Chapter 12: Consumer Law

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CHAPTER 12

Consumer Law

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§12.1. Chapter 93A—Standing to Sue and Be Sued. During the Survey year Massachusetts appellate courts settled two questions concerning standing under chapter 93 of the General Laws, the Consumer Protection Act. In Lantner v. Carson,1 the Supreme Judicial Court ended the argument concerning the applicability of chapter 93A to a selling homeowner. The Appeals Court in Levings v. Forbes & Wallace, Inc.2 considered whether a business seller could invoke chapter 93A against a business customer.

In Lantner, the plaintiffs brought an action against the private individuals who sold them their home. In the sale agreement, the defendant had made several representations concerning the condition of the house3 and the quality of the water, which was supplied from the property’s well.4 Accepting these representations as true, the plaintiffs and the defendants completed the sale.5 Shortly after moving into the house, the plaintiffs experienced difficulties with the house and the well.6 The plaintiffs repaired the defects and then, pursuant to section 9(3) of chapter 93A,7 notified defendants of the problems and demanded relief.8 When no offer to settle the matter had been received, the plaintiffs

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3 374 Mass. at 608, 373 N.E.2d at 975. In the purchase and sale agreement, the defendant had represented that (1) the visible damage to the second-floor ceiling was the result of a defective roof, which had already been repaired; and (2) that the second-floor fireplace was stuffed with paper to avoid drafts, but that it was otherwise in complete working condition. Id.
4 Id. The purchase and sale agreement read in part: “This agreement so made . . . subject to the following: Water turned on, well functional, and water quality tests acceptable.” Id.
5 Id.
6 Id. at 608-09, 373 N.E.2d at 975.
7 G.L. c. 93A, § 9(3), provides in pertinent part: “At least thirty days prior to the filing of any . . . action [under this section], a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent.” Id.
8 374 Mass. at 609, 373 N.E.2d at 975.
commenced an action under chapter 93A, alleging numerous misrepresentations by the defendants and seeking treble damages, attorney's fees, and other relief.\(^9\)

The Supreme Judicial Court rejected the plaintiffs' contention that the broad language of sections 9 and 2 of chapter 93A encompassed strictly private transactions not undertaken in the ordinary course of a trade or business.\(^{10}\) Section 9 of chapter 93A provides a private right of action to any person who purchases property for personal use and thereby suffers a loss as a result of another's unfair or deceptive practice. Section 2 proscribes unfair or deceptive practices "in the conduct of any trade or commerce . . .".\(^{11}\) Noting that the statute nowhere specifically defines "trade or commerce," the Court observed that in section 11 the words referred specifically to individuals acting in a business context.\(^{12}\) The Court then determined that the legislature intended the same meaning when using the phrase in section 2.\(^{13}\) It thereby confined the application of section 2 to unfair practices occurring in a business context.\(^{14}\) On this basis, the Court concluded that an individual selling his own home does not engage in trade or commerce and therefore is not subject to the provisions of chapter 93A.\(^{15}\)

In addition to finding support for its decision in narrow statutory analysis, the Court also found its conclusion consistent with the statute's broad protective purpose.\(^{16}\) The Court emphasized the statute's goal of balancing the relative positions of the parties.\(^{17}\) The Court noted that the owner and potential purchaser in such a transaction stand in equal relation to one another.\(^{18}\) Giving the consumer-purchaser the weapon of chapter 93A would only unbalance this relationship.\(^{19}\) Hence, the Court concluded, allowing an individual home-buyer a cause of action under article 93A would only destroy the fundamental fairness that the legislature sought to achieve.\(^{20}\)

\(^9\) Id. at 607, 373 N.E.2d at 974.
\(^{10}\) Id. at 610, 373 N.E.2d at 976.
\(^{11}\) G.L. c. 93A, § 2.
\(^{12}\) 374 Mass. at 610, 373 N.E.2d at 976.
\(^{13}\) Id. at 611, 373 N.E.2d at 977.
\(^{14}\) Id. Some consumer law practitioners have argued that the nature of the transaction, rather than a generic description of the provider of the goods or services, should control the applicability of the law. Therefore, a sale of a home, even though not within the usual business practices of the seller, would necessarily be covered by the provisions of G.L. c. 93A.
\(^{15}\) Id. at 607-08, 373 N.E.2d at 974-75.
\(^{16}\) Id. at 612, 373 N.E.2d at 977.
\(^{17}\) Id.
\(^{18}\) Id.
\(^{19}\) Id.
\(^{20}\) Although a professional real estate broker was involved in the sale, the plaintiffs did not initiate a chapter 93A claim against him. The conclusion reached by the
After the Supreme Judicial Court settled the question of whether a non-business seller may be held liable under chapter 93A, the Appeals Court in *Levings v. Forbes & Wallace, Inc.* considered whether chapter 93A reached commercial disputes between business organizations. In *Levings*, the plaintiff had repaired a central air conditioning unit at the request of Forbes & Wallace. Forbes and Wallace refused to pay the bill. Levings sued Forbes and Wallace under section 11 of chapter 93A, which confers a right of action upon “[a]ny person who engages in the conduct of any trade or commerce . . . .” Levings alleged that Forbes & Wallace never intended to pay for the work and that, in effect, it had tricked him into working for it. This last allegation formed the foundation of Levings’s claim of unfair or deceptive acts or practices. Forbes and Wallace argued in defense that only buyers, and not sellers, could avail themselves of remedies under section 11 of chapter 93A. Thus, it maintained, this section could not be utilized by a supplier of goods or services.

The Appeals Court found no support for Forbes & Wallace’s contention in the statutory language of the Consumer Protection Act. The court examined the language of section 9, which until recently had limited rights of action to purchasers and lessees. It contrasted this section with the broad entitlement contained in section 11, where no such limitation is present. The court concluded that the restrictions encompassed in section 9 could not by implication be conferred upon section 11.

