reasoned that the failure to pay the deposit would permit PSI to repudiate the agreement, if after review . . . the property seemed not [to] be an economically advantageous transaction.

NASCO v. Pub. Storage, Inc., 127 F.3d at 153; *see Damon v. Sun Co.*, 87 F.3d 1467, 1484 (1st Cir. 1996) ("As we have already affirmed the district court's finding of misrepresentation, it is manifest that [the defendant's] acts sink below the level of 'simply neglecting to discuss' the 1974 contamination.").

The federal courts have recognized that misrepresentation claims may be appropriate under Section 9, as well. In *Smith v. Jenkins*, 818 F. Supp. 2d 336, 345 (D. Mass. 2011), the court found a violation of G.L. c. 93A, § 9 when the defendants "conspired to enrich themselves by taking advantage of a person who they knew, or should have known, lacked the ability to anticipate, or even identify, the consequences of his actions."

The general regulations of the Office of the Attorney General contain numerous prohibitions against misrepresentations, including the following:

- 940 C.M.R. § 3.02, covering false advertising;
- 940 C.M.R. § 3.07, covering misrepresentations about "easy credit";
- 940 C.M.R. § 3.11, covering employment agencies and business schemes;
- 940 C.M.R. § 3.13, covering pricing and refunds;
- 940 C.M.R. § 3.14, covering subscriptions and mail orders; and
- 940 C.M.R. § 3.15, covering, among other things, the use of the word "new" for a used product.

The attorney general's motor vehicle regulations, 940 C.M.R. § 5.00, and retail advertising regulations, 940 C.M.R. § 6.00, also prohibit misrepresentations.

The FTC has also found deception based on misrepresentations in numerous cases. In *Doherty, Clifford, Steers & Shenfield v. FTC*, 392 F.2d 921 (6th Cir. 1968), for example, the court upheld an FTC order pertaining to the advertisement of Sucrets because the advertisements implicitly misrepresented that Sucrets would cure a sore throat, and such fraudulent misrepresentations "not only operate to defraud purchasers but are a distinct menace to the public health." *Doherty, Clifford, Steers & Shenfield v. FTC*, 392 F.2d at 925–26 (citations omitted); *see also Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) (deceptive to misrepresent formula and effect of diet pills); *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 (7th Cir. 1977) (deceptive for trade association to claim that egg consumption and heart disease had not been scientifically linked); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973) (deceptive for Firestone to claim falsely, among other things, that tests proved its tires would stop 25 percent quicker than its competition's tires). For FTC cases after 1983, see discussion at § 2.5.5, The 1983 FTC Deception Statement, below.

Liability for misrepresentations does not always lead to G.L. c. 93A liability, however. In *Chedd-Angier Production Co. v. Omni Publications International Ltd.*, 756 F.2d 930 (1st Cir. 1985), the court discussed a business dispute concerning breach of an oral contract to produce a scientific television series. The court said, "[W]e find nothing inconsistent in ruling that the evidence is sufficient to go to the jury on misrepresentation, while at the same time it fails to persuade the court of 93A liability." *Chedd-Angier Prod. Co. v. Omni Publ'ns Int'l Ltd.*, 756 F.2d at 939. "Lack of complete candor" was insufficient to create liability under G.L. c. 93A. *Chedd-Angier Prod. Co. v. Omni Publ'ns Int'l Ltd.*, 756 F.2d at 939; *see also Wallace Motor Sales, Inc. v. Am. Motors Sales Corp.*, 780 F.2d 1049 (1st Cir. 1985) (judge's verdict on Chapter 93A claim can be inconsistent with jury's verdict on other claims).

(b) *Fraud*

Fraud claims may also form the basis for Chapter 93A claims. In *Sidney Binder, Inc. v. Jewelers Mutual Insurance Co.*, 28 Mass. App. Ct. 459 (1990), an insurer claimed that the insured violated G.L. c. 93A by acting fraudulently. The court commented, "In *International Fid. Ins. Co. v. Wilson*, 387 Mass. at 851–58, the right of an insurance company to recover under c. 93A was assumed when based on fraudulent representations to the insurer." *Sidney Binder, Inc. v. Jewelers Mut. Ins. Co.*, 28 Mass. App. Ct. at 465. In *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704 (1990), the court upheld the judge's finding of Chapter 93A liability because the jury found the defendant liable for fraud. "Common law fraud can be the basis for a claim of unfair and deceptive practices under the statute." *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. at 714 (citations omitted) (defendant travel company misrepresented its intent to not enforce contractual termination provision); *Bio-Vita, Ltd. v. Rausch*, 759 F. Supp. 33, 36 (D. Mass. 1991) (allegations that plaintiffs fraudulently misrepresented corporate principals' character, integrity, reputation, and criminal background stated a claim for relief under G.L. c. 93A, § 11); *see also Columbia Chiropractic Grp., Inc. v. Tr. Ins. Co.*, 430 Mass. 60, 61 (1999) (submitting unreasonable or unnecessary medical bills and litigating to recover on those bills violated G.L. c. 93A); *Coastal Oil New Eng., Inc. v. Citizens Fuel Corp.*, 38 Mass. App. Ct. 26, 35 (1995) (without proof of fraudulent conveyance, no support for a Chapter 93A claim); *Ne. Data Sys. v. McDonnell Douglas Comput. Sys.*, 986 F.2d 607, 611 (1st Cir. 1993) (fraud claim under Chapter 93A excluded by contractual choice of law provision). *But cf. Lee v. Conagra Brands, Inc.*, 958 F.3d 70, 74 (1st Cir. 2020) (Chapter 93A complaint sounding in fraud must meet the heightened pleading requirements of Fed. R. Civ. P 9(b)).

The FTC has frequently found that evidence of fraud was sufficient to support a claim for unfair and deceptive acts or practices. *See FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991) (representations about coins' investment value were fraudulent and thus deceptive); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988) (fraudulent advertisements of the cost of Hawaiian vacation packages).

Although fraud can form the basis for liability under Chapter 93A, in *In re Varrasso*, 194 B.R. 537 (D. Mass. 1996), the court noted that a Chapter 93A judgment may not be sufficient to avoid dischargeability in bankruptcy, because a Chapter 93A judgment lacks the essential elements of nondischargeability found in fraud cases. The court stated that

> [f]raud can constitute a basis for finding a violation of G.L. c. 93A, § 2, but "a violation of G.L. c. 93A, § 2 can be found on behavior that lacks the characteristics of misconduct necessary to support a finding of nondischargability for actual fraud." In particular, an "unfair or deceptive act or practice" . . . may be established without proof that the Debtor knew his false representation to be false and without proof that the Plaintiffs relied on the representation, both of which are required under § 523(a)(2)(A).

In re Varrasso, 194 B.R. at 539–40 (citations omitted).

In *McCarter & English, LLP v. PcVue, Inc.*, No. 1984CV01983-BLS2, 2020 WL 957645 (Mass. Super. Ct. Jan. 24, 2020), a law firm attempted to collect unpaid legal fees from its former clients. The court denied the defendants' motion to dismiss, reasoning with respect to Chapter 93A that "the allegations that Defendants made fraudulent promises, in order to trick [the firm] into continuing to provide services for which Defendants never intended to pay, states a viable claim for violation of G.L. c. 93A." *McCarter & English, LLP v. PcVue, Inc.*, 2020 WL 957645, at *2. These allegations, along with allegations of the firm's reliance and damages, were found to state a claim for fraud. *McCarter & English, LLP v. PcVue, Inc.*, 2020 WL 957645, at *2 (citing *Cumis Ins. Soc'y v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 474 (2009) (fraud claim may be based on false promise if "the promisor had no intention to perform the promise at the time it was made") (quoting *Yerid v. Mason*, 341 Mass. 527, 530 (1960)).

Further, the court stated that the plaintiff's allegations of intentional fraud sufficed to state a claim that the defendants engaged in deceptive conduct violating Chapter 93A. *McCarter & English, LLP v. PcVue, Inc.*, 2020 WL 957645, at *2 (citing *Cmty. Builders, Inc. v. Indian Motocycle Assocs., Inc.*, 44 Mass. App. Ct. 537, 557 (1998) (false promise to pay fees with no intention to perform); *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 605 (2007) (intentional misrepresentation or common law fraud or deceit "sufficient foundation for a finding of a c. 93A violation in a business context"); *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 51–52, 54–56 (1st Cir. 1998)).

(c) *Failure to Disclose Material Facts*

Section 9

One of the main purposes of prohibiting deception is to ensure that a party receives accurate disclosures of all material information before entering into the transaction. *See Greenfield Country Estates Tenants Ass'n v. Deep*, 423 Mass. 81, 84 (1996); *Commonwealth v. DeCotis*, 366 Mass. 234 (1974). Thus, the failure to disclose material information is a violation of G.L. c. 93A. The general regulations of the Office of the Attorney General state that it is a violation of G.L. c. 93A, § 2 to fail to disclose to buyers or prospective buyers any fact that may influence them not to enter into the transaction. 940 C.M.R. § 3.16(2); *cf. Rothbaum v. Samsung Telecomm. Am., LLC*, 52 F. Supp. 3d 185, 207 (D. Mass. 2014) (misconduct constituting a failure to disclose a *potential* problem and not a present, actual problem does not rise to the level of a Chapter 93A violation).

This regulation was first applied by the Supreme Judicial Court in *York v. Sullivan*, 369 Mass. 157 (1975), where the landlord failed to disclose to prospective tenants that the landlord had applied to the Department of Housing and Urban Development for a rent increase. The court said that

> [t]he evidence clearly warranted a finding that the disclosure of the application "may have influenced" a prospective tenant "not to enter into transaction," within the meaning of [940 C.M.R. § 3.16(2)]. If such a finding were made, we have no doubt that the failure to disclose would be a deceptive act or practice.

York v. Sullivan, 369 Mass. at 162.

