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Case Comment

The Applicability of Chapter 93A to Intra-enterprise Disputes in the Wake of *Governo Law Firm LLC v. Bergeron* — Where Do We Go From Here?

Governo Law Firm LLC v. Bergeron, 487 Mass. 188 (2021)

Introduction

Massachusetts General Laws (G.L.) chapter 93A prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" and permits a court to punish such misdeeds with an award of damages, possibly doubled or trebled, and attorneys' fees.[1] Given its broad scope and potent remedies, claims under chapter 93A are a regular part of business disputes in Massachusetts. Since its enactment, there have been a series of cases that have addressed the meaning of "trade or commerce" and thus the reach of chapter 93A. A number of those rulings have involved intra-enterprise disputes, such as between employers and employees and owners of entities. Over the last few decades, our courts also have addressed conduct outside of the enterprise that had its genesis in relationships within the enterprise itself.

On April 9, 2021, the Supreme Judicial Court (SJC) issued its opinion in *Governo Law Firm LLC v. Bergeron*, which potentially expands the applicability of chapter 93A to certain intra-enterprise disputes.[2] This comment will provide a brief history of chapter 93A; explain how the courts in a series of cases held that chapter 93A did not apply to employer-employee, shareholder, and other internal disputes; and discuss later refinements of those rulings. The comment will then turn to the *Governo* ruling itself and its implications for future disputes.

Chapter 93A

Chapter 93A was enacted in 1967.[3] Initially crafted to allow the attorney general to seek redress for "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," it soon expanded to permit private rights of action by consumers (1969) and then businesses (1972).[4] The scope of chapter 93A is deliberately broad — an act or practice may be deemed unfair if it is "within at least the penumbra of some common-law, statutory, or other established concept of unfairness."[5] However, what is deemed to be unfair is narrower in the business context than in consumer-business disputes; in the business-to-business context, as Appeals Court Justice Rudolph Kass stated in *Levings v. Forbes & Wallace, Inc.*, "[t]he 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."[6] Even with this heightened standard, because of its broad reach, fact-specific analyses, and the potential for an award of double or treble damages and attorneys' fees, 93A claims have become routine in business disputes.[7]

Exceptions for Private and Intra-Enterprise Disputes

Soon after its enactment, the Massachusetts appellate courts issued a series of rulings that placed outer limits on the types of transactions covered by chapter 93A. In 1983, a decade after the

1. Mass. Gen. Laws ch. 93A, §§ 2, 9, 11.

2. Governo Law Firm LLC v. Bergeron, 487 Mass. 188 (2021). The decision was authored by Justice Dalila Wendlandt, and all seven justices of the SJC were on the panel that issued the decision.

3. *See generally* Michael C. Gilleran, *The Law of Chapter 93A*, (2nd ed. 2007 & Supp. 2020). As the SJC has noted, the statute "directs us to consider the interpretations of unfair acts and practices under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970), as construed by the Federal Trade Commission (commission) and the Federal courts." PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975).

4. Mass. Gen. Laws c. 93A, §§ 2, 4, 9, and 11. The attorney general has broad powers under chapter 93A, including the ability to conduct civil investigations and seek injunctive relief and monetary penalties. Mass. Gen. Laws c. 93A, §§ 2, 4, and 6. However, the attorney general's role in chapter 93A litigation is outside the scope of this comment.

5. Commonwealth v. Fremont Investment and Loan, 452 Mass. 733, 743 (2008) (quoting PMP, 366 Mass. at 596). While the "penumbra" phrase is frequently quoted as the definition of unfair, the PMP ruling itself listed it as only one means "to be used in determining whether a practice is to be deemed unfair…." PMP, 566 Mass. at 596. The full passage from PMP is: "(1) whether the practice . . . 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; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *Id*. What is clear from our case law is that chapter 93A is designed to reach a broad range of conduct, some of which is not readily definable but can only be decided on a case-by-case basis.

6. Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504 (1979).

7. The statute also tries to promote settlement of disputes. A consumer making a chapter 93A claim must first send a demand letter to the alleged wrongdoer. Mass. Gen. Laws c. 93A, § 9. If the entity responds within 30 days with a reasonable offer of settlement, that offer can be used as a defense to later 93A claims. *Id.* It is hard to know how effective the demand letter remedy is because, by its very nature, a successful demand letter will avoid litigation. "The demand letter requirement 'is not merely a procedural nicety, but, rather, "a prerequisite to suit,"' … 'designed "to encourage negotiation and settlement" and "as a control on the amount of damages.'" McKenna v. Wells Fargo Bank, N.A., 693 F.3d 207, 217-18 (1st Cir. 2012) (citations omitted). The demand letter requirement in the consumer context can be a trap for the unwary attorney.

