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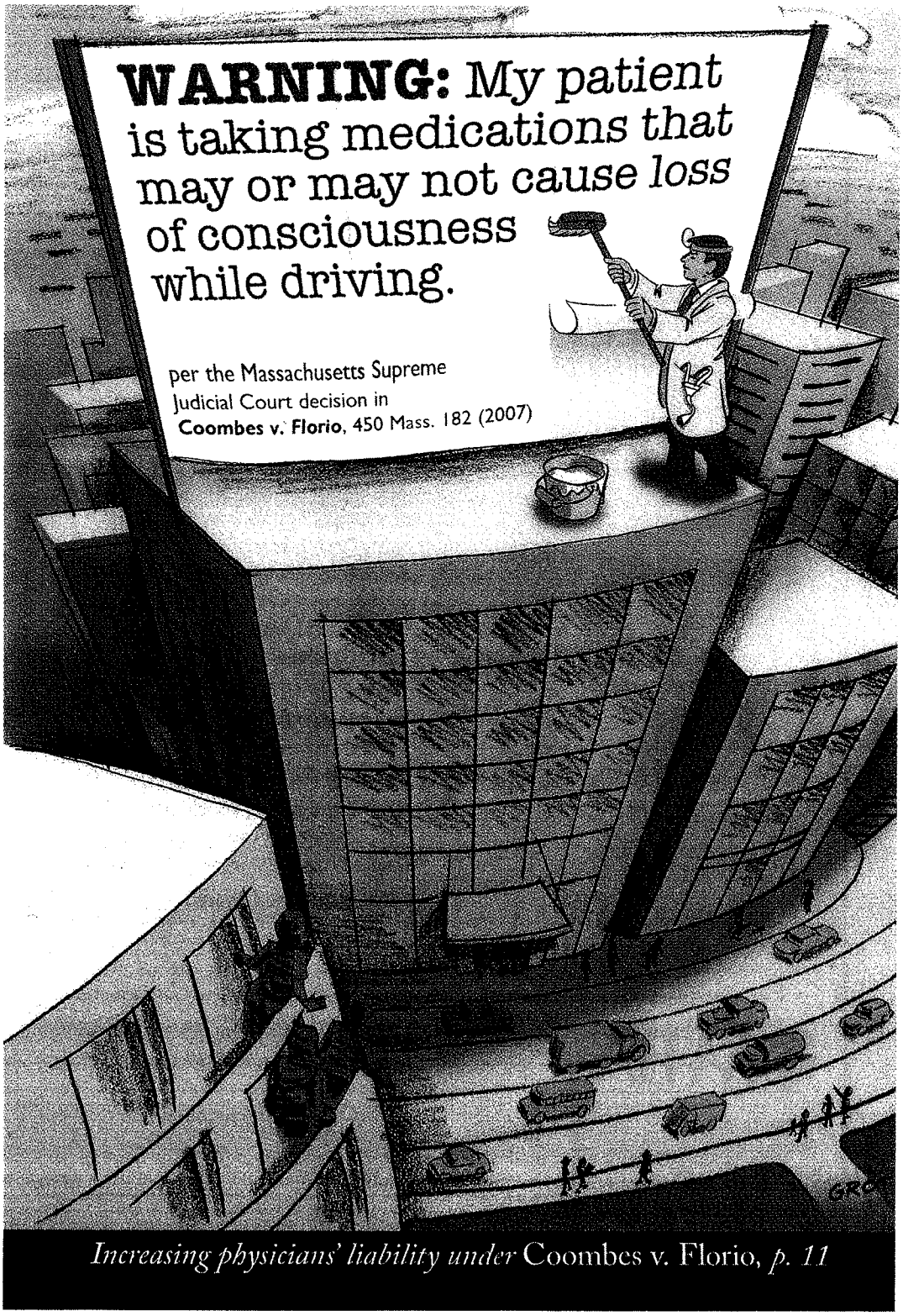

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CHAPTER 93A AND POST-EMPLOYMENT CONDUCT

By Marc C. Laredo and Lisa J. Cooney

It is well established, under *Manning v. Zuckerman*, 388 Mass. 8, 12-14 (1983), that Massachusetts General Laws Chapter 93A, the Massachusetts Unfair and Deceptive Trade Practices Act, generally does not apply to disputes between employers and employees or among members of the same legal entity. The law in Massachusetts is far less clear, however, as to whether and when a Chapter 93A claim will survive when it concerns conduct or events that occur *after* the employment relationship has ended, particularly when that conduct involves anti-competitive conduct by a former employee and/or that employee's new employer.

This article provides an overview of *Manning v. Zuckerman* and discusses the various employment-related contexts under which the "*Manning* Rule" applies. It then focuses on whether and when Chapter 93A claims are sustainable both by and against former employees (and their new employers), when the objectionable conduct occurs after the termination of the employment relationship. Finally, the article highlights the lack of, and need for, clear appellate authority in this area.

