State Consumer Protection Laws
Enforcement and Litigation
Trends in
Connecticut and Massachusetts

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Discussion Roadmap

• Relevant Compare and Contrast, and Key Developments of Consumer Protection Laws in Connecticut and Massachusetts
• Government Enforcement of These Consumer Protection Laws
• Q&A

Enforcement and Litigation Trends in Connecticut
An Overview of Connecticut Consumer Protection Laws

Robert M. Langer
Purpose and Construction

Laws governing commercial transactions failed to provide either relief or adequate relief on actionable conduct. To remedy this, CUTPA was written in very broad terms—allowing the development and application of a doctrine to address a wide range of unfair and deceptive trade practices and unfair methods of competition.
Substantive Prohibitions

Conn. Gen. Stat. § 42-110b(a):

“No person shall engage in *unfair methods of competition* and *unfair or deceptive acts or practices* in the conduct of *any trade or commerce*.”

Conn. Gen. Stat. § 42-110a(3) broadly defines person as “a natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, and any other legal entity . . .”

Substantive Prohibitions, cont.

The breadth of “person” as defined negates any inference that CUTPA is limited to consumers or parties in “consumer” relationships. *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 496, 656 A.2d 1009, 1020 (1995).

Unfair Acts or Practices

- Whether the practice, without necessarily having been previously declared unlawful, offends public policy as it has been established by statutes, the common law or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
- Whether it is immoral, unethical, oppressive or unscrupulous; or
- Whether it causes substantial injury to consumers (or competitors or other businessmen).


Unfair Acts or Practices, cont.

This is known as the “cigarette rule” and the foundation for analyzing “unfair acts or practices” in Connecticut.

It is a three prong disjunctive test.
Unfair Acts or Practices, cont.

For the first prong, when is a violation of another Connecticut law sufficient to find a violation of the “public policy” of the unfairness doctrine?

What is a “technical” violation?


Unfair Acts or Practices, cont.

For the second prong, . . .


However, for the third prong “substantial injury” there is a three prong conjunctive test.

– It must be substantial;
– It must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and
– It must be an injury that consumers themselves could not reasonably have avoided.


“The Commission shall have no authority ... to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice *causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.* In determining whether an act or practice is unfair, the Commission *may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.*”
Deceptive Acts or Practices

Deceptive acts or practices are unfair, but not all unfair acts and practices are deceptive.

– First, there must be a representation, omission or practice that is likely to mislead consumers.

– Second, the consumers must interpret the message reasonably under the circumstances.

– Third, the misleading representation, omission, or practice must be material—that is, likely to affect consumer decisions or conduct.


Deceptive Acts or Practices, cont.

• Innocent, negligent and intentional misrepresentations

• Comparisons to the common law torts of fraud and deceit

• Are intent to deceive and reliance ever essential to the cause of action?
Deceptive Acts or Practices, cont.

- Affirmative Misrepresentations

  - distinguish puffery

- Omissions of Material Fact—expressed representations are presumed to be material; implied claims are material if they pertain to central characteristics of a product, such as its safety, cost or fitness for the purposes sold.

  - unfair vs. deceptive omissions

Deceptive Acts or Practices, cont.

- The duty to disclose as a predicate to a deceptive act or practice


Unfair Method of Competition

CUTPA utilizes antitrust principles for its framework to analyze this portion of the Act. The conduct of the same character violating the Sherman Act and the Clayton Act is understood to constitute “unfair methods of competition.” The Connecticut Antitrust Act covers the same subject matter.


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Unfair Method of Competition

- Pleading an antitrust type claim as a CUTPA claim
- Acts that are close to being antitrust violations may still be a violation under CUTPA’s broader enforcement.
Unfair Method of Competition, cont.

When the antitrust framework is unavailable, courts may use the framework for evaluating “unfair acts or practices”—the cigarette rule—to establish non-antitrust type “unfair methods of competition”

*Sportsmen’s Boating Corporation v. Hensley, 192 Conn. 747, 474 A.2d 780 (1984).*

Trade and Commerce

Conn. Gen. Stat. § 42-110a(4) defines as “the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.”
Trade and Commerce, cont.

“In the conduct of any trade or commerce”

In certain circumstances, this may be a significant limitation in applying CUTPA.


Trade and Commerce, cont.

Isolated Transactions

- a single act is generally sufficient to establish a violation – _Johnson Electric Co., Inc. v. Salce Contracting Associates, Inc.,_ 72 Conn. App. 342, 805 A.2d 735 (2002);
- there is an exception when the underlying claim is based upon another body of law requiring a multiplicity of acts - _Mead v. Burns_, 199 Conn. 651, 509 A.2d 11 (1986).
Trade and Commerce, cont.

Employer/Employee Relationships
- CUTPA does not apply to conduct in employment relationships because such conduct is not "in trade or commerce" but courts have been willing to find violations when conduct by an employee was competitive to interest of the employer, e.g., usurping business opportunities, underselling employer, or using confidential information to compete.
- Relationship would include those with independent contractors


Trade and Commerce, cont.

Intracorporate Conflicts
- pure intracorporate conflicts are excluded from CUTPA


Professional Services
- non-entrepreneurial aspects of learned professions are excluded from CUTPA, e.g., professional negligence or malpractice.


*Haynes v. Yale-New Haven Hospital*, 243 Conn. 17, 699 A.2d 964 (1997) (health care providers and the meaning of "entrepreneurial").

Trade and Commerce, cont.