In the business context, there is no demand requirement, but the alleged wrongdoer can tender an offer of settlement with its answer. Mass. Gen. Laws c. 93A, § 11; Nader v. Citron, 372 Mass. 96, 99-101 (1977). If the offer is deemed to be reasonable, that will be a defense to a claim for multiple damages and attorneys' fees. Mass. Gen. Laws ch. 93A, §§ 9 and 11. As a practical matter, there seem to be relatively few instances where an offer of settlement is conveyed along with the answer.

enactment of section 11, the SJC summarized its prior rulings as follows: "[a]s this court has frequently stated, § 11 of G.L. c. 93A was intended to refer to individuals acting in a business context in their dealings with other business persons and not to every commercial transaction whatsoever."[8] Thus, chapter 93A does not apply to private transactions that do not take place in trade or commerce.[9] Whether "an isolated transaction takes place in a 'business context' must be determined from the circumstances of each case."[10] So, in *Linkage Corp. v. Trustees of Boston University,* the SJC ruled that Boston University, a nonprofit educational institution, was properly found liable under chapter 93A because "in the particular circumstances of this case, Boston University was engaged in 'trade or commerce'" in connection with the termination of a contract that it had with Linkage "to create and provide educational, training, and other programs of a technical nature at a satellite facility owned by Boston University."[11]

In their rulings, the Massachusetts appellate courts had seemingly drawn bright lines in the employment and other intra-enterprise dispute context. For example, in *Manning v. Zuckerman,* the editor of *The Atlantic* magazine sued his employer and the entity's new owner, claiming that the corporation and the new owner had "committed unfair and deceptive acts in connection with an agreement terminating his employment."[12] The court rejected the editor's claims, holding that the claims had "occurred in the context of the parties' employment relationship … or arose out of that relationship, and not in an arms-length commercial transaction between distinct business entities."[13] The court ruled that "[d]isputes arising out of the employment relationship between an employer and an employee are not cognizable under c. 93A."[14,15]

In *Szalla v. Locke*, the SJC summarized a series of rulings of Massachusetts appellate courts, holding that "[i]t is well established that disputes between parties in the same venture do not fall within the scope of G.L. c. 93A, § 11."[16] In rulings prior to *Szalla*, our courts had held that chapter 93A does not apply to disputes between shareholders in a closely held entity,[17] claims by a shareholder against a corporation regarding corporate governance,[18] and disputes between partners.[19]

In 2014, the SJC once again reaffirmed that chapter 93A does not apply to intra-enterprise disputes.[20] In *Selmark*, Marathon and Selmark were two "closely held Massachusetts corporations…."[21] Erhlich was a shareholder of Marathon, as was Selmark.[22] Elofson was the majority owner of both entities and "supervised and terminated" Erhlich.[23] The court rejected Ehrlich's chapter 93A claims, holding that (a) the fact that "Selmark and Marathon believe they are separate entities" did not change the fact that "[t]he 'intra-organizational' connection among the parties is undeniable"; (b) conduct that took place in connection with agreements before they were signed was still part of the intra-enterprise process; and (c) post-termination conduct "was still governed by the fiduciary obligations that they owed as joint shareholders of Marathon, which places the conduct outside the scope of c. 93A."[24]

More uncertain was how to draw the line between employment

8. Manning v. Zuckerman, 388 Mass. 8, 10 (1983); *see* Weeks v. Harbor Nat'l Bank, 388 Mass. 141 (1983).

9. *See generally Gilleran*, §§ 2.7-2.11.

10. Begelfer v. Najarian, 381 Mass.177, 190-91 (1980). In making this assessment, the SJC held that:

> we assess the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties…. Other relevant factors are whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons (as in the sale of a home), and whether the participant played an active part in the transaction. We do not read § 11 as requiring that a commercial transaction must take place only in the ordinary course of a person's business or occupation before its participants may be subject to liability under Mass. Gen. Laws ch. 93A, § 11.