In *Heller v. Silverbranch Construction Corp.*, 376 Mass. 621 (1978), the court upheld the finding that a construction company's failure to disclose a drainage problem to purchasers violated 940 C.M.R. § 3.16(2) and G.L. c. 93A, § 2. Similarly, in *Schwartz v. Rose*, 418 Mass. 41, 45 (1994), the court held that a vendor of land was liable under 940 C.M.R. § 3.16(2) for failing to disclose to purchasers of the property a letter from the Conservation Commission concerning the property being sold. The lower court had found that the failure to disclose was deliberate. *See also Grossman v. Waltham Chem. Co.*, 14 Mass. App. Ct. 932 (1982) (failure to disclose insect infestation in inspection report); *Mongeau v. Boutelle*, 10 Mass. App. Ct. 246 (1980) (broker failed to disclose property encumbrances to seller).

In *Dujon v. Williams*, 5 Mass. L. Rptr. 456 (Suffolk Super. Ct. 1996), *aff'd sub nom. Dujon v. Kurtz*, 47 Mass. App. Ct. 1112 (1999), the plaintiff brought a personal injury action and an action under G.L. c. 93A against various taxi companies and an individual defendant after a cab collided with the plaintiff's car. The defendants had told the plaintiff that one of the defendant companies had been dissolved without disclosing that its corporate assets had been transferred to another cab company. The court stated that

> [t]he implication of no available corporate assets . . . was deceptive. . . . The omission of information about the true state of [the cab company] created a false impression about its ability to an-

> swer a judgment. . . . Wrongful withholding of information is an unfair act under Chapter 93A. *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 778–779 (1986).

Dujon v. Williams, 5 Mass. L. Rptr. at 463 (citation omitted). See also *Vanderwiel v. Jones*, 1996 Mass. App. Div. 184, where a broker told the plaintiff-buyers not to have a septic inspection done because the property was new. The court upheld the lower court's finding of Chapter 93A liability (based on unfairness, not deception), although the broker believed that the house had no sewage problems. The duty to disclose is found throughout the attorney general's regulations—including regulations covering motor vehicles, retail advertising, and mortgage brokers.

Section 11

The failure to disclose has been recognized as a basis for liability under G.L. c. 93A, § 11, as well. In *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411, 417 (1st Cir. 1985), the court said that a plaintiff in a Section 11 case "needs to allege [no] more than a failure to disclose a material fact to state a cause of action under chapter 93A." *See also Winter Panel Corp. v. Reichhold Chems.*, 823 F. Supp. 963, 975 (D. Mass. 1993); *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 323 (2018) ("A duty exists under c. 93A to disclose material facts known to a party at the time of a transaction.") (quoting *Underwood v. Risman*, 414 Mass. 96, 99–100 (1993)). Similarly, in *Homsi v. C.H. Babb Co.*, 10 Mass. App. Ct. 474 (1980), the court found that it was deceptive for a seller of ovens to fail to disclose to the purchaser that the gas needed to run the ovens was unavailable in the area. In *Sargent v. Koulisas*, 29 Mass. App. Ct. 956, 958 (1990) (rescript), the court, citing to *Homsi* and 940 C.M.R. § 3.16(2), held that the seller of a pizza business was liable to the buyer for failing to disclose the poor condition of the equipment.

In *Industrial General Corp. v. Sequoia Pacific Systems Corp.*, 44 F.3d 40, 43–45 (1st Cir. 1995), *rev'g* 849 F. Supp. 820, 824–25 (D. Mass. 1994), the court held that there was no duty to disclose under Section 11 unless the parties had a fiduciary relationship that could be created merely because one party trusted the other. Thus, a seller of an office building was not held liable under Section 11 when it failed to disclose a tenant's financial difficulties, because the disclosure was held to be opinion rather than fact. *See Greenery Rehab. Grp., Inc. v. Antaramian*, 36 Mass. App. Ct. 73 (1994).

In *Hanover Insurance Co. v. Sutton*, the Appeals Court held that a newly formed company violated G.L. c. 93A, § 11 by "aiding and abetting" an employee in breaching his fiduciary duty to disclose a business opportunity to his former employer. *Hanover Ins. Co. v. Sutton*, 46 Mass. App. Ct. 153, 172–73 (1999). *But cf. In re Telexfree Sec. Litig.*, 389 F. Supp. 3d 101, 104–05 (D. Mass. 2019) (Chapter 93A does not recognize a separate cause of action for aiding and abetting).

The FTC has long recognized that the failure to disclose is a basis for a claim of deception. As the court said in *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950), "[t]o tell less than the whole truth is a well known method of deception; and he [or she] who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished." *P. Lorillard Co. v. FTC*, 186 F.2d at 58 (company failed to disclose that lower amounts of tar and nicotine in "Old Gold" would not lessen harm associated with smoking this brand of cigarette).

Historically, the FTC has been especially concerned about the failure to disclose when a consumer's health may be involved. In *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967), the court reviewed an FTC order pertaining to the company's advertisement of Geritol products and stated the following:

> While the advertising does not make the affirmative representation that the majority of people who are tired and rundown are so because of iron deficiency anemia and the product Geritol will be an effective cure, there is substantial evidence to support the finding of the Commission that most tired people are not so because of iron deficiency anemia, and the failure to disclose this fact is false and misleading because the advertisement creates the impression that the tired feeling is caused by something which Geritol can cure.

J.B. Williams Co. v. FTC, 381 F.2d at 889.

Several "failure to disclose" cases deal with weight loss claims. *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1145 (9th Cir. 1978), concerned the failure of clinics to disclose the use of drugs not approved for dieting. The court held that "[f]ailure to disclose material information may cause an advertisement to be false or deceptive . . . even though the advertisement does not state false facts." In *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 303 (7th Cir. 1979), the court dealt with diet pills and found, among other things, that the failure to disclose that testimonials of weight loss were unusual, and the failure to include a health warning made the advertisements deceptive. *See also Nat'l Bakers Serv., Inc. v.*

FTC, 329 F.2d 365, 366–67 (7th Cir. 1964) (claim that a specific bread had fewer calories per slice was deceptive because consumers were not told it was simply sliced more thinly than other breads).

(d) *Overall Impression Is Misleading Despite Literal Truth*

Representations that are literally true may also be deceptive if they create an overall impression that is misleading. In *Leardi v. Brown*, 394 Mass. 151 (1985), a landlord used a lease that stated, contrary to the law, that there was no implied warranty of habitability. In smaller print, the lease said "except so far as governmental regulation, legislation or judicial enactment otherwise requires." *Leardi v. Brown*, 394 Mass. at 156. The court rejected the landlord's claim that the quoted provision made the disclaimer of the warranty lawful. The court stated the following:

> Under [the FTC Act] an act or practice is deceptive if it possesses "a tendency to deceive." *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979). In determining whether an act or practice is deceptive, "regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public." *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950).

Leardi v. Brown, 394 Mass. at 156.

Taken as a whole, the lease provision clearly tended to deceive tenants as to the landlord's obligations. *Leardi v. Brown*, 394 Mass. at 156; *see also Dujon v. Williams*, 5 Mass. L. Rptr. 456 (Suffolk Super. Ct. 1996), *aff'd sub nom. Dujon v. Kurtz*, 47 Mass. App. Ct. 1112 (1999).

In *Commonwealth v. Amcan Enterprises, Inc.*, 47 Mass. App. Ct. 330 (1999), the defendants, who were not affiliated with any telephone company, used the words "yellow pages" and the "walking fingers" logo in solicitation packages used to sell advertising for a product they called the "New England Yellow Pages." The court upheld the motion judge's determination that the defendants had violated Chapter 93A, reasoning as follows:

> Whether the defendants had the right to use the words "yellow pages" and the "walking fingers" logo is not the issue; rather the question is whether their use in the context of the solicitation as a whole was misleading. . . . As the [motion] judge stated:
>
> . . . "The defendants' solicitation packages, taken as a whole, were likely to mislead business consumers, acting reasonably under the circumstances, to believe that they were sent by the publisher of the local 'yellow pages' directory and that by responding to the solicitation package, the recipients were renewing an existing listing."

Commonwealth v. Amcan Enters., Inc., 47 Mass. App. Ct. at 336–37.

The attorney general's regulations also recognize that deception must be determined from the overall impression created by advertisements, rather than a literal analysis of their words. See the following:

- 940 C.M.R. § 3.05(1), which states that "[n]o claim or representation shall be made by any means . . . which directly, or by implication, . . . has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect";
- 940 C.M.R. § 3.01, which, in defining "deceptive warranty," refers to representations that, "in the light of all the circumstances, would mislead";
- 940 C.M.R. § 3.02, which states that "[n]o statement or illustration shall be used in any advertisement which creates a false impression"; and
- 940 C.M.R. § 3.05(2), which states that "[n]o advertisement shall . . . tend to mislead . . . through pictorial representations or in any other manner, as to the product being offered for sale."

The FTC and the federal courts have long recognized that the impressions created by an ad are not limited to its exact wording. In *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942), the court reviewed an FTC order dealing with ads for a product intended to relieve delayed menstruation. The advertisements failed to reveal the product's dangers. The court stated the following:

> To an educated analytical reader, these and similar statements may not seem to claim anything more than to relieve delayed menstruation. But the buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the

> reader arises from the sum total of not only what is said but also of all that is reasonably implied. . . . *The law is not made for experts but to protect the public, the vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.*

Aronberg v. FTC, 132 F.2d at 167 (citations omitted) (emphasis added).

In *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967), the court noted that "[t]he Commission need not confine itself to the literal meaning of the words used but may look to the overall impact of the entire commercial." *J.B. Williams Co. v. FTC*, 381 F.2d at 889 (quoting *Carter Prods., Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963)).

The overall impression analysis proved injurious to a manufacturer in *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973). The manufacturer had advertised its tires as the "Safe Tire" and had claimed that "[e]very new Firestone design goes through rugged tests of safety and strength far exceeding any driving condition you'll ever encounter." *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d at 247. The parties had stipulated that no manufacturer could ensure that each tire was absolutely free from defects. Firestone conducted a survey to determine what the "Safe Tire" advertisement meant. It found that 15.3 percent of those surveyed believed that the tires were absolutely safe no matter how they were used or that every single tire would be absolutely free from defects. The Sixth Circuit upheld the FTC order finding the ads deceptive. *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d at 249.