The result of the *Lantner* and *Levings* decisions is both a broadening and a narrowing of the class of plaintiffs who may avail themselves of the remedies of the Consumer Protection Act. *Lantner* limits this

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22 Willard S. Levings was designated as a trustee for Trane, the plaintiff. *Id.*
23 *Id.*
24 *Id.* at 2044, 396 N.E.2d at 151.
25 G.L. c. 93A, § 11.
27 *Id.* at 2049, 396 N.E.2d at 153.
28 *Id.*
29 *Id.*
30 *Id.* G.L. c. 93A, § 9, was amended during the Survey year by chapter 406 of the Acts of 1979. For a discussion of these recent amendments, see § 8 infra.
31 Whereas the old version of section 9 spoke of “[a]ny person who purchases or leases goods, services or property . . . .”, section 11 refers to “[a]ny person who engages in the conduct of any trade or commerce . . . .” G.L. c. 93A, § 11.
class by restricting chapter 93A actions to consumers injured in a business transaction.\textsuperscript{33} Leving, on the other hand, broadens the class of business consumers to include sellers as well as buyers.\textsuperscript{34} Both cases are significant for clarifying who may avail themselves of the protections of chapter 93A.

\textbf{§12.2. Chapter 93A—Standards for Determining Violations—Consumer Actions.} As any attorney who has ever filed an action under chapter 93A, or has ever defended against such an action, can attest, in most cases the attorney's estimate of the chances for success is, at best, an educated guess. Of course, these guesses become more educated as the judiciary shapes the limits of the law's prohibitions. During this Survey period the Supreme Judicial Court in two opinions continued this process of shaping the boundaries of chapter 93A.\textsuperscript{1}

In \textit{Schubach v. Household Finance Corp.},\textsuperscript{2} the plaintiffs, residents of Holyoke, had borrowed money from the defendant at its Holyoke office.\textsuperscript{3} When the plaintiffs failed to pay the amount due, the defendant filed a suit in Boston Municipal Court.\textsuperscript{4} The plaintiffs alleged that by filing suit in Boston, rather than in a court in Holyoke, the defendants had engaged in an unfair or deceptive act in violation of chapter 93A.\textsuperscript{5} The plaintiffs complained that the defendant had a policy to file suit in a forum inconvenient to the plaintiffs in order to precipitate default judgments, to make defense of the action more difficult, and to secure judgments more favorable to the Household Finance Corporation than would otherwise be the case.\textsuperscript{6} Household Finance moved to dismiss, asserting that there could be no finding of unfairness or deception when their choice of forum was within the parameters created by law.\textsuperscript{7} The trial judge denied the motion, and the Supreme Judicial Court granted direct appellate review.\textsuperscript{8}

The Court, in upholding the trial judge's denial of the motion to dismiss, considered interpretations given by federal courts and the Fed-

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\textsuperscript{33} Id. at 646, 373 N.E.2d at 976.
\textsuperscript{3} Id. at 1154, 376 N.E.2d at 141.
\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{6} Id.
\textsuperscript{7} G.L. c. 332, § 2, as amended by Acts of 1975, c. 836, § 2. Section 2 provides that a complaint may be filed in the "county where one of the parties lives or has his usual place of business." Id. Since the defendant's main office is located in Boston, a complaint could be filed in Suffolk County.
\textsuperscript{8} 1978 Mass. Adv. Sh. at 1154, 376 N.E.2d at 140.
\end{flushleft}
eral Trade Commission to the phrase “unfair or deceptive acts or practices.” The Court noted that the Federal Trade Commission had issued cease and desist orders in matters involving the commencement of consumer collection suits in courts far from the consumer's home on the grounds that such act constitutes unfair practice. In addition, the Court noted that a Federal Trade Commission order involving a practice substantially similar to the conduct complained of in Schubach had been enforced by the Seventh Circuit Court of Appeals. On this basis, the Supreme Judicial Court rejected the argument that "an act or practice which is authorized by a statute can never be an unfair or deceptive act or practice under §2(a) of G.L. c. 93A." In so doing, the Court enunciated the standard to be applied when determining whether a practice is deceptive. It stated that "[t]he circumstances of each case must be analyzed, and unfairness is to be measured not simply by determining whether particular conduct is lawful apart from G.L. c. 93A but also by analyzing the effect of the conduct on the public." The Court noted that while a court in making such an assessment should consider whether a form of conduct was permitted by statute or common law, this factor would not be conclusive on the issue of fairness. Hence, the Court ruled that since Household Finance had based its motion to dismiss solely on a ground which is not conclusive on the issue of fairness, the judge's order denying the motion to dismiss was correct.

An opportunity to apply the standard enunciated in Schubach was provided in Mechanics National Bank of Worcester v. Killeen. Killeen

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9 Id. at 1155, 376 N.E.2d at 141. G.L. c. 93A, § 2(b), as amended by Acts of 1978, c. 459, § 2, states:

It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

10 1978 Mass. Adv. Sh. at 1155, 376 N.E.2d at 141. See In re Commercial Serv. Co., 86 F.T.C. 467 (1975); In re Montgomery Ward & Co., 84 F.T.C. 1337 (1974). The FTC's cease and desist orders required the defendants to stop instituting collection suits in any county other than the county in which the consumers resided or that in which the contract was executed.

11 1978 Mass. Adv. Sh. at 1156, 376 N.E.2d at 141. See Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976), where the court noted that the Supreme Court left no doubt that the Federal Trade Commission had the authority to prohibit conduct as unfair even though it was legal. Id. at 292 (citing FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972)).


