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No Harm, No Foul? First Circuit Departs from Trend Narrowing Chapter 93A Injury Requirement, Reverses Dismissal of Claim Arising from Failed Price-Fixing Conspiracy

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State unfair competition laws can sometimes provide a vehicle to permit consumers to bring certain types of claims arising from violations of the Sherman Act – for example, indirect purchaser price fixing claims – that such consumers might otherwise lack standing to bring. In its recent decision in *Liu v. Amerco, Inc*.,[1] the First Circuit goes even further, holding that conduct that does not violate the Sherman Act – in this instance, an alleged failed attempt to fix truck rental prices – nonetheless could be actionable as an unfair and deceptive trade practice under the Massachusetts Consumer Protection Act, G.L. c. 93A (Chapter 93A).[2] In so ruling, the court determined that a defendant's unilateral but unreciprocated price increases, allegedly in furtherance of the unsuccessful price-fixing scheme, could constitute actionable injury under Chapter 93A. The First Circuit's ruling, which runs counter to the recent narrowing of Chapter 93A's injury requirement in Massachusetts state courts, focused exclusively on the question of whether the plaintiff had alleged facts plausibly establishing that the defendant had raised its prices. Left unanswered was the question of whether the refusal of competitors to raise their prices, which made it possible for consumers to rent trucks at lower prices, would negate the claim of injury. Absent further development of such injury issues, which were not specifically addressed in the opinion, the decision in *Liu* could signal more expansive construction of consumer claims under Chapter 93A by state and federal courts in Massachusetts.

Factual and Procedural Background

The complaint in *Liu* grew out of an investigation by the Federal Trade Commission (FTC) into allegations that U-Haul International, Inc., the nation's largest truck rental company, had hatched a plan to enlist its competitors in a scheme intended to eliminate price competition and put in place coordinated price increases in the truck rental market. The FTC investigation found that U-Haul unilaterally increased its prices on one-way truck rentals, and directed local U-Haul managers to apprise competitors of these increases in hopes that they would follow suit. None did.[3] Because U-Haul failed to get competitors to agree to fix prices, there was no agreement in illegal restraint of trade in violation of Section 1 of the Sherman Act.[4] The FTC, however, did allege that U-Haul's conduct contravened Section 5 of the FTCAct,[5] which prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[6]

U-Haul neither admitted nor denied the FTC allegations. Instead, U-Haul entered into a consent order enjoining U-Haul "from inviting collusion and from entering into or implementing a collusive scheme."[7] U-Haul did not face criminal prosecution, paid no civil fines, and was not required to pay any reimbursement to its customers.

Private litigation followed entry of the FTC consent order. In *Liu*, two people who had rented U-Haul trucks brought a class action lawsuit against U-Haul and its corporate parent, Amerco, Inc., alleging that the attempted price-fixing scheme violated Chapter 93A with respect to truck rentals to, from, or within Massachusetts. The plaintiffs alleged that U-Haul's scheme, despite being a failed attempt at collusion, nonetheless caused them to pay at least 10% more for one-way truck rentals.[8] This conduct, according to the plaintiffs, violated Section 2 of Chapter 93A which, like Section 5 of the FTC Act, proscribes "[u]nfair methods of competition and unfair or

deceptive acts or practices in the conduct of any trade or commerce."

The district court ruled that plaintiffs in *Liu* had failed to allege sufficient facts to establish plausible injury and dismissed their complaint for failure to state a claim. Specifically, the district court found that the consumers failed to allege injury because they did not enumerate facts concerning their own dealings with the company, or the rates of competitors at the time they did business with U-Haul.[9] The plaintiffs appealed, and the First Circuit reversed.