Id. at 191. Thus, for example, chapter 93A does not apply to a private sale of real estate. Lantner v. Carson, 374 Mass. 606 (1978).

11. Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 2, 24, cert. denied, 522 U.S. 1015 (1997); *see* Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 562-65 (2008) (creditor had insufficient "relationship" with parties who allegedly organized scheme to acquire assets of company and thereby prevent company from being able to pay its debts to find liability under chapter 93A).

12. Manning v. Zuckerman, 388 Mass. 8, 8 (1983).

13. *Id*. at 11.

14. *Id*. at 15.

15. As the *Manning* court noted, employees have an array of other protections in the employer-employee context that are designed to level the playing field in certain situations. *See Id.* at 11-14. For example, claims of discrimination can lead to an award of attorneys' fees and punitive damages. *See* Mass. Gen. Laws c. 151B, §§ 4, 9. An employer's failure to pay wages can result in the imposition of mandatory treble damages plus attorneys' fees. Mass. Gen. Laws c. 149, §§ 148, 150. Moreover, wages are not just limited to base wages but also include vacation pay and, in some instances, commissions. Massachusetts v. Morash, 490 U.S. 107 (1989) (vacation pay); *see* Levesque v. Schroder Inv. Mgmt. N. Am., Inc., 368 F.Supp.3d 302, 313 (D. Mass. 2019) ("the Wage Act generally does not encompass bonuses but protects commission payments that are 'due and payable' and 'arithmetically determinable.'").

16. Szalla v. Locke, 421 Mass. 448, 451 (1995); *see* Psy-Ed Corp. v. Klein, 459 Mass. 697, 719 (2011) (no chapter 93A violation where "dispute arose out of a private transaction between the Psy-Ed board and Klein in his role as a former employee and shareholder of the company"); First Enters., Ltd v. Cooper, 425 Mass 344, 347-48 (1997) (statements made by attorney not actionable under chapter 93A because they related to "an internal business dispute"); Farsheed v. Syed, 85 Mass. App. Ct. 1128 (2014) (unpublished per Rule 1.28) (plaintiff who was deprived of opportunity to invest in closely held business could not maintain chapter 93A claim).

17. Zimmerman v. Bogoff, 402 Mass. 650, 662-63 (1988).

18. Riseman v. Orion Research, Inc., 394 Mass. 311, 313-14 (1985).

19. Newton v. Moffie, 13 Mass. App. Ct. 462, 469-70 (1982).

20. Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 549-51 (2014). Interestingly, the only reference in *Governo* to the *Selmark* case is in regard to the adequacy of jury instructions. *Governo*, 487 Mass. at 194.

21. *Selmark*, 467 Mass. at 526.

22. *Id.* at 550.

23. *Id.*

24. *Id*. at 550-51.

or other intra-entity conduct, which is not actionable under chapter 93A, and post-relationship conduct, which often is. Thus, in *Augat, Inc. v. Aegis, Inc.,* the SJC reaffirmed that third parties could be held liable under chapter 93A for working with an employee to breach his duty to his employer, even if the employee himself was immune from liability under 93A.[25]

The more difficult questions revolved around the conduct of the now-former employee. The Appeals Court struggled with this issue in a pair of cases, *Peggy Lawton Kitchens, Inc. v. Hogan* and *Informix, Inc. v. Rennell*.[26] In *Peggy Lawton*, a company sued a former employee for stealing its secret recipe for making chocolate chip cookies.[27] The court ruled that the employee could be held liable under chapter 93A because his "use of … the trade secret was made when he was no longer an employee…."[28] In contrast, in *Informix* (decided 12 years later), a different Appeals Court panel held that an employee's "postemployment violations … of confidentiality and noncompetition provisions in a confidentiality agreement entered into with … his former employer" were not within the scope of chapter 93A.[29] Distinguishing *Peggy Lawton*, the court held that the conduct in *Peggy Lawton* did not involve a confidentiality or noncompetition agreement, and "the theft of trade secrets … was independent of and did not arise from the former employment relationship.[30] A 2011 ruling of the Appeals Court attempted to reconcile these rulings, holding that even though an "employee was bound by a confidentiality agreement as part of his employment contract, his misappropriation of the trade secret was actionable independent of his contractual obligations and accordingly may support a claim under c. 93A."[31]