In *Kraft, Inc. v. FTC*, 970 F.2d 311, 315 (7th Cir. 1992), Kraft used a series of advertisements for its cheese slices. The ads showed pictures of milk being poured into a glass up to a five-ounce marking. The voiceover said: "Kraft has five ounces [of milk] per slice" or "Kraft is made from five ounces per slice." The court said that such statements may be deceptive although literally true. Because 30 percent of the milk is lost during processing, "even literally true statements can have misleading implications." *Kraft, Inc. v. FTC*, 970 F.2d at 322; *see also Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) (advertisements for Aspercreme misrepresented that the product actually contained aspirin); *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982) (stating that "[t]he Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole").

§ 2.5.4 Defendant's Liability; Knowledge of Deception

The following sets forth various instances where a defendant's knowledge of the deception and intent to deceive may impact liability.

(a) *When Defendant Is Liable Without Knowing About the Deception*

If there have been misrepresentations or violations of some of the attorney general's regulations, defendants may be found liable even if they had no actual knowledge of their misrepresentations. "[I]t is not necessary to establish that the defendant knew that the representation was false." *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703 (1975). As the court said in *Glickman v. Brown*, 21 Mass. App. Ct. 229, 235 (1985), which dealt with misrepresentations by a landlord about a faulty heating system, "a deceptive act which is the result of a defendant's negligence is actionable [under G.L. c. 93A, § 2] without more." *Accord Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193 (1990) (breach of warranty that resulted in personal injury to a nonpurchaser); *Linthicum v. Archambault*, 379 Mass. 381, 388 (1979) (breach of implied warranty claim); *see also Dalis v. Buyer Adver., Inc.*, 418 Mass. 220, 225 (1994) ("Unlike a traditional common law action for fraud, consumers under c. 93A need not prove . . . that the defendant knew that the representation was false.") (citing *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688 (1975)).

In *Jeffco Fibres, Inc. v. Dario Diesel Service, Inc.*, 13 Mass. App. Ct. 1029 (1982), the defendant was found liable under G.L. c. 93A for misrepresenting the condition of a truck's engine and for breaching the express warranty, although it did not know that the representations were false at the time they were made. The court said, "[i]t is implicit in the findings and conclusions that the misrepresentation was innocent or at worst negligent." *Jeffco Fibres, Inc. v. Dario Diesel Serv., Inc.*, 13 Mass. App. Ct. at 1031. Similarly, in *Acushnet Federal Credit Union v. Roderick*, 26 Mass. App. Ct. 604, 607 (1988), the court held that a G.L. c. 93A claim should be retried where a jury was not informed that "liability might accrue from false statements carelessly made but as to which the speaker, having not checked the available facts, was unaware of any falsity." *But see Walsh v. Chestnut Hill Bank & Tr.*, 414 Mass. 283, 289, 290 n.7 (1993) (negligent misrepresentation may not create liability under Chapter 93A); *Conway v. Licata*, No. 13-12193-LTS, 2015 WL 5120997, at *13 (D. Mass. Sept. 1, 2015) (negligent misrepresentation without more is insufficient to violate Chapter 93A).

(b) *When Defendant Is Liable Without an Intent to Deceive*

The U.S. Supreme Court has said that the intent or purpose behind the deception is irrelevant. In *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965), the Court stated the following:

> We find an especially strong similarity between the present case and those cases in which a seller induces the public to purchase an arguably good product by misrepresenting his [or her] line of business, by concealing the fact that the product is reprocessed, or by misappropriating another's trademark. In each the seller has used a misrepresentation to break down what he [or she] regards to be an annoying or irrational habit of the buying public—the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he [or she] receives. Yet, a misrepresentation has been used to break the habit and, as was stated . . . a misrepresentation for such an end is not permitted.

FTC v. Colgate-Palmolive Co., 380 U.S. at 388–89; *cf. Weiner v. Rushmore Loan Mgmt. Servs., LLC*, 424 F. Supp. 3d 163, 169 (D. Mass. 2019) (an intent to deceive is not required to establish liability under Chapter 93A).

In *FTC v. Publishers Clearing House*, 104 F.3d 1168 (9th Cir. 1997), the court said, "[T]he FTC is not required to show that a defendant *intended* to defraud consumers in order to hold that individual personally liable. . . . [The president of Publishers Clearing House (PCH)] was at least recklessly indifferent with regard to the truth or falsity of the misrepresentations made by PCH employees." *FTC v. Publishers Clearing House*, 104 F.3d at 1171. The court noted, among other things, that the president had filed the company's license at the direction of someone that the president knew to be facing criminal charges for improper telemarketing activities. *FTC v. Publishers Clearing House*, 104 F.3d at 1171.

In FTC cases, the federal courts have therefore specifically recognized that the defendant's good faith or lack of proven intent to deceive is not a defense, even if the defendant relied on the advice of counsel. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 575 (7th Cir. 1989) ("The magistrate correctly found that the blessing of an attorney did not make the telemarketing scripts truthful. Obtaining the advice of counsel did not change the fact that the business was engaged in deceptive practices."); *accord Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988); *see also FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) (citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976)) ("these misrepresentations or practices need not be made with an intent to deceive"); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977) ("an advertiser's good faith does not immunize it from responsibility for its misrepresentations").

The federal district court in Massachusetts applied these principles in *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851 (D. Mass. 1992), where the court said the following:

> In essence, Defendants argue that they did not know that the representations were false. But a violation of [the FTC Act] can occur even absent an intent to deceive, and an advertiser's good faith does not shield it from liability. Therefore, the fact that Defendants may have unknowingly repeated the misrepresentations of others is not material.

FTC v. Patriot Alcohol Testers, Inc., 798 F. Supp. at 859 (citation omitted).

Massachusetts courts have also referred to the issues of good faith and intent to deceive. In *Maillet v. ATF-Davidson Co.*, 407 Mass. 185 (1990), the court said that the "Attorney General['s] regulations may proscribe even good faith business practices that could be unfair or deceptive." *Maillet v. ATF-Davidson Co.*, 407 Mass. at 194 (citing *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762 (1980)). The Supreme Judicial Court has said in *Swanson v. Bankers Life Co.*, 389 Mass. 345, 349 (1983), "[n]o intention to deceive need be shown" to satisfy a claim under G.L. c. 93A. *Accord Fraser Eng'g Co. v. Desmond*, 26 Mass. App. Ct. 99, 104 (1988). *But see Turnpike Motors, Inc. v. Newbury Grp., Inc.*, 413 Mass. 119, 130–31 (1992) (upheld the lower court's determination that sellers justifiably withheld payment of a brokers' fee on advice of counsel). The Supreme Judicial Court has said that partners in a law firm may be vicariously liable under G.L. c. 93A for a partner's conduct even if they were "entirely unaware and . . . entirely uninvolved." *Kansallis Fin. Ltd. v. Fern*, 421 Mass. 659, 672 (1996).

(c) *When Defendant's Lack of Knowledge About the Deception Precludes Liability*

Despite the expansive nature of a G.L. c. 93A claim, the courts have limited liability where the claim is based on a failure to disclose rather than a misrepresentation. In *Lawton v. Dracousis*, 14 Mass. App. Ct. 164 (1982), the court held that a broker and a seller were not liable to the purchaser for failing to disclose code violations when the defendants did not know about the violations and had exercised reasonable care to determine if violations existed.

In *Nei v. Boston Survey Consultants, Inc.*, 388 Mass. 320, 324–25 (1983), the court held that the plaintiffs failed to state a cause of action against a surveyor who failed to disclose the significance of tests made for the sellers concerning the sellers' property in a report shown to the buyer-plaintiffs. The court stated the following:

> Although we recognize that there is no requirement of privity of contract, it is somewhat significant that [the surveyor] had no contractual or business relationship with the plaintiffs. They made no misstatements to the plaintiffs or to anyone else. . . . We decline to impose a risk of liability under G.L. c. 93A to some prospective purchaser of land because an accurate statement of soil tests given to the owner of the property did not also contain . . . an explanation of the significance of the test results.

Nei v. Bos. Survey Consultants, Inc., 388 Mass. at 324–25.

In *Underwood v. Risman*, 414 Mass. 96, 100 (1993), the court, citing to the cases discussed above, said, "There is no liability for failing to disclose what a person does not know." Therefore, the plaintiffs' prior landlord could not be held liable for failing to warn the then-childless couple of the possibility of lead-based paint in their apartment. The Supreme Judicial Court rejected the lower court's decision to hold the landlord liable on the grounds that he was experienced in real estate and should have assumed that older homes such as that rented to the plaintiffs would contain lead. *Underwood v. Risman*, 414 Mass. 96, 99–100 (1993). The court stated the following:

> We conclude that the facts of this case do not support a material, knowing, and wilful nondisclosure which violated § 2. . . . The judge [incorrectly] imposed liability because of a suspicion or a likelihood, rather than knowledge. . . . We have never imposed liability for nondisclosure of a fact not known by the person against whom liability is sought. . . . Culpability turns on Risman's state of mind at the time of the letting of the apartment. Knowing requires more than negligence. . . . Liability will attach when there is a partial disclosure, misrepresentation or false statement. . . . None of these principles results in the imposition of liability on Risman because the factual predicates are missing.

Underwood v. Risman, 414 Mass. at 99–101 (citations omitted).

The Appeals Court has rejected Chapter 93A liability in numerous Section 11 cases brought under a failure-to-disclose theory. For example, in *Greenery Rehabilitation Group, Inc. v. Antaramian*, 36 Mass. App. Ct. 73 (1994), the plaintiff-buyer claimed that the seller had violated G.L. c. 93A, § 11, by failing to disclose the poor financial status of a tenant. The court rejected such a claim because the tenant was current on rent at the time of sale. "Indeed, a predictive insight about the future operations of a going business in relation to changing market conditions would hardly fit under the heading of 'fact,' and would seem at most in the nature of opinion." *Greenery Rehab. Grp., Inc. v. Antaramian*, 36 Mass. App. Ct. at 78.