13 Id.

14 Id.

15 Id.

was indebted to the bank on three notes executed in 1974.17 All three notes were secured by stock in a company traded on the New York Stock Exchange.18 Between April and June 1974, the value of this stock declined substantially.19 The bank requested that Killeen pledge additional collateral because the value of the stock no longer adequately protected the bank's position.20 To comply, Killeen executed a mortgage on his home.21 Five days after the mortgage was executed, the bank's loan committee decided to sell the stock.22 An order to sell was placed the next day, and the shares were sold during that day and the next two days. At no time before these sales did the bank inform Killeen that the due dates of the notes had been accelerated, or that these notes were then due.23

After receiving notice from Killeen purporting to cancel the mortgage and a demand letter seeking damages for wrongful sale of the stock, the bank filed a complaint seeking declaratory relief.24 The complaint sought a determination that the mortgage could not be cancelled. Killeen counterclaimed, alleging, inter alia, violations of chapters 93A and 140C.25 The trial judge ruled that the bank had violated its contract by selling the stock in the manner it did, but found that the mortgage was valid, and that there had been no violations of chapters 93A or 140C.26

The Court, interpreting the underlying promissory notes executed by the parties, concluded that the bank had no right to sell the stock until notice was given to Killeen that the notes were due, and Killeen was given a reasonable opportunity to pay the amount due.27 Having decided that stock sale was improper, the Court then turned its attention to the question of whether this improper conduct constituted the basis for a violation of chapter 93A. The Court concluded that it did

17 Id. at 130, 384 N.E.2d at 1233.
18 Id. at 130, 384 N.E.2d at 1234.
19 Id. at 131, 384 N.E.2d at 1234.
20 Id. at 132, 384 N.E.2d at 1234.
21 Id. Killeen asserted that the bank obtained the mortgage by representing that the stock would not be sold if the additional collateral was pledged. The trial judge found that no such assurance was given. Id. at 138, 384 N.E.2d at 1237.
22 Id. at 132, 384 N.E.2d at 1234.
23 Id. at 142, 384 N.E.2d at 1237. This notice of cancellation was given well after the period of time allowed by G.L. c. 140C, § 8, had expired. This section requires a party to cancel within three days following the granting of the mortgage. See G.L. c. 140C, § 8.
24 1979 Mass. Adv. Sh. at 133, 384 N.E.2d at 1235. The demand letter was filed pursuant to G.L. 93A, § 9.
25 Id. G.L. c. 140C relates to consumer credit cost disclosure.
26 Id. at 134, 384 N.E.2d at 1235.
27 Id. at 136-37, 384 N.E.2d at 1236.
not. Citing Schubach, the Court declared that "[j]ust as every lawful act is not thereby automatically free from scrutiny as to its unfairness under c. 93A, . . . so not every unlawful act is automatically an unfair (or deceptive) one under G.L. c. 93A." The Court employed the same approach that it used in Schubach, namely, analyzing all the circumstances of the case. It noted that the bank's concern for its security was reasonable and that the bank had no knowledge of any other assets that Killeen possessed. Thus, after balancing the equities in the relationship of the parties, the Court ruled that there was no unfair act or practice in the bank's sale of the stock.

In Schubach and Mechanics National Bank, the Court made it clear that it would not consider every unlawful action in a consumer context to be a violation of chapter 93A. At the same time, it emphasized that an act, otherwise legal, could nevertheless constitute an unfair or deceptive practice within the meaning of chapter 93A. These cases define the current boundaries of the Consumer Protection Act. Whether these boundaries can be of any practical assistance to the practitioner is a matter best left to conjecture, because each case must be decided upon its unique circumstances.

While the standard enumerated in the previous two cases is important in determining potential violations of chapter 93A in the absence of either federal precedents or of specific violation of the rules and regulations promulgated by the Attorney General, in one class of cases the existence of chapter 93A violations is much more easily determined. One such case is Heller v. Silverbranch Construction Corp., decided by the Supreme Judicial Court during this Survey period. Heller involved allegations by purchasers of a private home that the real estate

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28 Id. at 138, 384 N.E.2d at 1237.
29 Id. at 139, 384 N.E.2d at 1237.
30 Id.
31 Id. at 140, 384 N.E.2d at 1237.
32 Id.
33 Id. The Court in Mechanics Nat'l Bank had no reason to discuss the implications of 940 C.M.R. § 3.16, which states that an act violates G.L. c. 93A if "[i]t fails to comply with existing statutes, rules, regulations or laws meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection." Id.
36 G.L. c. 93A, § 2(c), enables the Attorney General to make rules and regulations interpreting the provisions of subsection 2(a). These rules and regulations are found at 940 C.M.R. §§ 3.00-11.00.
brokers and the builder had misrepresented the property. The plaintiffs, residents of Illinois, came to Massachusetts to purchase a home. They contacted a broker who showed them numerous houses. During one house visit, they noticed running water on the property and told the broker that they were not interested in any property that had any water on it. The broker then directed them to a house that was constructed and owned by the defendant, Silverbranch. The plaintiffs decided to purchase the house. Before signing the purchase and sale agreement, Mrs. Heller asked the president of Silverbranch if there was good drainage on the land. He responded in the affirmative. The transaction was completed, and the Hellers moved into their new house two months later. On their arrival at the house, they noticed standing water on the property. They called the president of Silverbranch, who acknowledged that there was a drainage problem, but refused to assume the costs of cure.

The plaintiffs sent a written demand for relief to both Silverbranch and the brokers. Silverbranch made no offer of relief during the ensuing thirty days, and the plaintiffs initiated a suit claiming violations of chapter 93A. The trial judge entered judgment for the brokers as against the plaintiffs, and for the plaintiffs as against Silverbranch. The trial judge awarded damages in the amount of twice the cost of cure plus attorney's fee, interest, and costs. Silverbranch appealed, arguing, inter alia, that there could be no finding of a violation of chapter 93A when the buyers of real property accepted a deed in full satisfaction of a purchase and sale agreement, when the defendant had not committed fraud, had violated no warranties, and when there was insufficient evidence of negligence.