Background of *Manning v. Zuckerman*

A threshold requirement to asserting a Chapter 93A claim is proof of unfair or deceptive acts or practices occurring in "trade or commerce." Mass. Gen. Laws ch. 93A, § 1. In *Manning v. Zuckerman*, 388 Mass. 8, 12-14 (1983), the Supreme Judicial Court held that Chapter 93A does not cover disputes between employers and employees that arise out of the employment relationship, reasoning that such claims are essentially private in nature and employers and employees are not engaged in trade or commerce with each other. Similarly, the Court held, employment agreements between the employee and the company do not constitute trade or commerce.

Manning has been applied fairly consistently and in various contexts to bar Chapter 93A claims between employees and employers. *See, e.g., Hoffman v. Optima Sys., Inc.*, 683 F. Supp. 865, 871 (D. Mass. 1988) (breach of oral employment contract); *Anzalone v. MBTA*, 403 Mass. 119, 121-22 (1988) (claim that employer improperly handled employee's workers' compensation claim); *The Stop & Shop Supermarket Co. v. Loomer*, 65 Mass. App. Ct. 169, 177-78 (2005) (conversion claim against employee and her husband); *Dorfman v. TDA Indus., Inc.*, 16 Mass. App. Ct. 714, 720-21 (1983) (Chapter 93A claim barred even though contract was executed in partial consideration of employee's sale of stock). *See also Zimmerman v. Bogoff*, 402 Mass. 650, 662-63 (1988) (Chapter 93A does not apply to "inter-company" disputes between shareholders); *Szalla v. Locke*, 421 Mass. 446, 451-52 (1995) (Chapter 93A does not apply to disputes between joint venturers). *But see Mitchelson v. Aviation Simulation Tech., Inc.*, 582 F. Supp. 1 (D. Mass. 1983) (denying summary judgment where Chapter 93A claim arose out of commercial transaction that also involved execution of an employment contract).[1]

Consistent with the reasoning set forth in *Manning*, Chapter 93A claims have generally failed even when the conduct that forms the basis of the claim occurred before the employment relationship was actually established. *See Sargent v. Tenaska*, 914 F. Supp. 722, 731-32 (D. Mass. 1996), *aff'd on other grounds*, 108 F.3d 5 (1st Cir. 1997); *Whelan v. Intergraph Corp.*, 889 F. Supp. 15, 20-21 (D. Mass. 1995)

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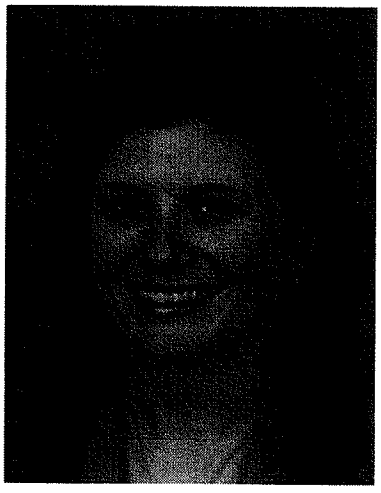

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(plaintiff did not state cause of action for violation of Chapter 93A based on statements made during recruitment process); *DeAngelis v. Weston Assocs. Mgmt. Co.*, 2008 WL 1799966, at *4 (Mass. Super. April 7, 2008) (intentional misrepresentation concerning compensation during hiring process arose out of an employment relationship, precluding Chapter 93A claim against employer);[2] *Farrington v. DeAngelis*, 2000 WL 1273868 (Mass. Super. April 14, 2000). The inquiry, noted the *Sargent* court, is not when the alleged misconduct took place, but, taken as a whole, whether the allegations arose out of the employment relationship or contract. *Sargent*, 914 F. Supp. at 732. The *DeAngelis* court also found germane to the analysis that the employee did not suffer any damages as a result of the pre-employment misrepresentation until he refused other employment opportunities and the defendants refused to pay him the promised compensation, both of which occurred after the employment relationship had been established. *DeAngelis*, 2008 WL 1799966, at *4. However, in *Brown v. Cloverleaf*, 1998 WL 1247998 (Mass. Super. July 27, 1998), the court denied a motion to dismiss the plaintiff's Chapter 93A claim which was based on conduct, in addition to breaching promise to hire plaintiff, that caused plaintiff to close his business, turn over his client list and sell his equipment at below market value.