In *Townsends, Inc. v. Beaupre*, 47 Mass. App. Ct. 747 (1999), the court held that an individual defendant—the corporate president and sole stockholder, who was the one person aware of the company's complete financial condition—was not personally liable under Chapter 93A for various misrepresentations made in a financial statement provided by the corporation. The company's accountant had prepared the statement, and, after analyzing the several representations at issue, the court found that the plaintiff had failed to show that the president intentionally or negligently misrepresented information or had been negligent in signing the statement. *Townsends, Inc. v. Beaupre*, 47 Mass. App. Ct. at 752; *cf. Christian Book Distribs., Inc. v. Wallace*, 53 Mass. App. Ct. 905, 906 (2001) (individual defendant who worked with corporate defendant could be held personally liable under G.L. c. 93A, § 11, having personally and knowingly made false representations to plaintiff).

Similarly, in *Govoni & Sons Construction Co. v. Mechanics Bank*, 51 Mass. App. Ct. 35, 51 (2001), the court held that, although the defendant bank violated "reasonable commercial standards" and was liable for wrongful debit of the plaintiff's accounts, its actions—even if negligent—did not amount to a Chapter 93A violation. *Govoni & Sons Constr. Co. v. Mechs. Bank*, 51 Mass. App. Ct. at 51; *see also Saint-Gobain Indus. Ceramics Inc. v. Wellons, Inc.*, 246 F.3d 64, 74–75

(1st Cir. 2001) (commercial supplier liable for breach of warranty but not liable under Chapter 93A; the court, noting that the supplier had disclosed its uncertainty about the intended use of the product, found that the company may have been "overly optimistic" in assessing its product's effectiveness but that this assessment "[was] not one that establishes the requisite deceptive or unfair conduct [necessary] to sustain a Chapter 93A violation").

In *Nissan Automobiles v. Glick*, 62 Mass. App. Ct. 302, 312 (2004), the defendant's attorney, without the plaintiff's or the defendant's knowledge, mistakenly altered a provision of the contract. The plaintiff sought damages under Chapter 93A when the defendant failed to sell under the altered provision. The court dismissed the Chapter 93A claim, holding that a person who acts in accordance with an earnestly held interpretation of a document or the law does not engage in deception. *Nissan Autos. v. Glick*, 62 Mass. App. Ct. at 312.

Earlier cases had taken the same approach. In *V.S.H. Realty v. Texaco, Inc.*, 757 F.2d 411, 418 (1st Cir. 1985), the court reviewed a complaint about the failure to disclose relating to a purchase and sale contract and said, "The Supreme Judicial Court has held that [940 C.M.R.] § 3.16(2) imposes liability only when the defendant had knowledge, or should have known of the defect, and where a direct relationship existed between the parties." In *Sargent v. Koulisas*, 29 Mass. App. Ct. 956 (1990), the Appeals Court also rejected liability against a broker for failing to disclose latent defects in the equipment in a pizza store. The court said that since there was no evidence that the broker knew or should have known of the latent defects, he had no intent to fail to disclose and was therefore not liable. *Sargent v. Koulisas*, 29 Mass. App. Ct. at 959.

This limitation on liability has been utilized in several Section 11 cases dealing with contaminated land. In *Sheehy v. Lipton Industries, Inc.*, 24 Mass. App. Ct. 188, 195 (1987), the court said that, in order for the plaintiff to be able to recover under 940 C.M.R. § 3.16(2), the plaintiff had to show, among other things, that the defendants knew about the contaminated land. Referring to *Lawton v. Dracousis*, 14 Mass. App. Ct. 164 (1982), and *Nei v. Boston Survey Consultants, Inc.*, 388 Mass. 320 (1983), the court said, "[t]hese cases affirm the obvious principle that someone should not be liable for not disclosing what he [or she] does not know." *Sheehy v. Lipton Indus., Inc.*, 24 Mass. App. Ct. at 196. Since the defendant's knowledge of the contamination was in doubt, the court overruled summary judgment for the defendant on the G.L. c. 93A issue. (The case was remanded on this and other issues.) In *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988), the First Circuit cited to the *Sheehy* case when it granted a defendant's motion to dismiss a Section 11 case, stating, in part, that the plaintiff had not alleged that Mobil had actual knowledge that the land at issue was contaminated.

Similarly, in *Brennan v. Carvel Corp.*, 929 F.2d 801, 813, 814 (1st Cir. 1991), the federal court held that the franchisor's failure to approve an appropriate site for the franchisee did not amount to a failure to disclose because there was no proof that the franchisor intended to deceive the franchisee. The court rejected liability under 940 C.M.R. § 3.16(2) because an "overly precious standard of ethical or moral behavior" was inappropriate and a "mere breach of contract" did not state a cause of action. *Brennan v. Carvel Corp.*, 929 F.2d at 812–13 (citations omitted). "There was no evidence that Carvel intended to deceive or mislead the Brennans." *Brennan v. Carvel Corp.*, 929 F.2d at 814.

The courts have also recognized limitations on the duty to disclose when the disclosure was not material. In *Mayer v. Cohen-Miles Insurance Agency, Inc.*, 48 Mass. App. Ct. 435, 443 (2000), the insurer's failure to disclose that an insurance policy had a two-year suicide contestability clause was not material since the insurance purchaser had been motivated primarily by cost. The court upheld the denial of benefits after the plaintiff's husband (the purchaser) committed suicide fifteen months after purchasing the policy.

While recognizing that a seller has a duty to warn users of dangers that the seller knows or reasonably should have known, the Supreme Judicial Court has held that this duty does not extend to those who are members "of a universe too diffuse and too large for" sellers to identify. *Lewis v. Ariens Co.*, 434 Mass. 643, 649 (2001). In particular, the court concluded that a snowblower manufacturer did not owe a duty to warn a person who purchased a secondhand snowblower sixteen years after it was manufactured.

§ 2.5.5 The 1983 FTC Deception Statement

Before 1983, the standards applied by the FTC and the Massachusetts courts were very similar in deception cases, as shown by the numerous FTC cases discussed above. However, three years after issuing the unfairness statement, the FTC issued its Statement on Deception ("deception statement") on October 4, 1983. Two members of the commission wrote vigorous dissents and prepared a nineteen-page "Analysis of the Law of Deception" ("deception analysis") because they said that the statement created a new standard for deception cases. The deception statement and dissents can be found at

4 Trade Reg. Rep. (CCH), ¶ 13,205 at 20,911–23. The deception statement has also been reproduced as an appendix to the first case to apply the deception statement, *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174–84 (1984).

According to the FTC majority, three elements "undergird all deception cases." 4 Trade Reg. Rep. at 20,911. "First, there must be a representation, omission or practice that is likely to mislead the consumer." 4 Trade Reg. Rep. at 20,911. Second, the consumer must be interpreting the practices reasonably under the circumstances. Third, the representation, omission, or practice must be material or detrimental to the consumer. 4 Trade Reg. Rep. at 20,911–12.

Dissenting Commissioner Bailey said that the new standards were "clearly flawed" and "misstate[d] the law." 4 Trade Reg. Rep. at 20,918. Dissenting Commissioner Pertschuk said that the new standards were a "destructive, anti-consumer" attempt to change the law of deception. 4 Trade Reg. Rep. at 20,920. Consequently, the dissenters expressed concern about the apparent rejection of the tendency or capacity standard, which had been articulated in numerous FTC cases and is used in G.L. c. 93A cases.

Even more troubling to the dissenters was the application of the reasonable consumer standard. Although the entire commission recognized that a claim was not deceptive "merely because it will be unreasonably understood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed," the dissenters feared that a reasonableness test would create a higher threshold for a finding of deception. 4 Trade Reg. Rep. at 20,919 (citing *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)). Both dissenters cited to *FTC v. Standard Education Society*, 302 U.S. 112 (1937), in which the Supreme Court had said, in part:

> The fact a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.

FTC v. Standard Educ. Soc'y, 302 U.S. at 116.

Massachusetts defendants may argue that the Supreme Judicial Court has implicitly used a reasonableness test when it said a practice is deceptive "if it 'could reasonably be found to have caused a person to act differently.'" *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 777 (1980) (quoting *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37 (1979)).

The commission applied the deception statement in all subsequent cases. In *Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), the respondent made numerous misrepresentations about Aspercreme, including allegedly implying that it contained aspirin when it did not. The FTC discussed, first, whether Thompson made the representations alleged in the complaint; second, whether they were material; and third, whether they were likely to mislead consumers acting reasonably under the circumstances. *Thompson Med. Co.*, 104 F.T.C. at 788.

Thompson's ads contained both express and implied claims. The FTC will presume that reasonable consumers will be deceived by express claims. *Thompson Med. Co.*, 104 F.T.C. at 788–89 & n.6. To determine whether an ad contains implied claims, the commission looks at the ad itself or, if necessary, at extrinsic evidence. *Thompson Med. Co.*, 104 F.T.C. at 789. The commission acknowledged that one subset of consumers might read an ad differently than others. The FTC preferred direct evidence of how consumers actually read an ad, as determined from survey research or, secondarily, adequately supported expert witnesses. *Thompson Med. Co.*, 104 F.T.C. at 789–90. The commission reiterated its approval of the "overall, net impression" approach and rejected looking at how consumers react to a particular element of an ad in a context different from the ad itself. *Thompson Med. Co.*, 104 F.T.C. at 790.

Thompson made no express claims that Aspercreme contained aspirin. The implied claim was derived from the Aspercreme name and a picture of two aspirin being replaced by a tube of Aspercreme. *Thompson Med. Co.*, 104 F.T.C. at 651, 752. The commission said, "Like much advertising we find deceptive, the ads are drafted with an artful choice of words to make what Thompson thought were literally correct statements." The commission found that "reasonable consumers" or "average or ordinary members of the adult population" believed the ads meant that the product contained the "special chemical . . . aspirin." *Thompson Med. Co.*, 104 F.T.C. at 810.