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38 Id. at 2850, 382 N.E.2d at 1067-68.
39 Id. at 2851, 382 N.E.2d at 1068.
40 Id.
41 Id. at 2852, 382 N.E.2d at 1068.
42 Id. at 2853, 382 N.E.2d at 1069.
43 The plaintiffs sent the demand note pursuant to G.L. c. 93A, § 9(3), which requires that such note be written and delivered to a prospective defendant at least 30 days prior to the commencement of any action under this section. The demand for relief must identify the claimant, state the injury suffered, and must describe the unfair and deceptive practices which were relied upon.
45 Id. at 2850, 382 N.E.2d at 1068. Since the plaintiffs did not appeal this entry of judgment, the underlying reasons for the judge's finding of no liability for the brokers was not discussed by the Court.
46 Id.
47 Id. at 2850-51, 382 N.E.2d at 1068. The issues of multiple damages and attorney's fees were appealed and discussed in the Court's decision. For a review of the Court's conclusions relative to these issues, see § 4 infra.
48 Id. at 2851, 382 N.E.2d at 1068.
The Supreme Judicial Court rejected the defendant’s appeal, finding that its entire theory, based as it was on arguments relevant to common law, was without merit as a defense to allegations of unfair or deceptive acts under chapter 93A.49 The Court noted that by focusing solely on common law theories of liability, the defendant had ignored prior decisions of the Supreme Judicial Court 50 and of the United States Supreme Court which held that consumer protection statutes create new substantive rights.51 Such rights are established by making unlawful that conduct which was previously not deemed unlawful under the common law.52 Thus, rather than focusing on common law theories to determine the application of chapter 93A, the Court relied on the policy surrounding chapter 93A and the facts of the case to determine the existence of unfair or deceptive acts and practices.53 The lower court had concluded that Silverbranch had granted its president the authority to enter into an agreement with the Hellers for the sale of the property and to make representations about that property.54 The trial judge also found that the president’s failure to disclose the drainage problem violated paragraph XV of the Attorney General’s Rules and Regulations.55 After reviewing the record, the Court found sufficient evidence to support the trial judge’s findings and thus affirmed the lower court’s judgment concerning Silverbranch’s general liability.56

§12.3. Chapter 93A—Standards for Determining Violations—Business Actions. Section 9, relating to non-business consumers, and section 11, relating to business consumers, both create a right of action to redress “unfair or deceptive act(s) or practice(s)” used in the course of a trade or business.1 Two decisions 2 handed down during the Survey year

49 Id. at 2855, 382 N.E.2d at 1069.
52 Id.
53 Id. at 2856, 382 N.E.2d at 1070.
54 Id.
55 Id. 940 C.M.R. § 3.16(2), paragraph XV, provides that an act or practice violates G.L. c. 93A, § 2, if “A. It is oppressive or otherwise unconscionable in any respect ...” or “B. Any person or other legal entity subject to this act fails 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 ...” Id.

§12.3. 1 Section 9 provides a right of action for “[a]ny person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person’s use or employment of any method, act or practice declared to be unlawful by section 2 ...” G.L. c. 93A, § 9. Section 11 confers the same right upon “[a]ny person who engages in the conduct of any trade or commerce and who suffers any loss of money or property ...” Id., § 11.
indicate that courts are inclined to impose different standards for determining violations of these two sections. The imposition of different standards is understandable in light of the overall perception that chapter 93A was enacted to readjust the inequities that have evolved in a commercial world. It is assumed that a business requires less protection than a consumer and that, therefore, a more stringent standard is appropriate for section 11 claims.

The Appeals Court in *Levings v. Forbes & Wallace, Inc.* imposed a much stricter standard for what constitutes unfair or deceptive conduct among business consumers than had been adopted in any previously decided case. *Levings* arose out of an action to recover on a contract for materials sold and services rendered by the plaintiff at the request of the defendant Forbes & Wallace. The plaintiff had repaired the air conditioning in the defendant's department store. Subsequently, the defendant refused to pay the plaintiff's bill. The plaintiff asserted that Forbes & Wallace, from the moment it ordered the work, never intended to pay for its labor and materials. This assertion was the basis of the plaintiff's claim that the defendant had indulged in unfair or deceptive practices in violation of chapter 93A.

The Appeals Court ruled that Forbes & Wallace's conduct did not amount to a violation of chapter 93A. In reaching its decision, the court applied the criteria established in *PMP Associates v. Globe Newspaper Co.* Using these criteria the court looked for "conduct which is (1) within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) . . . is immoral, unethical, oppressive or unscrupulous . . . ." The court found that the defendant's refusal to pay for goods and services was based upon a genuine dispute concerning the amount of the bill. It ruled that such a refusal did not amount to deceptive conduct within the meaning of chapter 93A. The court stated that in order to violate chapter 93A, "[t]he ob-

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5 Id. at 2044, 396 N.E.2d at 151.
6 Id.
7 Id.
8 Id. at 2051, 396 N.E.2d at 154.
jectionable conduct must attain a level of rascality that would raise an eyebrow of someone unused to the rough and tumble of the world of commerce." 12

The standard applied by the Levings court would appear to create a sophisticated businessman test for violations of section 11, thereby cementing the status quo of the pre-chapter 93A era. Both the Appeals Court 13 and the Supreme Judicial Court 14 have recognized that the philosophical basis for the enactment of chapter 93A is the principle that one party should not unfairly take advantage of another party. It is not generally conceded that such a search for parity would be accomplished by using a test as difficult as that proposed in Levings. Clearly, this principle should be applicable to business and non-business parties alike. Indeed, the Appeals Court in Levings recognized that such unfair advantage could be taken in a business context. As the court wryly observed, "[i]t does not . . . require an exceptionally lively imagination to conjure circumstances under which an economically powerful business in the capacity of a buyer might act unfairly in relation to a small business in the capacity of a seller of goods or services." 15 It is unlikely that such a search for parity can be accomplished by using a test as difficult as that proposed by the Levings court.

