What is an “unfair or deceptive business practice” in Massachusetts?

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Answer: it is not specifically defined and is decided on a case-by-case basis. Kattar v. Demoulas, 433 Mass. 1, 14 (2000). (The phrase “unfair or deceptive business practice” is from and is a reference to the standard for liability under chapter 93A § 2 of the Massachusetts General Laws.).

The determination is to be guided by interpretations made by the Federal Trade Commission (FTC) and federal courts of a federal law, specifically 15 U.S.C. § 45(a)(1), which also prohibits “unfair or deceptive acts or practices.” A common misconception is that a claim under Mass. Gen. Laws c. 93A is only assessed after proving a different, more basic claim. However it is not dependent on proving any other type of claim. It “rises and falls on its own merit.” Patricia Kennedy & Co. v. Zam-Cul Enterprises, Inc., 830 F. Supp. 53, 59 (D. Mass. 1993).

The determination is not an easy one. Mass. Gen. Laws c. 93A has broad scope, is not limited to traditional concepts of tort or contract or the common law, and can provide nontraditional remedies, like specific performance of certain acts. On one hand, otherwise lawful acts, if found to be unfair or deceptive, can form the basis for a claim; on the other hand, otherwise illegal acts are not necessarily deemed a valid claim under Mass. Gen. Laws c. 93A.

There is some meat to the bone though. There must be harm done to the plaintiff. Garden variety disputes in good faith or mere negligence are not a sufficient basis for a 93A claim. The conduct complained of must be either: (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business people. Morrison v. Toys `R' Us, Inc., 441 Mass. 451, 457 (2004); *see also* Duclersaint v. Fed. Nat’l Mortgage Ass’n, 427 Mass. 809, 814 (1998). Nonetheless, it is fair to say though that determining a sufficient basis for a 93A claim can be elusive and well respected legal minds can have differing opinions.

There are some practical items to understanding the laws application. It does not apply to simply personal transactions, which means the conduct complained of must occur in the course of trade or commerce. Morrison v. Toys `R' Us, Inc., 441 Mass. 451, 457 (2004). For business-to-business transactions, sections 2 and 11 of chapter 93A apply; for consumer-to-business transactions, sections 2 and 9 apply. A demand letter is a prerequisite to the imposition of liability for a claim based on consumer-to-business transactions. The demand letter must have specific elements to it to trigger the benefits and burdens of the law and must be done properly or the claim could fail at trial. It is not required, but probably a prudent measure, to send at least some form of demand

letter for a claim based business-to-business transactions. Thus, right at the beginning stage much care is needed.

In practice, the author observes that threats of pursing claims under Mass. Gen. Laws c. 93A claims appear to be made rather thoughtlessly by some. The threat should not be made rashly, and is best made when backed by a careful analysis. In part, because it could be obvious to those that are familiar and/or analyze the law, probably like the law firm that will likely review the demand for the potential defendant, that the requirements of the demand letter were not met or the facts do not otherwise suffice for a legitimate claim.

If you think that you might have a 93A claim against someone in business or are being accused of conducting an unfair or deceptive act, feel free to give this office a call.

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