Applying Chapter 93A to post-employment conduct

Claims by and against the former employee

Consistent with the reasoning set forth above, employees generally have not had much success in suing their former employers under Chapter 93A for claims that arise when the plaintiff was technically no longer employed, but still directly relate to actions taken during the employment relationship. For example, in *Powderly v. Metrabyte Corp.*, 866 F. Supp. 39, 41 (D. Mass 1994), the plaintiff sued his former employer when it refused, after he was no longer employed, to pay him a bonus provided for in his employment contract. The employee included a Chapter 93A claim, arguing that he was no longer an employee when he was denied the bonus and, thus, the *Manning* Rule did not apply. *Id.* at 44. The Court disagreed and dismissed the Chapter 93A count, noting that the claim for the bonus rested "on the very Agreement" that created the employment relationship and stressing that *Manning* does require that the employment relationship be ongoing for the "bar" to apply. *Id.*; *see also Sargent*, 914 F. Supp. at 732 (awarding summary judgment on Chapter 93A claim based on post-employment failure to tender the plaintiff financial interests provided for in his employment contract).

The more difficult question arises when the claim involves a former employee's "post-employment" use of the employer's trade secrets or solicitation of the company's customers, often at the behest of, and for the benefit of, the new employer. The Massachusetts Appeals Court has issued two somewhat contradictory decisions involving claims by employers against former employees grounded in this scenario. In *Peggy Lawton Kitchens Inc. v. Hogan*, 18 Mass. App. Ct. 937, 940 (1984) (rescript), the court ruled that plaintiffs were entitled to bring a Chapter 93A claim against a former employee who stole a secret recipe and used it in forming a competing business. Distinguishing *Manning*, the court held that the conduct did not arise out of the employment relationship because the defendant was no longer employed when he misappropriated the confidential information and no post-employment agreement had been signed. *Id.* In *Informix v. Rennell*, 41 Mass. App. Ct. 161, 163 (1996), however, the court reached a different result, ruling that Chapter 93A did *not* apply where the employee engaged in post-employment conduct that violated a non-competition agreement executed as part of the employment relationship. *See also Professional Staffing Group, Inc. v. Champigny*, 2004 WL 3120093 (Mass. Super. Nov. 18, 2004) (discussing conflict between *Peggy Lawton Kitchens* and *Informix*).

In the decade since *Informix*, there have been no Massachusetts appellate decisions directly addressing this issue and, as a result, employers and employees have little guidance as to whether Chapter 93A applies to these types of "post-employment" claims. The Superior Court decisions on this topic demonstrate this uncertainty. In some cases, Chapter 93A claims arising out of the alleged violation of contractual post-employment restrictive covenants have been dismissed. *Harvard Translations, Inc. v. Heuberger*, 1999 WL 967569 (Mass. Super. Sept. 9, 1999) (disclosure of trade secrets); *Burgess v. McLaughlin Transp. Sys., Inc.*, 1998 WL 374914 (Mass. Super. June 10, 1998) (solicitation of employer's customers). In other cases, similar claims have survived. In *The Descartes Sys. Group, Inc. v. Celarix, Inc.*, 2001 WL 721493 (Mass. Super. June 20, 2001), the court allowed the Chapter 93A claim to proceed, because the evidence showed that the employee did not improperly acquire the company's trade secrets until after his employment had ended. *See id.* at *2 n.4 (noting, however, that a Chapter 93A claim based on the employee's use of trade secrets obtained during employment would fail); *see also Cambridge Internet Solutions, Inc. v. The Avicon Group*, 1999 WL 1959673 (Mass. Super. Sept. 21, 1999) (noting former employee's breach of fiduciary duty may cause him to incur Chapter 93A liability).

Two other Superior Court decisions have allowed Chapter 93A claims to proceed against the former employee based on the argument that the employee, while engaging in the unlawful competitive conduct, was acting not solely as an employee, but as an agent of the employee's "soon-to-be" new employer. *JRB Medical Associates v. Moran*, 2008 WL 2121002, at *1 (Mass. Super. May 1, 2008), involved allegations that two of the plaintiff's former employees misappropriated trade secrets for the benefit of their new employer. Noting that the *Manning* Rule does not "immunize a former employee from all c. 93A claims brought by his former employer," the court divided the defendants' misconduct into two categories. *Id.* at *2. First, the defen-

dants misused the plaintiff's confidential information obtained during their employment, which, the court stated, was based on the employment relationship and was barred by Chapter 93A. *Id.* Second, however, once no longer employed, the defendants conspired with their new employer to obtain additional confidential information used for the new employer's benefit, which conduct occurred not in their capacity as employees of the plaintiff, but as salesmen for the new employer and, as such, could form the basis for a cognizable claim under Chapter 93A. *Id.* Similarly, in *Opus Investment Management, Inc. v. Donohue*, 2004 WL 1588091, at *4 (Mass. Super. June 22, 2004), the court determined that the plaintiff stated a valid cause of action under Chapter 93A because it alleged that the defendants acted as agents of another business entity, and not merely as employees of the plaintiff, when they interfered with the plaintiff's relationship with one of its customers.