The FTC found that the claims were "likely to mislead" because they were either false or failed to have a reasonable basis for support. For example, Thompson failed to have a reasonable basis for the claim that Aspercreme was effective to relieve arthritis pain. *Thompson Med. Co.*, 104 F.T.C. at 818, 821. Citing several pre-1983 decisions, the commission summarized the factors it reviewed to determine the appropriate level of substantiation for objective advertising claims

(these factors are discussed in a policy statement appended to the decision at 104 F.T.C. 839–42). They include the following:

- the product involved,
- the type of claim,
- the benefits of a truthful claim,
- the ease of developing substantiation for the claim,
- the consequences of a false claim, and
- the amount of substantiation experts in the field would agree is reasonable.

Thompson Med. Co., 104 F.T.C. at 821.

The commission found that a high level of substantiation was required, first, because the product is a drug, and, second, because it is the "type of claim whose truth or falsity could be difficult or impossible for consumers to evaluate by themselves." *Thompson Med. Co.*, 104 F.T.C. at 822. Third, because the benefits to consumers of an effective arthritis pain reliever were enormous and would create a large potential market, the costs of performing two well-controlled tests would not reduce the development or advertising of new arthritis remedies. *Thompson Med. Co.*, 104 F.T.C. at 823–24. Reviewing the fourth factor, the FTC found that a false claim could cause significant economic harm to consumers from their repeated purchase of an ineffective product. (The health risk from using Aspercreme was uncertain, given its warning label.) *Thompson Med. Co.*, 104 F.T.C. at 824–25. Finally, at least two well-controlled tests were generally required by the Food and Drug Administration for efficacy claims for an analgesic and were thus appropriate here. *Thompson Med. Co.*, 104 F.T.C. at 825–26.

Therefore, the FTC ordered Thompson to cease, among other things, using the brand name "Aspercreme" for any product that did not contain a significant amount of aspirin, provided that the brand name "Aspercreme" could be used if all ads and labels clearly and prominently disclosed that the product did not contain aspirin. *Thompson Med. Co.*, 104 F.T.C. at 843–44; *see also Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990) (discussion of health-related claims).

Shortly thereafter, in *In re International Harvester Co.*, 104 F.T.C. 949, 1055–64 (1984), the commission reviewed both the unfairness claim (discussed in § 2.4.1, The 1980 FTC Unfairness Statement—Unjustified Consumer Injury, above) and the deceptive claim. The FTC said that it would "not go beyond likelihood to require evidence on the incidence of actual false belief." *In re Int'l Harvester Co.*, 104 F.T.C. at 1056. On the "reasonable consumer element," the FTC repeated that it would "not require evidence that a claim has been interpreted in a certain way by some threshold number of consumers." *In re Int'l Harvester Co.*, 104 F.T.C. at 1057 (footnote omitted). The commission noted that, if practices are targeted to a specific audience, then reasonable consumers are representatives of that group. *See In re Int'l Harvester Co.*, 104 F.T.C. at 1057 n.22.

The FTC focused on deceptive omissions because *International Harvester* dealt with a failure to disclose a "fuel geysering" problem. The commission noted that remaining silent may constitute an implied but false representation, such as when the seller fails to disclose that the goods are reasonably fit for their intended purpose. *In re Int'l Harvester Co.*, 104 F.T.C. at 1058. "Pure omissions," however, are not unlawful because they "may lead to erroneous consumer beliefs if [the] consumer had a false, pre-existing conception which the seller failed to correct." *In re Int'l Harvester Co.*, 104 F.T.C. at 1509. Pure omissions are not deceptive because "the concept is limitless" and the omissions do not "reflect a deliberate act on the part of the seller." *In re Int'l Harvester Co.*, 104 F.T.C. at 1509. The commission did not find that Harvester had acted deceptively, although it did find that the company had acted unfairly. See discussion in § 2.4.1, The 1980 FTC Unfairness Statement—Unjustified Consumer Injury, above.

After *Thompson* and *International Harvester*, the Ninth Circuit said that "each of the three elements of the new standard . . . imposes a greater burden of proof on the FTC to show a violation." *Sw. Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986). The court said that the FTC must first show "probable, not possible deception" and then "must show potential deception to consumers acting reasonably in the circumstances, not just any consumers." *Sw. Sunsites, Inc. v. FTC*, 785 F.2d at 1436. "Third, the new standard considers deception material as applied to a reasonable relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance." *Sw. Sunsites, Inc. v. FTC*, 785 F.2d at 1436. The court therefore rejected the defendants' claim that the commission violated their rights by applying the new deception standard. But see *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985), where the court said, without citing to the deception statement or subsequent cas-

es, "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals."

While the Ninth Circuit said that the new standard created a higher burden, other jurisdictions have reiterated several of the long-standing principles found in earlier FTC decisions. In *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988), a travel agency and its principals were found to have acted deceptively by soliciting consumers to purchase a $29 certificate that could be redeemed for a roundtrip airfare to Hawaii. When consumers received the certificate, they were first told that they had to book hotel reservations through the agency for eight days minimum at a calculated "hotel cost" and pay a prebooking deposit of $100 per person. In reality, the "hotel cost" included the full charges for airfare and hotel rates. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d at 1022–23. The court referred to *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1986) for the proposition that "the FTC must establish that the representations, omissions, or practices likely would mislead consumers, acting reasonably, to their detriment." *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d at 1029.

The court reiterated that "these misrepresentations or practices need not be made with an intent to deceive," and that "an advertiser's good faith does not immunize it from responsibility for its misrepresentations. Moreover, the omission of material information, even if an advertisement does not contain falsehoods, may cause the advertisement to violate section 5." *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d at 1029 (citations omitted). Once the FTC had shown "(1) that a reasonably prudent person would rely on the deceptive advertisements, (2) that these advertisements were widely disseminated, and (3) that consumers purchased the product, '[t]he burden then shifts to the defendants to prove that the representations were not relied upon.'" *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d at 1029 (quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)).

The court rejected the defendants' claim that the consumers were acting unreasonably, stating that "[e]vidence that some consumers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead." *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d at 1029. The court also rejected the defendants' claim that a disclaimer "that 'prices do not reflect actual hotel rates'" was effective because it was an ambiguity that must be viewed in accordance with consumer behavior. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d at 1030. Subsequently, in *FTC v. World Travel Vacation Brokers, Inc.*, 761 F. Supp. 68, 69–70 (N.D. Ill. 1991), the court rejected a claim of one of the principals that the court had to decide whether each consumer was actually deceived. The court relied on the number of certificates sold as evidence of deception. *FTC v. World Travel Vacation Brokers, Inc.*, 761 F. Supp. at 69–70.

In *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989), the court once again dealt with a deceptive travel scheme and discussed the degree of proof required. It rejected the defendants' position that the FTC needed to "prove that every consumer was injured," and also to show the defendants' intent to deceive. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d at 572, 574 (citations omitted).

The tendency or capacity standard was also resurrected in *Removatron International Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989), an advertising case against a hair removal machine company, in which the court focused on the "common sense reading of the ads" and the "difficulty for the average consumer to evaluate such claims through personal experience." *Removatron Int'l Corp. v. FTC*, 884 F.2d at 1497, 1499 (quoting *Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 698 (3d Cir. 1982)).

The court reiterated that reliance need not be proven in *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991), stating, in part, that the FTC only needs to show that "the misrepresentations or omissions were of a kind usually relied upon by reasonable and prudent persons," especially in a highly specialized and technical field. The court found that the defendant company had acted deceptively in marketing and selling rare coins.

In *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), the court affirmed the principle that the commission would examine the "overall net impression of an ad and engage[ ] . . . in [the] three-part inquiry" described in *Thompson Medical Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

Kraft had used a series of advertisements for its cheese slices with pictures of milk being poured into a glass until it reached a five-ounce marking. The voiceover said, "Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow." *Kraft, Inc. v. FTC*, 970 F.2d at 314–15. In reality, after processing, the calcium content of each slice was reduced by 30 percent and was similar to the amount found in other imitation cheese slices.

While the court said that the most convincing extrinsic evidence of an advertisement's message was a survey, it relied on other extrinsic evidence, including the FTC's "reasoned analysis to determine what claims, including implied ones, are

conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement." *Kraft, Inc. v. FTC*, 970 F.2d at 319.

The court held that Kraft's implied claims that its product contained the same amount of calcium found in five ounces of milk and that the product was superior to other imitation slices were material. The court used the analysis found in pre-1983 cases rather than focusing on consumer detriment or injury. Quoting from *Thompson Medical Co.*, 104 F.T.C. 648 (1984), the court said that certain categories of information were presumptively material, including "(1) express claims, (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned." *Kraft, Inc. v. FTC*, 970 F.2d at 322.

In *Commonwealth v. Amcan Enterprises, Inc.*, 47 Mass. App. Ct. 330 (1999), the court addressed the impact of the 1983 Deception Statement on Massachusetts cases. The defendants in *Amcan Enterprises* argued that, in light of the adoption of that standard and the decision in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174–84 (1984), two regulations of the attorney general—940 C.M.R. § 3.05 (prohibiting claims that have the tendency or capacity of deceiving buyers) and 940 C.M.R. § 3.16(2) (defining as a violation any "fail[ure] to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction")—were no longer valid.

Agreeing with the motion judge, the court stated that "based on Massachusetts law, the newly articulated standard 'did not represent a radical change in policy' and that the 'new test is rooted in established precedent and does not affect the validity of the Attorney General's regulations.'" *Commonwealth v. Amcan Enters., Inc.*, 47 Mass. App. Ct. at 335. The court also recognized that "Massachusetts courts need not adopt Federal interpretations in their entirety but must only be guided by those interpretations. Thus, the Attorney General may adopt regulations that are more restrictive than the rules adopted by the Federal Trade Commission . . . ." *Commonwealth v. Amcan Enters., Inc.*, 47 Mass. App. Ct. at 335 n.9.

In *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 396 (2004), the Supreme Judicial Court reiterated its adherence to this analytical approach:

> Although we need only be guided by, and not strictly adhere to, interpretations of the term "deceptive" under Federal law, what has been said in the above Federal cases comports in substance with what has been said in our own: an advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product).