§12.4. Chapter 93A—Multiple Damages. Before filing an action under chapter 93A, a plaintiff, pursuant to section 9(3), must first send a demand letter to the defendant describing the specific unfair practices alleged and the injuries suffered. 1 The party receiving the demand letter has thirty days in which to respond by a written offer of settlement. 2 If such an offer is made and rejected, damages in any subsequent action will be limited to the relief offered, provided that the court finds the offer to be reasonable. 3 If the defendant fails to make such an offer of settlement, section 9(3) authorizes the judge to award a multiple of two to three times plaintiff's actual damages. 4 The award of multiple damages may be made under either of two circumstances: (1) if the court finds a wilful or knowing violation of chapter 93A, section 2; or (2) if the court finds that the refusal to offer a settlement upon demand

12 Id.

§12.4. 1 G.L. c. 93A, § 9(3). The letter must be sent at least 30 days prior to the filing of the action. Id.
2 Id.
3 Id.
4 Id.
was made in bad faith with knowledge or reason to know that section 2 has been violated.\(^5\)

During the Survey year the Supreme Judicial Court considered the issue of multiple damages in *Heller v. Silverbranch Construction Corp.*\(^6\) In *Heller* the defendant had declined to respond to the plaintiff’s demand letter.\(^7\) Finding that the defendant had actual knowledge that its acts were unlawful when it refused to offer a settlement,\(^8\) the Court upheld the trial judge’s award of multiple damages as just punishment for conduct that was “precisely the type that § 9(3) was designed to deter.”\(^9\)

In the course of its decision, the Court discussed the circumstances under which multiple damages will be awarded. It observed that the first circumstance under which such damages are granted required little explanation. This ground for awarding multiple damages was designed to deal with “callous and intentional violations” of chapter 93A.\(^10\) The Court viewed the second ground as an attempt by the legislature “to promote prelitigation settlements by making it unprofitable for the defendant either to ignore the plaintiff’s request for relief or to bargain with the plaintiff with respect to such relief in bad faith.”\(^11\) Thus, the standard changes from one of wilfulness or knowledge in the first circumstance to one of knowledge or reason to know in the second. With respect to the knowledge or reason to know requirement of the second ground for awarding multiple damages, the Court ruled that the time for ascertaining this knowledge is after receipt of the demand letter and not at the time of the alleged violation.\(^12\) The Court noted that the standard is an objective one and “requires the defendant to investigate the facts and consider the legal precedents.”\(^13\)

Prior to this decision defendants could have argued that at the time the alleged act was committed they did not possess the requisite reason to know that their actions were in violation of chapter 93A. Had the *Heller* Court accepted this argument fixing the time of knowledge at the time of the alleged violation, motivation for pre-litigation settlement would have been considerably reduced. By fixing the time for determining knowledge as the point when the demand letter is received,

\(^{5}\) *Id.*

\(^{6}\) 1978 Mass. Adv. Sh. 2850, 382 N.E.2d 1065. For a discussion of other aspects of this case, see § 2 *supra.*

\(^{7}\) *Id.* at 2853, 382 N.E.2d at 1069.

\(^{8}\) *Id.* at 2859, 382 N.E.2d at 1070-71.

\(^{9}\) *Id.* at 2859, 382 N.E.2d at 1071.

\(^{10}\) *Id.* at 2858, 382 N.E.2d at 1070 (citing Rice, *New Private Remedies for Consumers: the Amendment of Chapter 93A, 54 Mass. L.Q. 307, 318 (1969))*.


\(^{12}\) *Id.*

\(^{13}\) *Id.*
the Court is requiring the defendant to consider his actions in the light of the allegations made by the plaintiff. The plaintiff’s attorney should therefore carefully draft demand letters so that they reasonably inform the defendant of the legal bases for the plaintiff’s claim. The defendant’s attorney should use the thirty-day period provided in the statute to review thoroughly the allegations and the law, including the rules and regulations promulgated by the Attorney General.

Since section 11, which deals with a business plaintiff, contains no comparable provision for pre-litigation settlement of claims, the result in *Heller* is not available to a business plaintiff. Multiple damages are available only if the plaintiff can prove that the act was a wilful or knowing violation of section 2. This difference between awards available under sections 9 and 11 of chapter 93A was confirmed in a case decided by the Supreme Judicial Court during the latter days of this Survey period.

*Linthicum v. Archambault* resulted from a claim that the defendant, a roofing contractor, had breached his warranty by failing to reshingle the plaintiff’s duplex house “in a workman-like manner according to standard practices.” After receiving no satisfaction from a demand letter, the plaintiff commenced actions based upon breach of contract, breach of implied warranty, and violation of chapter 93A. The trial court allowed the plaintiff to recover only on the basis of breach of warranty. It refused to award damages under chapter 93A.

On appeal, the Supreme Judicial Court reversed the trial court’s decision to deny relief under chapter 93A, finding that such relief “is in addition to, and not an alternative to, traditional tort and contract remedies.” The Court remarked that the trial judge’s finding of a material and substantial breach of warranty constituted an ample basis for recovery under chapter 93A. It held, however, that on these facts the plaintiff’s status as a business plaintiff prevented recovery of multiple damages. Any relief provided by chapter 93A for persons engaged in “any trade or commerce” must be sought under section 11,

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14 C.L. c. 93A, § 11.
15 *Id.*
17 *Id.* at 2662, 398 N.E.2d at 484.
18 *Id.* at 2661, 398 N.E.2d at 484.
19 *Id.* at 2662 n.2, 398 N.E.2d at 484 n.2. The trial judge held “that the insertion of a M.G.L.A. Chapter 93A Count or Consumer Protection Act Count in said Complaint was unnecessary to secure adequate relief for said plaintiff” since the court had already found in favor of the plaintiff on her contract claim. *Id.*
20 *Id.* at 2663, 398 N.E.2d at 485.
21 *Id.* at 2667, 398 N.E.2d at 487.
22 *Id.* The plaintiff had sought relief under section 9 as a consumer who contracted with the defendant for personal, family, or household purposes. The Court,
rather than section 9. The Court observed that by its terms section 11 limits a business plaintiff's recovery to actual damages, unless there is a wilful or knowing violation of section 2. Since the trial judge had found that the defendant's actions were not wilful, intentional, or deliberate, the Court concluded that multiple damages were not available to this plaintiff. In so ruling, the Court has made it likely that a business plaintiff bringing an action under section 11 of chapter 93A will have a more difficult time securing a multiple damage award than a non-business plaintiff seeking recovery under section 9.