Chapter 93A as a Vehicle for Obtaining Relief

The plaintiffs in *Liu* sought relief under Chapter 93A because there is no federal statute that permits a private action for an attempted conspiracy to violate the Sherman Act. An agreement among competitors to fix prices is a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, which carries both criminal and civil liability.[10] Section 4 of the Clayton Act[11]creates a private right of action on the part of any consumer who claims injury resulting from a violation of the Sherman Act, such as an illegal price fixing agreement.[12] In order to prove a violation of Section 1, however, it is necessary to prove an actual agreement between competitors, because the Sherman Act does not proscribe attempted price-fixing.[13] Thus, as was true for the FTC, a Sherman Act claim was not available to plaintiffs in *Liu.*

Similarly, the plaintiffs in *Liu* could not seek recourse under the FTC Act. As noted above, in the absence of an actionable Sherman Act claim, the FTC pursued its claims against U-Haul under Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), which broadly proscribes "unfair and deceptive acts or practices" and, therefore, can be read to encompass even failed attempts to engage in price fixing.[14] The FTC Act, however, has no private right of action.[15] Consumers, therefore, cannot utilize the FTC Act in order to obtain compensatory relief for alleged collusion.

This left Chapter 93A as the most likely vehicle for the Massachusetts plaintiffs in *Liu* to pursue claims arising from U-Haul's alleged attempt to fix prices with its competitors. Section 9 of Chapter 93A authorizes consumer actions – including class actions – to enforce its provisions.[16] In language that is essentially identical to Section 5 of the FTC Act, Section 2 of Chapter 93A bars "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Moreover, Section 2(b) of Chapter 93A expressly states that, in consumer actions, "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 . . . ."[17] Thus, to the extent that U-Haul's alleged attempt to fix prices could constitute a violation of Section 5 of the FTC Act, such conduct would also constitute a violation of Chapter 93A and could give rise to a consumer claim such as that asserted in *Liu.*

Proving Injury Under Chapter 93A

Merely alleging that a defendant engaged in unfair or deceptive conduct is insufficient to state a claim under Section 9 of Chapter 93A. In order to state a claim, plaintiffs must show that such conduct caused them injury.[18] A 1979 amendment to Section 9 eliminated any express requirement that such injury would require the loss of money or property. Initially, cases construing the 1979 amendment to Section 9 defined the injury requirement liberally to encompass any "invasion of any legally protected interest of another."[19] In its landmark decision in *Leardi v. Brown*, the Supreme Judicial Court (SJC) held that an injury sufficient to meet that standard existed by virtue of a landlord's improper incorporation of an illegal disclaimer of the implied warranty of habitability in residential leases, even in the absence of any claim that such provision had been enforced against renters to their detriment. The SJC reasoned that such a disclaimer "tends to deceive tenants with respect to the 'landlord's obligation to deliver and maintain the premises in habitable condition.'"[20]

Although *Leardi* nominally remains good law, recent cases have substantially narrowed the viability of consumer Chapter 93A claims in circumstances in which the conduct at issue did not result in any pecuniary loss. For instance, in its 2006 decision in *Hershenow v. Enterprise Rent-A-Car Co.*,[21] the SJC ruled that the presence of language in a car rental agreement which would illegally cancel a damage waiver if there was any breach of a rental agreement was not actionable under Chapter 93A.[22] The SJC distinguished *Leardi* and explained, in pertinent part, that "the statutorily noncompliant terms in Enterprise's automobile rental contracts did not and could not deter the plaintiffs from asserting any legal rights. Nor did the plaintiffs experience any other claimed economic or noneconomic loss."[23] The SJC consequently ruled that the class had not established an actionable injury.

In the wake of *Hershenow*, it has proved difficult for consumers to plead an actionable Chapter 93A claim in the absence of pecuniary loss. Consistent with *Hershenow*, the plaintiffs in *Liu* did allege that they suffered pecuniary

loss in the form of the higher truck rental prices allegedly charged by U-Haul in connection with its purported effort to orchestrate industry-wide price increases. The First Circuit's evaluation of whether such injury had been adequately pleaded concentrated on the plausibility of the allegation that prices had increased in light of facts specifically alleged. The meat of the court's analysis focused on the sufficiency of such allegations in light of the "*Twombly/Iqbal*"[24] pleading standard applicable to complaints in federal court. Ultimately, the First Circuit found that the allegations of injury were sufficient under *Twombly* and *Iqbal*.[25] In that respect the *Liu* decision does not represent a significant departure from recent Chapter 93A cases.