The Massachusetts federal district court has applied the principles of the Deception Statement in *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992). Quoting from *Removatron International Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989), and *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), the court emphasized the "whole" impression approach for analyzing an advertisement. It also said, "[A] court must focus on 'the impression created by the advertisement, not its literal truth or falsity.'" *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. at 855 (quoting *Am. Home Prods. v. FTC*, 695 F.2d 681, 686 (3d Cir. 1982)). The District Court reiterated that "express representations that are shown to be false are presumptively material." *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. at 855.

The District Court also acknowledged "the fact that an advertiser may have acted without an intent to deceive is not a defense to a violation of [the FTC Act]. Nor is an advertiser's good faith a defense to a violation of [the Act]." *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. at 855 (citations omitted). While reiterating that the FTC does not need to prove subjective reliance by each customer, it did articulate the "more stringent" standard of the deception statement. To prove individual liability for a deceptive act under the FTC Act, the court stated the following:

> [F]irst, the FTC must show that the misrepresentations were of a kind usually relied upon by reasonable and prudent persons; second, the FTC must show that the misrepresentations were widely disseminated; and third, the FTC must show the injured consumers actually purchased the defendants' products [which is not required under Chapter 93A]. Once the FTC satisfies this test, the burden then shifts to the defendant to prove that the misrepresentations were not relied upon.

FTC v. Patriot Alcohol Testers, Inc., 798 F. Supp. at 860 (quoting *Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)) (citation omitted).

The First Circuit utilized the Deception Statement's principles regarding pure omissions in *Tomasella v. Nestle USA, Inc.*, 962 F.3d 60 (1st Cir. 2020), in affirming the District Court's determination that Nestle's failure to state on its packaging

of chocolate products that there were known labor abuses in its cocoa supply chains did not constitute a deceptive act. *Tomasella v. Nestle USA, Inc.*, 962 F.3d at 72–74. The court held that the omission did not "ha[ve] the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Tomasella v. Nestle USA, Inc.*, 962 F.3d at 74 (quoting *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 488 (2004)).

In *FTC v. Publishers Clearing House*, 104 F.3d 1168 (9th Cir. 1997), the FTC won a restitution award of more than $300,000 against PCH and the president of PCH for misrepresenting to consumers that they had won one of several valuable prizes and that donations would be tax deductible. The court said the following:

> Some courts . . . have held that to find [the president of PCH] liable for restitution, the FTC must also show that [the president] had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type on which a reasonable and prudent person would rely, and that consumer injury resulted. To satisfy the knowledge requirement, the FTC must show that [the president] had actual knowledge of material misrepresentations, [was] recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth. . . . However, the FTC is not required to show that a defendant intended to defraud consumers in order to hold that individual personally liable.

FTC v. Publishers Clearing House, 104 F.3d at 1171 (citations omitted).

Neighboring courts have also utilized the deception statement. For example, the Vermont Supreme Court has referred to the *International Harvester* opinion in *Peabody v. P.J.'s Auto Village, Inc.*, 569 A.2d 460 (Vt. 1989), in which it found that the plaintiff was entitled to relief where the defendant failed to disclose that a used car was "clipped" (the back of a 1972 Saab was attached to the front of a 1974 Saab). Such omission was found to be material where it was "'likely to influence a consumer's conduct' by 'distort[ing]' the buyer's 'ultimate exercise of choice.'" *Peabody v. P.J.'s Auto Vill., Inc.*, 569 A.2d at 463 (quoting *In re Int'l Harvester Co.*, 104 F.T.C. at 1057).

Connecticut has continued to use the tendency or capacity standard as well. *See Aurigemma v. Arco Petroleum Prods. Co.*, 734 F. Supp. 1025 (D. Conn. 1990) (franchisor failed to disclose that a petroleum market withdrawal would also automatically terminate a twenty-four-hour mini-market).

The September 9, 1991, edition of *FTC: Watch* contained an article by David Clanton, a member of the FTC majority that issued the deceptive statement. Not finding in post-1983 cases any "major departure from pre-1983 precedent," Mr. Clanton summarized the reasonable consumer standard as follows:

> (1) express claims require no further analysis as to their meaning; (2) obvious implied claims, or "almost" express claims, generally require no extrinsic proof, but survey evidence will always be considered; and (3) implied claims that cannot be deciphered from a facial examination will always require proof by extrinsic means, such as expert testimony or consumer perception surveys. Thus, the Commission still looks first to its own judgment and intuition in reviewing ad claims.

David A. Clanton, "Deceptive Advertising: Is the FTC Acting Reasonably Under the Circumstances?," *FTC: Watch*, Sept. 9, 1991, at 10.

§ 2.6 SECTION 11 DISTINGUISHED FROM SECTION 9

The courts have frequently commented that businesses are expected to have a level of acumen not necessarily found in consumers. In *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498 (1979), the court articulated a "standard" frequently quoted by the courts. The court said, "The objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. at 504, quoted by the courts in the past. The *Levings* court said that the refusal to pay for services because of a dispute over the amount owed did not by itself give rise to a claim under G.L. c. 93A. *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. at 504. The court said the refusal was not within some "recognized conception of unfairness," and was not "immoral, unethical, oppressive . . . [or] unscrupulous." *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. at 502 (citation omitted). See discussion on the *PMP Associates* unfairness test and its application to Section 9 and Section 11 cases in § 2.3.2, above.

The Supreme Judicial Court has also recognized that "[o]ne can easily imagine cases where an act might be unfair if practiced upon a commercial innocent yet would be common practice between two people engaged in business." *Spence v. Bos. Edison Co.*, 390 Mass. 604, 616 (1983). The court in *Spence* said that the Boston Housing Authority may have to show greater "rascality" than one of its tenants in a case against Edison for overcharging. *Spence v. Bos. Edison Co.*, 390 Mass. at 616.

The Supreme Judicial Court has criticized the "level of rascality" language in the *Levings* case as "uninstructive." *Mass. Emp'rs Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 42 (1995); *see also NASCO v. Pub. Storage, Inc.*, 127 F.3d 148, 151 (1st Cir. 1997). The substantive point, however, that businesses seeking relief under Section 11 are held to a stricter standard than consumers in terms of what constitutes unfair or deceptive conduct, remains valid.

In *Doliner v. Brown*, 21 Mass. App. Ct. 692 (1986), the Appeals Court held that a real estate developer was not liable to a competitor who was also negotiating to purchase the same building. The court stated the following:

> It is recognized that the language is broad enough to take in some reprehensible acts committed in business contexts that elude conventional definitions and categories. The courts are not invited by the statute to punish every departure from "the punctilio of an honor the most sensitive" but they may enforce standards of behavior measurably higher than perfidy. They need not necessarily endorse a pattern of behavior because it happens to be current in the marketplace. We tried to suggest a mood, although we could not prescribe a rule . . . in *Levings v. Forbes & Wallace, Inc.* [8 Mass. App. Ct. 498 (1979)]. . . . In our view the present case is outside § 11 unless we are prepared to say that the statute enacts a rule of noblesse oblige by which a party is to be barred from competing for a business advantage because he is made aware that another has been exerting himself to the same end. That would be an extravagant rule of law.

Doliner v. Brown, 21 Mass. App. Ct. at 697–98 (citations and footnotes omitted).

Justice Brown dissented from the majority decision that the defendant's conduct was not actionable under G.L. c. 93A, § 11. He stated, "I would characterize the totality of the defendant's conduct as having been infused with a high enough 'level of rascality' not only to have raised the plaintiff's eyebrow, but also to have permitted him to recover under § 11." *Doliner v. Brown*, 21 Mass. App. Ct. at 700 (Brown, J., dissenting) (citations omitted).

The Appeals Court also recognized that a higher standard of unfair or deceptive was required in *Madan v. Royal Indemnity Co.*, 26 Mass. App. Ct. 756, 762–63 (1989). The court said that, since a plaintiff-lawyer and the defendant-lessor were engaged in trade or commerce, "any conduct of the defendant would be judged by a standard of unfairness higher than the standard employed where actions are brought by a consumer under § 9." *Madan v. Royal Indem. Co.*, 26 Mass. App. Ct. at 763 n.7; *see also Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F. Supp. 1188, 1204 (D. Mass. 1990). *But see Dowd v. Iantosca*, 27 Mass. App. Ct. 325 (1989) (real estate broker's alleged tortious interference with plaintiff's relationship with a seller of real property was unwarranted, improper, and egregious under G.L. c. 93A, § 11).

In *Greenery Rehabilitation Group v. Antaramian*, 36 Mass. App. Ct. 73 (1994), the court rejected liability for failure to disclose the financial status of a tenant, because the seller did not know about the tenant's financial problems. The court stated the following:

> More generally, in the circumstances of a transaction at arm's length between experienced, worldwise businessmen advised by counsel, we find nothing chargeable to the defendants that sank to the level of "rascality" made actionable by § 11 of the statute regarding dealings between businessmen (distinguished from the consumers' § 9).

Greenery Rehab. Grp. v. Antaramian, 36 Mass. App. Ct. at 78–79 (citations omitted).

The rascality test was also cited by the court in *Shepard's Pharmacy, Inc. v. Stop & Shop Cos.*, 37 Mass. App. Ct. 516, 522 (1994), where the court found that the supermarket chain's approach to contract negotiations with a pharmacist did not create liability under Chapter 93A.

The federal courts have also discussed what standards should apply in Section 11 cases. Although the defendant's breach in *Ahern v. Scholz*, 85 F.3d 774 (1st Cir. 1996), amounted to more than a dispute over the commercial reasonableness of certain deductions, the breach "did not amount to the level of rascality required for Chapter 93A liability." *Ahern v. Scholz*, 85 F.3d at 800. The defendant did not, for example, attempt to conceal the nature of the deductions. The court said that G.L. c. 93A, § 11, "'does not contemplate an overly precise standard of ethical or moral behavior. It is the

standard of the commercial marketplace.'" *Ahern v. Scholz*, 85 F.3d at 798 (quoting *Shepard's Pharmacy, Inc. v. Stop & Shop Cos.*, 37 Mass. App. Ct. 516, 520 (1994)); *see Anoush Cab, Inc. v. Uber Techs., Inc.*, 8 F.4th 1, 20–21 (1st Cir. 2021) (affirming District Court's finding of no Chapter 93A violation where conduct was in accordance with standard of commercial marketplace).