The *Governo* Ruling

In 2016, a number of attorneys at the Governo Law Firm (GLF) were engaged in negotiations to buy the practice from GLF's owner, David Governo, while at the same time engaging in actions — including conversion of GLF's property — designed to help them launch a separate law firm.[32] Negotiations failed, and six attorneys at GLF immediately left and formed a new entity, CMBG3 Law LLC (CMBG3).[33] Their conduct prior to and upon departure spawned a lawsuit, with GLF claiming that the attorneys had improperly downloaded and taken "a research library, databases, and administrative files" from GLF prior to their departure and put them on CMBG3's computers.[34] GLF further alleged that the attorneys "accessed GLF's materials … to assist in their representation of clients in paid legal work for CMBG3."[35] A trial was held, and the trial judge instructed the jury that "93A does not apply to anything a defendant did toward the Governo Firm while they were still employed there."[36]

The "jury found some or all of the defendants liable on the claims for conversion, breach of the duty of loyalty, and conspiracy, and none of the defendants liable for unfair or deceptive trade practices in violation of G.L. c. 93A, § 11."[37] GLF appealed, claiming that the trial judge had improperly instructed the jury on whether chapter 93A applied to the defendants' actions.[38] The SJC granted a request for direct appellate review, vacated the judgment on the chapter 93A claim, and remanded that claim for a new trial.[39]

The court began by describing the departing attorneys' conduct in harsh terms: they "secretly download[ed]" materials; "surreptitiously

25. Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 172 (1991); *see* Green v. Parts Distribution Xpress, 2011 WL 5928580 *4 (D. Mass. 2011) (Casper, J.) ("non-party to an employment relationship can be held liable under chapter 93A for aiding and abetting the wrongdoing of a party to an employment relationship regardless of whether the party to the employment relationship can itself be held liable under chapter 93A"). In Baker v. Wilmer Cutler Pickering, 91 Mass. App. Ct. 835, 849-51 (2017), the Appeals Court considered whether a law firm that rendered services to a closely held limited liability company could be held liable under chapter 93A for breaching a fiduciary duty to a minority owner. Describing it as "a novel and close question," the court held that the claim would withstand a motion to dismiss because "the plaintiffs have alleged sufficient facts to plausibly suggest an entitlement to relief." *Id*. at 850.

26. Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937, 939-40 (1984) (rescript); Informix, Inc. v. Rennell, 41 Mass. App. Ct. 161, 162-63 (1996).

27. *Peggy Lawton*, 18 Mass. App. Ct. at 937.

28. *Id*. at 141.

29. *Informix*, 41 Mass. App. Ct. at 161.

30. *Id*. at 163 n. 2.

31. Specialized Tech. Resources, Inc. v. JPS Elastomerica Corp., 80 Mass. App. Ct. 841, 847 (2011). *See Gilleran,* at §2.8 (Supp 2020) ("Just as there is a split of authority about whether a former employer can bring suit under 93A against its former employee, who has now gone to work for a competitor, there is a split in authority about whether the former employer can bring suit under 93A against the competitor who has now hired the former employee.").

32. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 189 (2021).

33. *Id*.

34. *Id*. at 191.

35. *Id*. at 192.

36. *Id*. at 193. The trial was conducted by Superior Court Justice Kenneth Salinger sitting in the Business Litigation Session of the Superior Court.

37. *Id*. at 189-90. (footnote omitted).

38. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 193 (2021). The trial judge's instruction, as set forth by the SJC, was as follows:

> Conduct is part of trade or commerce, as a general matter, if it takes place in a business context and it's not personal or private in nature. But by law an employee and employer are [not] in trade or commerce with each other for purposes of the statute. That means that [G.L. c.] 93A does not apply to anything a defendant did toward the Governo Firm while they were still employed there. So anything that happened before the 20th of November, 2016, whether it was negotiations, copying of materials, anything else[,] that's all irrelevant for purposes of [the G.L. c. 93A claim]. Instead for this claim the Governo Firm must prove the defendants did something to compete with the Governo Firm after they left that firm that was unfair or deceptive. So given the evidence in this case, the Governo Firm must convince you that the defendant[s] used confidential information or documents belonging to the Governo Firm, to compete against that firm in an [unfair] or deceptive manner and that they did so after their employment at the Governo Firm had [ended].