**§12.5. Chapter 93A—Applicability to Regulated Industries.** During the Survey year, in *Lowell Gas Co. v. Attorney General*, the Supreme Judicial Court considered whether a regulated industry could be found liable under chapter 93A. The Attorney General had filed suit against two privately-owned gas companies alleging that these companies violated chapter 93A by allocating interest expenses for their short-term debt to the inventory cost of the fuel sold to their customers. This accounting practice was contrary to the procedures allowed by the Department of Public Utilities. The Attorney General further alleged that these practices were done knowingly and with intent to deceive the customers of the companies. The companies filed a consolidated motion to dismiss the complaints. The motion to dismiss was reserved and reported to the Supreme Judicial Court, which held that the motion should be denied.

In denying the defendants' motion to dismiss, the Court rejected the defendants' contention that the Court lacked subject matter jurisdiction. The defendants argued that Attorney General's suit was in effect an impermissible collateral attack on rates lawfully promulgated by the

however, noted that when she bought the defendant's services, the plaintiff was using the entire house as rental property and was thus involved in "trade or commerce." Thus, the plaintiff was found to be involved in the rental business. *Id.*


Id. at 2668, 398 N.E.2d at 488.

See text at note 5 *supra*. Notwithstanding the difficulty facing a business plaintiff seeking multiple damages, such a plaintiff is nevertheless entitled to receive reasonable attorney's fees and costs pursuant to section 9(4) of chapter 93A. The Court ruled that award of such fees and costs should be available to both business and non-business plaintiffs who meet the requirements of section 9(4). 1979 Mass. Adv. Sh. at 2668, 398 N.E.2d at 488. Attorney's fees incurred with respect to an appeal may be included as well. *Id.* at 2669, 398 N.E.2d at 488.


*Id.* at 51, 385 N.E.2d at 243.

*Id.* at 53, 385 N.E.2d at 244.

*Id.* at 50, 385 N.E.2d at 243.

*Id.*

*Id.* at 53, 385 N.E.2d at 244.
Department of Public Utilities, an area in which the department had exclusive jurisdiction. The Court, however, noted that the Attorney General was not attacking the validity of the department’s rates. Rather, he was challenging practices of the companies, which he claimed were fraudulent and deceptive toward both the companies’ customers and the department. The Court then observed that there is nothing in the statute regulating gas companies that either explicitly or implicitly prevents the application of chapter 93A to the unfair or deceptive practices of gas utility companies. The Court noted, by way of example, that it had previously held that chapter 93A was applicable to deceptive insurance practices, notwithstanding the existence of a statute regulating insurance companies. Thus, the Court concluded that the mere existence of a statute regulating a public utility would not bar the application of chapter 93A.

After concluding that the courts did have jurisdiction over the chapter 93A complaints, the Court rejected the defendants’ contention that the Attorney General lacked standing to bring the chapter 93 complaints. The companies argued that because they had terminated the practices complained of before he filed the complaints, the Attorney General was not authorized to bring the complaints. Conceding that the Attorney General’s complaints were ambiguous with regard to the continuing nature of the alleged fraudulent activities, the Court nevertheless concluded that since the complaints could be read to imply that the practices were continuing, the complaints should survive the motion to dismiss. The Court, however, also added that it did not agree with the defendants’ interpretation of section 4 as precluding actions by the Attorney General where the practices complained of have terminated before the filing of the complaint. Looking to cases interpreting the Federal Trade Commission Act, the Court found that federal courts have al-

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8 Id.
9 Id. at 54, 385 N.E.2d at 244.
10 G.L. c. 164.
14 Id. at 60, 385 N.E.2d at 247. G.L. c. 93A, § 4, provides that the Attorney General may bring an action on behalf of the commonwealth “[w]henever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that the proceedings would be in the public interest . . . .” Id.
16 Id.
17 Id. at 61, 385 N.E.2d at 247.
ollowed injunctions even where the alleged deceptive practice has been discontinued.\(^{19}\)

Having decided that the Attorney General had standing to bring the chapter 93A complaints, the Court then considered the companies’ contention that the complaints did not state a claim upon which relief could be granted.\(^{20}\) The Court agreed with the companies that charging rates set by order of the Department of Public Utilities was not wrongful and could not be the subject of a civil action.\(^{21}\) The Court stressed that the validity of the department's rates was not in issue. Rather, the Court pointed out, the gist of the complaints was that the utility companies had employed deceptive practices in procuring approval of the rates.\(^{22}\) Hence, because the Attorney General’s complaints concerned the practices employed in obtaining the approval of the rates and not the rates themselves, the complaints did state a cause of action.\(^{23}\)

§12.6. Chapter 93A—Applicability of the Medical Malpractice Screening Procedure. In Little v. Rosenthal\(^ {1}\) the Supreme Judicial Court considered whether a chapter 93A action brought against a provider of medical care was exempt from the malpractice screening procedure.\(^ {2}\) In this action the plaintiff claimed damages for personal injuries suffered while she was the patient of the defendant physician and was the resident of a nursing home.\(^ {3}\) In four separate complaints, which were subsequently consolidated, she alleged both medical malpractice and violations of chapter 93A.\(^ {4}\) The actions were referred to

\(^{19}\) 1979 Mass. Adv. Sh. at 60, 385 N.E.2d at 247. The Court cited Goodman v. FTC, 244 F.2d 584, 593 (9th Cir. 1957), in which the federal court stated:

[A]s one of the aims of the statute is to prevent unfair and deceptive practices, [cease and desist] orders will be sustained even when it is clearly shown that the practices have actually been abandoned. The cogent and obvious reason is that there is no guarantee that the practice might not be resumed.

\(^{20}\) Id. at 593 (emphasis in original).

\(^{21}\) Id. at 62, 385 N.E.2d at 248.

\(^{22}\) Id. at 63, 385 N.E.2d at 248.

\(^{23}\) Id.


2 Id. at 2796, 382 N.E.2d at 1040. G.L. c. 231, § 60B, requires that claims against physicians or institutions that involve the provision of medical care must be screened by a panel consisting of a judge, an attorney, and a physician before the litigation can proceed in the courts. Section 60 B provides in relevant part:

[E]very action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a physician . . . and an attorney . . ., at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability . . . .


\(^{2}\) Id.
malpractice screening tribunals, which found the plaintiff's offer of proof inadequate to create any actionable issues of liability.\(^5\)

In her appeal, the plaintiff argued that actions brought under chapter 93A were not subject to the screening procedure.\(^6\) Interpreting the language of section 60B of chapter 231,\(^7\) the Supreme Judicial Court concluded that all treatment-related claims are subject to malpractice screening tribunal review.\(^8\) The Court noted that the legislature had expressly rejected language limiting the reach of the tribunal to actions of tort and breach of contract and instead had adopted language making the screening process applicable to "[e]very action for malpractice, error or mistake . . . ."\(^9\) The Court remarked that any alternative conclusion would create a mechanism whereby the tribunals would be sidestepped, thus thwarting the legislative purpose of providing a check on the filing of frivolous malpractice claims.\(^10\) It did indicate, however, that chapter 93A claims raising questions of unfair billing practices would not be subject to the screening tribunal's review, because they do not relate to any issue of medical care.\(^11\) Thus, by its decision in *Little*, the Supreme Judicial Court has made it clear that any chapter 93A claims against physicians or institutions involving allegations of improper or erroneous medical care must be reviewed by the medical malpractice screening tribunal.

\section*{§12.7. Landlord-Tenant—Implied Warranty of Habitability—Strict Liability.} In 1973 the Supreme Judicial Court in *Boston Housing Authority v. Hemingway*\(^1\) rejected the common law concept of a lease by holding that in every lease there is an implied warranty to the tenant that the property is fit for human habitation.\(^2\) The Court recognized that social changes in landlord-tenant relations and legislative changes in landlord obligations and tenant remedies, such as section 127A\(^3\) of chapter 111, required a recasting of the traditional relationship of the parties.\(^4\) In *Hemingway*, the Court observed that

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\(^5\) *Id.* at 2793-94, 382 N.E.2d at 1039.
\(^6\) *Id.* at 2796, 382 N.E.2d at 1040.
\(^7\) For the text of § 60B, see note 2 supra.
\(^9\) *Id.*
\(^10\) *Id.* at 2796-97, 382 N.E.2d at 1040-41.
\(^11\) *Id.* at 2797, 382 N.E.2d at 1041 (citing SDK Medical Computer Servs. Corp. v. Professional Operating Management Group, Inc., 371 Mass. 117, 354 N.E.2d 852 (1976)).

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A lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition. A breach of this implied warranty could result in a rent abatement, equal to the difference between the fair rental value of the apartment as warranted and the reasonable value of the apartment in its defective condition. During the Survey period, the Supreme Judicial Court ruled that this abatement could be had regardless of the landlord's fault and/or his reasonable efforts to repair.

Berman & Sons, Inc. v. Jefferson involved a tenant's claim that the landlord had failed to provide adequate heat and hot water. As a result, the tenant withheld $35 from one month's rent of $245. The landlord refused to accept her payment and brought an eviction action. The tenant counterclaimed, alleging, inter alia, a breach of the implied warranty of habitability. The trial judge denied the landlord possession and ordered him to pay $310 in damages for the breach. The judge did not find that the landlord had acted intentionally, negligently, or in bad faith. The landlord appealed, claiming that the tenant was obligated for the full measure of rent where the landlord was without fault and, alternatively, that the tenant was obligated for the total rent until the landlord had had a reasonable opportunity to remedy the breaches. On appeal, the Supreme Judicial Court affirmed.

At the outset, the Court rejected the landlord's claim that a tenant must pay full rent without abatement when the landlord's failure to maintain a dwelling was not attributable to fault or bad faith. The Court held that "the tenant's obligation abates as soon as the landlord has notice that premises fail to comply with the requirements of the warranty of habitability. The landlord's lack of fault and reasonable efforts to repair do not prolong the duty to pay full rent." Referring
extensively to *Boston Housing Authority v. Hemingway*, the Court concluded that considerations of fault have no bearing on issues of breaches of warranty, particularly when the warranty is one of habitability of a dwelling place. The justices recognized the existence of an interdependence between habitability and the payment of rent. They also noted that just as a tenant would not be excused if he made merely a reasonable attempt to pay rent, so a landlord should not be excused if he made merely a reasonable effort to provide a habitable apartment. Accordingly, the Court confirmed that a tenant's obligation to pay rent abates if the landlord breaches his obligation to provide a habitable dwelling, regardless of absence of fault on the landlord's part.

Having confirmed the tenant's right to abate rent once the warranty of habitability was breached, the Court then determined that a breach in effect occurs as soon as the landlord has notice of the defect. Thus, the tenant's obligation abates from this point. The Court rejected the landlord's claim that the breach becomes actual only after the landlord has been given a reasonable time to repair. It noted that the purpose of the notice requirement was not to assure the landlord of reasonable time to repair but to "minimize the time the landlord is in breach and hence mitigate the permissible period of abatement of rent." Recognizing the economic burden imposed upon the landlord, the Court nevertheless emphasized that the burden imposed upon the tenant was considerably greater—the loss of shelter. Thus, in the Court's view, permitting the tenant to abate rent as soon as the landlord receives notice of a defect in the rental property furthers the policy enunciated in *Hemingway* of assuring that a landlord provide property suitable for habitation.

§12.8. Legislation. During the Survey year the legislature enacted substantial modifications in chapter 93A, the Consumer Protection Act. Section 9, which previously had limited rights of action to persons who were either purchasers or lessees, has been broadened to allow a claim

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17 Id. at 2461, 396 N.E.2d at 984.
18 Id. at 2464, 396 N.E.2d at 985.
19 Id. at 2460-61, 396 N.E.2d at 983.
20 Id.
21 Id. at 2464-65, 396 N.E.2d at 985-86.
22 Id. at 2466, 396 N.E.2d at 986.
23 Id. at 2463, 396 N.E.2d at 984-85.