In *Industrial General Corp. v. Sequoia Pacific Systems*, 44 F.3d 40, 45–46 (1st Cir. 1995), the federal appeals court overturned a finding of liability, stating that the rascality test had not been met when a developer failed to disclose the financial state of a contractor to its supplier. Although the court agreed with the lower court's finding that the plaintiff-supplier was "naive, inattentive and altogether too trusting," the court disagreed with the lower court's finding that the trust created a duty to disclose. In *Commercial Union Insurance Co. v. Seven Provinces Insurance Co.*, 9 F. Supp. 2d 49 (D. Mass. 1998), which dealt with a dispute between insurers, the court said liability turned on whether the defendant's "conduct was sufficiently unfair so as to rise to the level of 'rascality' required by chapter 93A." *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 9 F. Supp. 2d at 68; *see also Compagnie de Reassurance d'Ile de France v. New Eng. Reinsurance Corp.*, 825 F. Supp. 370, 381 (D. Mass. 1993) (false representations about underwriting violated Chapter 93A); *Credit Data of Cent. Mass. v. TRW, Inc.*, 37 Mass. App. Ct. 442, 448 (1994) ("we think there was not enough 'rascality' (as distinguished from poor advice or judgment) to base a recovery under c. 93A, § 11") (citation omitted).

§ 2.6.1 Similar Standard

Despite the numerous cases that refer to the "rascality test," the federal court recognized in *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411 (1st Cir. 1985), that "[s]ophistication of the parties is not mentioned in chapter 93A and the amendment to chapter 93A to cover business entities did not limit the statute's protection to small, unsophisticated businesses." *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d at 418. The court recognized that a party's experience and sophistication are "relevant to the ultimate disposition of the chapter 93A claim." *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d at 418. The Supreme Judicial Court rejected the "rascality test" in *Massachusetts Employers Insurance Exchange v. Propac-Mass, Inc.*, 420 Mass. 39, 42–43 (1995), a Section 11 case, and said, "We focus [instead] on the nature of the challenged conduct and on the purposes and effect of that conduct as the crucial factors in making a G.L. c. 93A fairness determination." See *Nissan Autos. v. Glick*, 62 Mass. App. Ct. 302 (2004). In both *Cambridge Plating Co. v. Napco, Inc.*, 85 F.3d 752, 769 (1st Cir. 1996), and *Damon v. Sun Co.*, 87 F.3d 1467, 1483 (1st Cir. 1996), the U.S. court of appeals noted the Supreme Judicial Court's admonition in *Massachusetts Employers Insurance Exchange v. Propac-Mass, Inc.*, 420 Mass. 39 (1995), that the rascality test did not provide much guidance for analyzing G.L. c. 93A claims.

Although G.L. c. 93A, §§ 9 and 11, are distinct because the former grants a cause of action to consumers, whereas the latter grants a cause of action to those in trade or commerce, state courts have also recognized that "principles established in § 9 cases often apply to § 11 cases." *Kansallis Fin. Ltd. v. Fern*, 421 Mass. 659, 671 n.10 (1996). In *Piccicuto v. Dwyer*, 32 Mass. App. Ct. 137 (1992), the court said the following:

> The notion that the law is simply a mirror of the manners and mores of the marketplace should not be our lodestar. "Chapter 93A has established in general, for businesses as well as for consumers, a path of conduct higher than that trod by the crowd in the past."

Piccicuto v. Dwyer, 32 Mass. App. Ct. at 140 (quoting *Doliner v. Brown*, 21 Mass. App. Ct. 692, 700 (1986) (Brown, J., concurring)).

The court upheld a finding of liability against a landlord's agent who interfered with the prospective sale of the tenant's business. But see *MacGillivary v. W. Dana Bartlett Insurance Agency*, 14 Mass. App. Ct. 52, 59 (1982), where the court found that, although the insurance broker's conduct did not fall "within any recognized conception of unfairness" or reach "a level of rascality," because of various precedents, the court reluctantly held that the negligence of the broker constituted a violation of G.L. c. 93A. See cases discussed in § 2.5.4(a), When Defendant Is Liable Without an Intent to Deceive, above.

In *VMark Software v. EMC Corp.*, 37 Mass. App. Ct. 610 (1994), the court said that

> [t]o be held unfair or deceptive under c. 93A, practices involving even worldly-wise business people do not have to attain the antiheroic proportions of immoral, unethical, oppressive, or unscrupulous conduct, but need only be within any recognized or established common law or statutory concept of unfairness.

VMark Software v. EMC Corp., 37 Mass. App. Ct. at 620, *quoted in Kaur v. World Bus. Lenders, LLC*, 440 F. Supp. 3d 111, 118–19 (D. Mass. 2020).

The court, therefore, upheld a finding of liability based on misrepresenting the efficacy of a software package.

Although the court in *Zayre Corp. v. Computer Systems of America, Inc.*, 24 Mass. App. Ct. 559 (1987) rejected a lessor's Section 11 counterclaim for misrepresentations about a lessee's intentions, it noted that

> [e]ven in vigorous competition among business concerns, misrepresentations may be so seriously deceptive and harmful as to permit some recovery for the injury really caused by them. Indeed, in some circumstances, even half-truths may constitute serious deception. Business strategy . . . should not use conscious misrepresentation as a competitive weapon.

Zayre Corp. v. Comput. Sys. of Am., Inc., 24 Mass. App. Ct. at 570–71 n.23 (citation omitted); *see also Chedd-Angier Prod. Co. v. Omni Publ'ns Int'l Ltd.*, 756 F.2d 930 (1st Cir. 1985) (finding sufficient evidence to go to a jury on misrepresentation, while rejecting liability under G.L. c. 93A, § 11).

§ 2.6.2 Breaching the Covenant of Good Faith

Numerous cases, discussed in § 2.3.4, Illegal Acts Not Necessarily Unfair or Deceptive, above, hold that a mere breach of contract is not a violation of G.L. c. 93A, § 11. *See, e.g.*, *Mass. Emp'rs Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 42–43 (1995); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 100–01 (1979); *Motsis v. Ming's Supermarket, Inc.*, 96 Mass. App. Ct. 371, 380 (2019), *review denied*, 483 Mass. 1109 (2020); *Nissan Autos. v. Glick*, 62 Mass. App. Ct. 302, 312–13 (2004). Even if a mere breach of contract is not a violation of Chapter 93A, a breach of the implied covenant of good faith and fair dealing may violate Chapter 93A.

In *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451 (1991), the Supreme Judicial Court said that "[t]he implied covenant of good faith and fair dealing provides 'that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. at 471–72 (quoting *Druker v. Roland Wm. Jutras Assocs., Inc.*, 370 Mass. 383, 385 (1976)). By using a discretionary right under the agreement as a pretext to obtain more money, Anthony's breached this covenant. The parties agreed, and the court held, that a violation of this covenant of good faith and fair dealing is a violation of Chapter 93A. The court reiterated that "conduct 'in disregard of known contractual arrangements' and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes." *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. at 473 (citations omitted). In that case, the findings on the breach of the covenant of good faith and fair dealing were made by the trial judge in a jury-waived trial. *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. at 471–76. But in a jury trial, the judge's conclusion that the evidence was sufficient to support the jury's verdict does not compel the judge to adopt the jury's conclusion that a Chapter 93A violation occurred. *Frostar Corp. v. Malloy*, 63 Mass. App. Ct. 96, 109 (2005).

In *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. 672 (1986), the court held that a commercial landlord owed a duty of good faith and fair dealing to disclose to his tenant that he had made other plans for the tenant's rental property upon learning that the tenant was making arrangements to sell her business and sublease the property. Although the owner had a lawful right not to disclose the status of his plans as the property owner, the court said that "the evolving standard of fairness and good faith in business dealing mandated by c. 93A precluded his thereafter using disclosure to sabotage the sale of the business without assuming a responsibility for the changed situation of the [tenant]." *Wasserman v. Agnastopoulos*, 22 Mass. App. Ct. at 680.

In *Massachusetts Employers Insurance Exchange v. Propac-Mass, Inc.*, 420 Mass. 39, 43 (1995), the Supreme Judicial Court reiterated that a breach of the covenant of good faith and fair dealing may violate Chapter 93A. Propac was an attorney-in-fact for a reciprocal insurance exchange. Propac challenged the exchange's decision to terminate the attorney-in-fact agreement by, among other things, removing files, telling subscribers that their insurance would be jeopardized if they signed a new power of attorney, and telling subscribers to pay fees directly to the exchange. The court said that

> conduct undertaken as leverage to destroy the rights of another party to the agreement while the agreement is still in effect and jeopardizing the interests of subscribers in preserving their workers' compensation coverage has a coercive quality that, with the other facts, warranted a finding of unfair acts or practices.

Mass. Emp'rs Ins. Exch. v. Propac-Mass, Inc., 420 Mass. at 43.

In *Cherick Distributors, Inc. v. Polar Corp.*, 41 Mass. App. Ct. 125, 128 (1996), the court held that "[t]he same evidence that supported the jury's findings of a breach of covenant of good faith and fair dealing and tortious interference with advantageous relationships also supported the jury's finding that Polar's conduct amounted to an unfair or deceptive act under G.L. c. 93A." *See also Marshall v. Stratus Pharms., Inc.*, 51 Mass. App. Ct. 667, 676 (2001) ("The allegation that the defendants never intended to pay for the services stated sufficient facts to constitute a claim for relief under c. 93A.") (citation omitted).