In sum, these decisions indicate that it is almost impossible to predict whether a former employee will face the possibility of Chapter 93A liability due to post-employment competitive conduct.

Claims against the new employer

Superior Court cases also have reached inconsistent results as to whether, in light of *Manning* and its progeny, a Chapter 93A claim can be asserted against the former employee's new employer, when that conduct essentially grows out of the employee's former employment relationship with the suing employer. *See Coworx Staffing Servs., Inc. v. Coleman*, 2007 WL 738913 (Mass. Super. Feb. 7, 2007) ("the Supreme Judicial Court and the Appeals Court have not directly considered whether a former employer can sue its former employee's current employer under c. 93A").

Some courts have held that the former employer cannot assert a Chapter 93A claim against the new employer for "inducing" the employee to breach a non-competition agreement, reasoning that such a claim arises from the plaintiff company's employment relationship with the employee. *See Oceanair, Inc. v. Katzman*, 2002 WL 532475 (Mass. Super. Jan. 22, 2002); *Intertek Testing Servs. NA, Inc. v. Curtis-Strauss LLC*, 2000 WL 1473126 (Mass. Super. Aug. 8, 2000); *see also Coworx Staffing, supra* (determining Chapter 93A did not apply to claim that new employer induced former employee to violate non-compete); *William Gallagher Assocs. Ins. Brokers, Inc. v. Everts*, 2001 WL 1334763 (Mass. Super. Sept. 6, 2001) (granting summary judgment on Chapter 93A claims against former employee and new employer).

However, other cases have indicated that a Chapter 93A claim against the new employer in this context could be appropriate. *See Acorida Northeast, Inc. v. Academic Risk Resources & Ins., LLC*, 2005 WL 704870 (Mass. Super. Jan. 5, 2005) (noting in a footnote that the new employer's conduct in "moving in" to take over the plaintiff's business in the face of non-solicitation covenants "smacks of unfairness" and would support Chapter 93A claim); *Junker v. Enes*, No. 00-2098C (Mass. Super. Sept. 5, 2002) (ruling Chapter 93A applied to dispute between former and current employers, because it arose between two discrete business entities). Further, in *Network Systems Architects Corp. v. Dimitruk*, 2007 WL 4442349 (Mass. Super. Dec. 6, 2007), the court, relying on *Peggy Lawton Kitchens*, refused to dismiss a Chapter 93A claim asserted against the new employer grounded in the misappropriation of the plaintiff's trade secrets, noting that the claim did not arise from any employment relationship, even though the defendant had the opportunity to acquire the plaintiff's trade secrets as a result of the employee's access to those secrets during his employment.

Conclusion

While Chapter 93A generally does not apply to actions arising out of the essence of the employment relationship, the potential for a viable Chapter 93A claim increases when the conduct involves post-employment conduct or anti-competitive behavior. Compelling arguments can be made both for and against the applicability of Chapter 93A in these circumstances. On one hand, an argument could be made that stealing trade secrets or engaging in anti-competitive behavior is the type of conduct that Chapter 93A was designed to address, especially if it occurs outside the confines of a single entity. On the other hand, one could argue that, at least in this scenario, the unfair act or practice would not have taken place but for the underlying (and prior) employment relationship. What is clear is that the lack of recent appellate court decisions addressing these issues has led to inconsistent results in the Superior Court. Further appellate guidance in this area would certainly be welcome and helpful for employers, employees and practitioners.

End notes

1. Independent contractors, however, have had greater success in bringing Chapter 93A claims against companies that retain them (although no clear authority has emerged from the Massachusetts appellate courts on this issue). *See Schinkel v. Maxi-Holding, Inc.*, 30 Mass. App. Ct. 41, 48-49 (1991) (allowing independent consultant to bring Chapter 93A claim, even though she effectively worked as the company's full-time manager); *see also Speakman v. Allmerica Fin. Life Ins. & Annuity Co.*, 367 F. Supp. 2d 122, 139-40 (D. Mass. 2005) (denying motion to dismiss Chapter 93A claim by independent insurance agents); *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 23, *cert. denied*, 522 U.S. 1015 (1997); *Marx v. Globe Newspaper Co., Inc.*, 2001 WL 43746 (Mass. Super. Jan. 18, 2002) (chapter 93A claim against freelancers survived motion to dismiss); *Smith v. Darouian*, 1994 WL 879830 (Mass. Super. July 7, 1994) (independent contractor was herself involved in trade or commerce and could pursue Chapter 93A claim).
2. The *DeAngelis* court opined that the Supreme Judicial Court did not, in *Weeks v. Harbor National Bank*, 388 Mass. 141 (1983), "carve out a hiring process exception to" Manning. *DeAngelis*, 2008 1799966, at *2 (internal quotations omitted).