§12.8. 1 G.L. c. 93A, § 9(1).
by any person who has been injured by the use of an unfair or deceptive act or practice.\textsuperscript{2} Section 9(1), as amended, now provides that

(1) [a]ny person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person’s use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action . . . for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.\textsuperscript{3}

The prior requirement that only consumers who had purchased goods or services could employ the remedial provisions of section 9 has been deleted. Thus, this modification eliminates the defense that certain industries are not subject to chapter 93A claims because they do not market goods or services.\textsuperscript{4}

In addition to eliminating the purchaser/lessee requirement, the amendment removes the precondition that a consumer must incur a loss of money or property before he can sue under the provisions of chapter 93A. The old requirement of actual loss operated as a bar to numerous potential actions and thus lessened the impact of section 9 as a remedial tool to discourage unfair practices.\textsuperscript{5} The previous statutory requirement that there be an actual loss of money or property has resulted in at least one unsatisfactory court decision in the past. The Court acknowledged its dissatisfaction in \textit{Baldassari v. Public Finance Trust},\textsuperscript{6} where it reluctantly ruled that the allegation of emotional distress resulting from acts potentially violative of chapter 93A did not satisfy the requirement of a loss of money or property.\textsuperscript{7}

\textsuperscript{2} Acts of 1979, c. 406.
\textsuperscript{4} See Mechanics Nat'l Bank of Worcester v. Killeen, 1979 Mass. Adv. Sh. 129, 384 N.E.2d 1231. The Court raised the question of whether the language "purchases or leases goods, services or property" can be properly interpreted to include banking activities. \textit{Id.} at 140-41 n.8, 384 N.E.2d 1237-38 n.8.
\textsuperscript{5} For example, under the pre-amendment provisions of § 9, a suit could not be maintained by individuals who had seen, but had not believed, deceptive advertisements, because they had not lost any money as a result of the deception. Likewise, a consumer who encounters an unscrupulous salesperson in a store, but leaves without buying any goods, would be without recourse under the Consumer Protection Act. In each of these examples, the consumer would have to find and allege some damage resulting from the unfair act before the remedial provisions, including injunctions, would be available.
\textsuperscript{6} 369 Mass. 33, 337 N.E.2d 701 (1975).
\textsuperscript{7} \textit{Id.} at 44-46, 337 N.E.2d at 708. The Baldassaris complained that the defendant had engaged in numerous unfair debt collection practices in violation of G.L. c. 93, § 49, and that, as a result, they had suffered severe emotional distress. \textit{Id.} at
of the Acts of 1979 alleviated this problem by changing the requirement that the consumer prove a loss of money or property to one that the consumer make a showing that the consumer has been "injured." 8

During the Survey year there were also several amendments to sections 9 and 11 of chapter 93A. By virtue of chapter 72 of the Acts of 1979, actions brought under sections 9 and 11 may now be maintained in housing court.9 The amendment was enacted in response to two recent Supreme Judicial Court decisions which held that the statute then in effect did not permit the maintenance of chapter 93A actions in housing court.10 Chapter 93A has also been amended to include a new provision for the initiation of chapter 93A actions by way of counterclaims, cross-claims, or third-party claims. 11 Another amendment clarifies this procedure by stating that the demand requirements of section 9(3) are not applicable to counterclaims or cross-claims. 12 Paragraph (3A) has been added to section 9 to allow for the initiation of chapter 93A actions in the district courts. 13 These district court actions are limited to claims for money and may not include requests for equitable relief or for certification of class membership. 14

In addition to amending existing sections of chapter 93A, the legislature also enacted two entirely new sections. Chapter 214 of the Acts of 1979 codifies the rights of patients in hospitals, nursing homes, and other health institutions. 15 These include, inter alia, the right of:

9 G.L. c. 93A, § 9(1), as amended by Acts of 1979, c. 406; G.L. c. 93A, § 11, as amended by Acts of 1979, c. 72, respectively. Pursuant to both these sections, a plaintiff may now bring an action in either the superior court or the housing court.
12 G.L. c. 93A, § 9(3), as amended by Acts of 1979, c. 406. A party complained against may avoid multiple damages and some attorney's fees by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of the counterclaim or cross-claim. Id.
14 Id. Decisions relative to remand, removal, and transfer are to be controlled by the amount claimed as single damages. Thus, it appears that a claimant may receive as much as $2,250 (3 x $750) in a small claims court action brought under chapter 93A.
(1) freedom of choice in selecting a facility or physician;
(2) receipt of itemized bills;
(3) confidentiality of records and communications;
(4) inspection of medical records;
(5) refusal to allow observation or treatment by students or other staff;
(6) refusal to serve as a research or educational subject;
(7) privacy during treatment; and
(8) informed consent to the extent provided by law.

Chapter 608 of the Acts of 1979 added section 49A to chapter 93. This new statute requires that retail trade reporting agencies must disclose to a requesting retail business the nature, content, and substance of any information transmitted to third parties. This section thereby creates a limited fair credit reporting act for retail merchants, and makes available to them the remedies of chapter 93A.

It appears from this brief review of the legislative amendments to the Consumer Protection Act that a major characteristic of the various amendments is that they expand the rights of the "consumer" as against businesses engaging in unfair practices. As a result of these amendments, the group of potential plaintiffs has expanded, and chapter 93A claims can now be raised in a greater number of courts. When chapter 93A was originally enacted it stated that its policy was to achieve "a more equitable balance in the relationship of consumers to persons conducting business activities." Similar concern for businessmen was later manifested when chapter 93A conferred a right of action on businessmen. The substantive modifications to chapter 93A that have occurred during this Survey period have served to achieve this policy goal.

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16 G.L. c. 93, § 49A, as enacted by Acts of 1979, c. 608. Section 49A states: Every retail trade reporting agency which discloses to any third person information concerning a business engaged in retail trade shall, upon request of such business, disclose to it the nature, contents and substance of such information contained in its files at the time of the request. Whoever fails to comply with the provisions of this section shall . . . be deemed to have committed an unfair or deceptive act or practice prohibited by chapter ninety-three A. Id. A retail trade reporting agency is defined as "any person, firm, association or corporation which for monetary fees or dues, regularly engages, in whole or in part, in the practice of assembling or evaluating trade or other information on a business engaged in retail trade for the purpose of furnishing reports on such business to third parties." Id.
17 See G.L. c. 93, §§ 50-68, for consumer credit reporting requirements.