Similarly, in *Green v. Blue Cross & Blue Shield of Massachusetts, Inc.*, 47 Mass. App. Ct. 443 (1999), the Appeals Court held that the insurer had breached its duty of good faith and fair dealing in relation to a claim filed by an insured. The insured and the insured's doctor asked repeatedly whether surgery on the insured's jaw would be covered. Although they did not specifically ask how much of the procedure would be covered, the court said that this question was implied in their inquiry—the insured's "attempts to obtain the information about her medical benefits should not require the utterance of a secret word (i.e., price), if the nature of the inquiry is reasonably clear." G*reen v. Blue Cross & Blue Shield of Mass., Inc.*, 47 Mass. App. Ct. at 447.

In *Diamond Crystal Brands, Inc. v. Backleaf, LLC*, 60 Mass. App. Ct. 502 (2004), the trial court found that Backleaf was not liable pursuant to Chapter 93A because it had not acted in bad faith in threatening to evict Diamond. The Appeals Court reversed, holding that Backleaf's threat to evict Diamond, based on a thoroughly unreasonable interpretation of the lease, was not made in good faith and therefore constituted a willful and knowing unfair practice in violation of Chapter 93A. *Diamond Crystal Brands, Inc. v. Backleaf, LLC*, 60 Mass. App. Ct. at 508.

The federal courts have also recognized that a breach of the implied covenant of good faith may support a violation of Chapter 93A. In *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47 (1st Cir. 1998), the U.S. Court of Appeals for the First Circuit stated the following:

> Where one party to an agreement employs a breach of contract to gain an unfair advantage over the other, the breach "has an extortionate quality that gives it the rancid flavor of unfairness." . . . The court based its Chapter 93A ruling both on testimony that Dooyang did not intend to pay ADL for the work it performed and on documents which stated that Dooyang was avoiding paying its creditors "by all possible means" and which created a mechanism for measuring the success of its strategy by listing the reductions that resulted from Dooyang's deceptive tactics. As the district court found, Dooyang intended to force ADL into an unfavorable settlement by threatening litigation. . . .
>
> Here, Dooyang's wrongful purpose was to extract a favorable settlement from ADL for less than the amount Dooyang knew that it owed by repeatedly promising to pay, not doing so, stringing out the process, and forcing ADL to sue.

Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d at 55–56 (citation omitted); *see also Gabriel v. Jackson Nat'l Life Ins. Co.*, No. 11-12307-MLW, 2015 WL 1410406, at *17–18 (D. Mass. Mar. 26, 2015) (holding that a life insurer violated Chapter 93A by virtue of the "extortionate character" of its breach of contract, namely in overstating the minimum payment required from the policyholder to keep the policy in force).

In *Commercial Union Insurance Co. v. Seven Provinces Insurance Co.*, 9 F. Supp. 2d 49 (D. Mass. 1998), *aff'd*, 217 F.3d 33 (1st Cir. 2000), the court said the following:

> Thus, [the defendant's] behavior fits within the 93A framework outlined by the Supreme Judicial Court: it withheld performance due under the contract in order to renegotiate the bargain between the parties and force CU to do what it other-wise was not legally obligated to do. Namely, compromise a valid claim. [The defendant's] behavior was particularly egregious when seen in the context of the mores of the reinsurance industry, an industry that has operated for centuries on the principles of "utmost good faith."

Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F. Supp. 2d at 69.

In *Trent Partners & Associates, Inc. v. Digital Equipment Corp.*, 120 F. Supp. 2d 84 (D. Mass. 1999), the court held that the plaintiffs' claim for breach of the implied covenant of good faith and fair dealing adequately supported their action under Chapter 93A. The court stated that

> [t]his case . . . does not raise merely a simple breach of contract claim. Rather the plaintiffs have shown a triable issue of fact as to a breach of the implied covenant of good faith and fair dealing

> in at-will employment contracts. Inherent in this claim is an element of either bad faith and improper motive or a breach of fair dealing in depriving an employee of "reasonably ascertainable future compensation based on his [or her] past services." [*Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 671 (1981).] By their very terms both of these elements clearly fall into "established common law . . . concept[s] of unfairness." [*VMark Software, Inc. v. EMC Corp.*, 37 Mass. App. Ct. 610, 620 (1994).]

Trent Partners & Assocs., Inc. v. Dig. Equip. Corp., 120 F. Supp. 2d at 106–07.

The courts have also held that not every breach of a covenant of good faith is also a breach of Chapter 93A. In *Atkinson v. Rosenthal*, 33 Mass. App. Ct. 219 (1992), however, the court rejected an application of *Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 474 (1991), and other cases, stating the following:

> There is in those decisions a consistent pattern of the use of a breach of contract as a lever to obtain advantage for the party committing the breach in relation to the other party, i.e., the breach of contract has an extortionate quality that gives it the rancid flavor of unfairness. In the absence of conduct having that quality, failure to perform obligations under a written lease, even though deliberate and for reasons of self-interest, does not present an occasion for invocation of G.L. c. 93A remedies.

Atkinson v. Rosenthal, 33 Mass. App. Ct. at 226 (citation omitted); *see Mass. Emp'rs Ins. Exch. v. Propac-Mass, Inc.*, 420 Mass. 39, 42 (1995) (criticizing phrase "rancid flavor of unfairness").

In *PH Group Ltd. v. Birch*, 985 F.2d 649 (1st Cir. 1993), the court affirmed the lower court's determination that G.L. c. 93A was not violated, although the jury found that a licenser of software had breached the covenant of good faith and fair dealing. The court said that "[v]iolations of G.L. c. 93A must meet a higher standard of liability than do breaches of an implied covenant of good faith and fair dealing." *PH Grp. Ltd. v. Birch*, 985 F.2d at 652.

The court in *Ahern v. Scholz*, 85 F.3d 774 (1st Cir. 1996), also cited to *Atkinson v. Rosenthal*, 33 Mass. App. Ct. 219 (1992), but not to the covenant of good faith, when it denied liability under G.L. c. 93A, stating that refusing to pay all royalties that it owed did not create an "extortionate element to the breach" or rise "to the level of rascality required for G.L. c. 93A." *Ahern v. Scholz*, 85 F.3d at 799–800.

§ 2.6.3 Look to the Terms of the Contract

Despite the implied covenant of good faith and fair dealing, courts may be more reluctant to look beyond the express terms of contracts in business disputes than they are in consumer disputes. Thus, an agreement appeared to control a determination of whether the defendant acted unfairly or deceptively in *Zapatha v. Dairy Mart, Inc.*, 381 Mass. 284, 297–300 (1980), where the defendants were found not liable under Section 11 for terminating a franchise agreement pursuant to a clause authorizing termination without cause on ninety days' notice. *But see Cherick Distribs., Inc. v. Polar Corp.*, 41 Mass. App. Ct. 125, 128 (1996). Likewise, in *Penney v. First National Bank*, 385 Mass. 715, 719–23 (1982), the bank did not act unconscionably or oppressively under G.L. c. 93A or 940 C.M.R. § 3.16(1) by seizing, without notice, the collateral securing a loan agreement, where the agreement put the debtor on notice of the bank's right to immediate possession on default. *See also Cummings v. HPG Int'l, Inc.*, 244 F.3d 16 (1st Cir. 2001) (where manufacturer had provided a written ten-year warranty, plaintiffs were unsuccessful in seeking Chapter 93A damages for misrepresentations about the long-term viability of a roof that collapsed after seventeen years).

In *Canal Electric Co. v. Westinghouse Electric Corp.*, 406 Mass. 369, 379 (1990), the court held that a limitation of liability provision in a "purely commercial" sales contract would bar a breach of warranty theory under G.L. c. 93A, § 11. *Accord Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F. Supp. 1188, 1204–05 (D. Mass. 1990). *But see H1 Lincoln, Inc. v. S. Washington St., LLC*, 489 Mass. 1, 26–27 (2022) (limitation of liability provision in lease contrary to public policy and unenforceable where defendant violated G.L. c. 93A, § 11 willfully and knowingly).

In *Winter Panel Corp. v. Reichhold Chemicals*, 823 F. Supp. 963, 974 (D. Mass. 1993), however, the court held that claims of misrepresentations were not "merely duplicative" of the claims of consequential damages for breach of warranty that were unenforceable because of a remedy-limitation provision. The court said that the "plaintiff's chapter 93A claim is predicated on a legal theory that is distinct from breach of warranty, namely, misrepresentation." *Winter Panel Corp. v. Reichhold Chems.*, 823 F. Supp. at 974. To prove a misrepresentation, the plaintiff still needed to satisfy "the eyebrow test" of *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498 (1979). *But cf. Mass. Emp'rs Ins. Exch. v. Propac-*

Mass., Inc., 420 Mass. 39, 42 (1995) (criticizing the language in the *Levings & Forbes* case as "uninstructive"). The court rejected the plaintiff's argument that the defendant's "mere statements of belief" were sufficient to support liability under G.L. c. 93A. It said that liability could exist if the plaintiff proved "the kind of knowing omission that achieves the level of rascality necessary to find a violation of chapter 93A." *Winter Panel Corp. v. Reichhold Chems.*, 823 F. Supp. at 975.

Subsequently, in *McCartin v. Westlake*, 36 Mass. App. Ct. 221 (1994), the Appeals Court rejected both a jury verdict of deceit and a finding that the defendant-franchisors had violated Chapter 93A by making various misrepresentations about their obligations under a franchise agreement. The court stated that

> [b]usiness people understand that much of what is said during the negotiation of a business agreement never becomes part of the final bargain. Only what matters is reduced to writing and signed. And where that writing warns the buyers that what they sign, and no more, is binding, and the buyers acknowledge that to be so and that they understand what they are signing, a firm case is made, as [a] matter of law, to enforce what was signed and not what was said during negotiations.

McCartin v. Westlake, 36 Mass. App. Ct. at 232–33; *see Ne. Data Sys. v. McDonnell Douglas Comput. Sys.*, 986 F.2d 607, 611 (1st Cir. 1993) (contractual choice of law provision precluded Chapter 93A claim based on fraud). A misplaced but earnest interpretation of a contract or the law is not an unfair or deceptive act under Chapter 93A. *Nissan Autos. v. Glick*, 62 Mass. App. Ct. 302, 312–13 (2004).

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