Nonetheless, *Liu* potentially liberalizes the Chapter 93A injury analysis by reason of its failure to address the impact on plaintiffs of the refusal of U-Haul's competitors to follow suit and raise prices. The absence of collusion by competitors should be a significant factor in the analysis of whether injury has occurred. One reason that failed attempts at collusion are not actionable under the Sherman Act is that the antitrust laws are intended to punish injury to competition. If one competitor raises prices while the other competitors, acting independently, decline to follow suit, competition has not been harmed. Put another way, the absence of collusion means the persistence of competition. Consumers remain free to patronize lower priced alternatives, and the competitive disadvantage that results from a unilateral price increase makes it more likely that consumers will avail themselves of the cheaper alternatives. Further, if customers continue to patronize a business that raises prices, notwithstanding cheaper alternatives, their reasons for doing so would include convenience, service, product features, product selection, and other factors that would make them willing to pay more for the goods or services offered. To the extent that consumers obtained or perceived benefits for which they were willing to pay higher prices, there is a strong argument that unilateral price increases, even if motivated by a bad purpose, represent fair market value and, accordingly, did not result in any injury, economic or otherwise, to affected consumers. In the absence of any economic analysis of the impact of continuing price competition, it is not possible to say whether the First Circuit would have found such analysis relevant to the injury requirement under Chapter 93A.

One could infer from the court's ruling that the alleged bad motivation for the price increases was deemed sufficient, in and of itself, to treat the price increases as injury for purposes of Chapter 93A, irrespective of any economic impact. An injury analysis that treats economic considerations as immaterial is functionally indistinguishable from the liberal *Leardi* test of injury, which treats the violation of a statutory right itself as injury. In such an analysis, the existence of price increases is not proof of injury but rather a convenient metric for quantifying damages.

Conclusion

There is no principled reason to treat the proof of injury requirement under the antitrust laws and the causation of injury requirement under Chapter 93A as distinct. The injury analysis in *Liu* should have addressed the economic impact of continued price competition before concluding that the plaintiffs had adequately pleaded injury for purposes of Chapter 93A. Because that issue has not been decided, defendants confronted with a Chapter 93A claim alleging a failed attempt to collude in violation of the antitrust laws should consider explicitly challenging the existence of injury for purposes of Chapter 93A based on the absence of economic impact.

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Endnotes

1 No. 11-2053, slip op. (1st Cir. May 4, 2012).

2 The *Liu* decision was authored by Judge Michael Boudin, who previously served as head of the Antitrust Division of the United States Department of Justice.

3 *See id.*, slip op. at 2-5.

4 *See* 15 U.S.C. § 1.

5 *See* 15 U.S.C. § 45(a)(1).

[6] *See Liu*, *supra* note 1, slip op. at 4-5.

[7] *See id.*, slip op. at 5.

[8] *See id.*

[9] *See id.*, slip op. at 6.

[10] *See id.*, slip op. at 8.

[11] *See* 15 U.S.C. 15.

[12] *See Liu*, *supra* note 1, slip op. at 5.

[13] *See id.*, slip op. at 9.

[14] *See id.*, slip op. at 9.

[15] *See id.*, slip op. at 5.

[16] *See* G.L. c. 93A, § 9(1).

[17] *See* G.L. c. 93A, § 2(b).

[18] *See* G.L. c. 93A, § 9(1).

[19] *See Leardi v. Brown*, 394 Mass. 151, 159 (1985).

[20] *See id.* at 156 (citation omitted).

[21] 445 Mass. 790, 840 N.E.2d 526 (2006).

[22] *See id.* at 800-01, 840 N.E.2d at 534-35.

[23] *Id.* at 800, 840 N.E.2d at 534-35.

[24] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

[25] *See Liu*, *supra* note 1, slip op. at 16-17.

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