39. *Id*. at 189, 190, 202. "The remainder of the judgment … [was] affirmed." *Id*. at 202.

removed these materials"; and then "used the stolen materials and derived profits therefrom."[40] It provided a more detailed recitation of the facts before turning to the principal issue in the case — the applicability of chapter 93A to the departing attorneys' conduct.[41,42]

The court ruled that "the inapplicability of G.L. c. 93A, § 11 to disputes arising from an employment relationship does not mean that an employee never can be liable to its employer under G.L. c. 93A, § 11."[43] The court held that it had only carved out "certain employment disputes from the broad reach of G.L. c. 93A, § 11…."[44] The court ruled that:

> [w]here an employee misappropriates his or her employer's proprietary materials during the course of employment and then uses the purloined materials in the marketplace, that conduct is not purely an internal matter; rather, it comprises a marketplace transaction that may give rise to a claim under G.L. c. 93A, § 11.[45]

The employment relationship was not a "shield … from liability under G.L. c. 93A, § 11, where they subsequently used the ill-gotten materials to compete with their now-former employer."[46] The court concluded that "[t]he erroneous instruction was prejudicial," vacated the judgment, and remanded for a new trial.[47]

What does the *Governo* ruling mean for future cases?

While the *Governo* ruling has some surface appeal — it punishes what seems to be wrongful conduct — it has the potential to upend seemingly settled case law.

There are strong public policy reasons for not allowing chapter 93A to intrude into the intra-enterprise sphere. As originally drafted, chapter 93A was designed as a vehicle for giving power to consumers who were the subject of unfair or deceptive acts by businesses. The demand letter requirement, coupled with the power of a court to order double or treble damages plus attorneys' fees, helped level the playing field in consumer disputes.

The extension to business versus business disputes was a natural outgrowth of that desire to level the playing field. Although entities large and small can utilize chapter 93A, it is particularly helpful to a smaller entity that may be the victim of unscrupulous business practices by a larger company. The subsequent restrictions on chapter 93A in the intra-enterprise context fit that scenario. There is less need for the power of chapter 93A in private disputes (such as an isolated sale of real estate), trust matters, and disputes among business owners and between employers and employees. In many such cases, as the court noted in *Zimmerman v. Bogoff*, "the aggrieved party has available an alternative avenue of relief in the form of a suit for breach of fiduciary duty."[48]

Governo seems to say that a breach of fiduciary duty claim now is not enough and that an aggrieved party can assert a chapter 93A claim as well. This leads to many new questions, including:

- Will a breach of fiduciary duty by a shareholder of a closely held business who competes with the enterprise now give rise to a chapter 93A claim?
- How is stealing trade secrets truly different than improperly using confidential information in breach of a fiduciary duty?
- What if the wrongful conduct involves the alleged breach of a confidentiality agreement *and* the general misuse of confidential information? Should the former not be part of a chapter 93A claim while the latter could form the basis for such a claim?
- Will attorneys now routinely include chapter 93A claims in intra-enterprise disputes and argue that at least some of the wrongful conduct took place outside of the enterprise itself?

Given *Governo's* broad language, these are all open questions that will need to be resolved by our courts.

— Marc C. Laredo

40. *Id*. at 189.

41. The court disposed of defendants' arguments that the appeal of the 93A issue was not timely and had not been properly preserved in a pair of footnotes. *Id*. at 192-93 n. 10 and 12. As to the former, the SJC ruled that since "[a] judgment is not final for purposes of Mass. R. App. P. 4 (a) until all claims against all parties have been resolved" and the final action in the lower court — "GLF's demand for equitable relief" — was not resolved until Sept. 13, the notice of appeal filed on Sept. 18 was timely filed. *Id*. at 192 n. 10. The court likewise rejected the preservation argument, holding that "GLF timely objected to the G.L. c. 93A jury instruction, repeatedly bringing to the judge's attention (both prior to and immediately following the jury charge) its objections." *Id*. at 193 n. 12.

42. The remaining legal issue in the case involved the calculation of interest. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 198-202 (2021). The court ruled that prejudgment interest was not in order, but postjudgment interest was appropriate. *Id*. at 190, 198-202.

43. *Id*. at 195.

44. *Id.*

45. *Id*. at 195-96.

46. *Id*. at 196.

47. Governo Law Firm LLC v. Bergeron, 487 Mass. 188, 196, 202 (2021).

48. *Zimmerman*, 402 Mass. at 663.