Non-Profit Institutions

- Lower courts have held that non-profit activity may occur in the conduct of trade or commerce, distinguishing CUTPA’s structure from that of the FTC – see 15 U.S.C. § 44 wherein non-profits not deemed “persons”

- Neither the Appellate nor the Supreme Court have opined on this issue.

Extraterritoriality

- the U.S. Constitution imposes limits on how states regulate conduct outside their borders—the Commerce Clause—prohibiting the application of a state statute to commerce that takes place wholly outside of the state’s borders

  State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003)(state’s cannot punish for conduct that is lawful where it occurred).

  – except where both the conduct and injury occurred outside Connecticut, whatever limits that exist on the extraterritorial effect of CUTPA arises from the statutory definition of trade or commerce rather than the constitutional limitation on power of a state

  – laws of the state where the party was injured applies even if injury was caused by conduct outside the state


  – ascertainable loss can occur outside of Connecticut, if CUTPA violation occurs here


  – CUTPA does not require that the violation occur in Connecticut, only that it be tied to a form of trade or commerce that is intimately associated with Connecticut

Relationship to FTC

Conn. Gen. Stat. § 42-110b(b):

“It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by 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.”

This provision is a floor not a ceiling. See, e.g., Murphy v. McNamara, 36 Conn. Supp. 183, 416 A.2d 170 (1979)(noting that despite courts being guided by FTC decisions, Connecticut courts under CUTPA are free to find methods, acts, practices not specifically declared unlawful by FTC).

Relationship to FTC, cont.

Conn. Gen. Stat. § 42-110b(c):

“The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.”
Relationship to FTC, cont.

The “Lodestar” Analysis is a judicially engrafted four part analysis to determine whether the suspect transaction in the first instance is subject to CUTPA

- Applicability of FTC rules to the suspect conduct and absence of FTC regulatory activity over industry practices;
- Existence and scope of alternative comprehensive regulatory scheme;
- Absence of activity by commissioner of consumer protection; and
- Case law of other jurisdictions.


Standing

Conn. Gen. Stat. § 42-110b(a):

“All person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . .”


- “Commercial” relationships
- Indirect Purchaser Rule

As previously noted, person is defined in Conn. Gen. Stat. § 42-110a(3).
Injury/Causation

The “ascertainable loss” standard
- threshold barrier limiting persons seeking either actual damages or equitable relief
- “ascertainable” means capable of being discovered, observed or established
- “loss” has to be measurable, but not necessary to allege or prove amount because the term is broader than the term damage. Loss is synonymous to deprivation, detriment or injury

*Hinchliffe v. American Motors Corporation, 184 Conn. 607, 440 A.2d 810 (1981).*

*Service Road Corporation v. Quinn, 241 Conn. 630, 698 A.2d 258 (1997).*

Injury/Causation, cont.

Caustion/Remoteness “as a result” determination
- traditional common law principles of remoteness and proximate cause applies
- alleged conduct must be a “substantial factor” in producing injury—in addition to “but for” test—an unbroken sequence of events

*Haesche v. Kissner, 229 Conn. 213, 640 A.2d 89 (1994).*

*Abrahams v. Young & Rubicam, Inc., 240 Conn. 300, 692 A.2d 709 (1997).*

*Ganim v. Smith and Wesson, 258 Conn. 313, 780 A.2d 98 (2001).*

*Vacco v. Microsoft Corporation, 260 Conn. 59, 793 A.2d 1048 (2002).*
Defenses

Statute of Limitations

Conn. Gen. Stat. § 42-110g(f) provides for the limitation to run from the date of the violation rather than from the date of discovery

- Date of injury vs. date of discovery
- Duty to Disclose/Fraudulent Concealment


Willo Springs Condominium Ass’n v. Seventh BRT Development Corp., 245 Conn. 1, 717 A.2d 77 (1998)
- Duty to Disclose/Fraudulent Concealment

- Statute of limitations is jurisdictional and cannot be waived

Defenses, cont.

Good Faith Defense

Limited to circumstances when there exists a reasonable belief that the statute upon which the CUTPA claim is premised is unconstitutional. Otherwise subjective good faith, although relevant to liability, is not a defense.

Defenses, Cont.

Applicability of:
- Laches
- Contractual Limitations – arbitration
- Sovereign Immunity
- Failure to Mitigate
- Unclean Hands
- Res Judicata/Collateral Estoppel

Note: Some of these defenses are available to the State, and others are deemed inapplicable to State sovereign enforcement actions, including the statute of limitations.


Exemption and Preemption

Conn. Gen. Stat. § 42-110c(a): Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States.

Conn. Gen. Stat. § 42-110c(a)(2) limits the liability of the media to situations in which the media has both knowledge of the false, misleading, unfair or deceptive character of the advertisement, and has a direct financial interest in the sale or distribution of the advertised product or service.

Conn. Gen. Stat. § 42-110c(b): “The burden of proving exemption, as provided in this section, from the provisions of this chapter shall be upon the person claiming the exemption.”
Exemption and Preemption, cont.

There are numerous examples of CUTPA claims expressly or implicitly preempted by certain state or federal legislation including:
- Bankruptcy Act
  - preemptions may not apply to certain actions of the State
- Admiralty Law
- Fair Credit Reporting Act
- Workers’ Compensation Act
- Copyright Act
- Health Care Quality Improvement Act
- Airline Deregulation Act
- ERISA


Remedies


“It is the intention of the legislature that this chapter be remedial and be so construed.”

Kim v. Magnotta, 249 Conn. 94, 733 A.2d 809 (1999)

Remedies, cont.


Private – Conn. Gen. Stat. § 42-110g-h

Conn. Gen. Stat. § 42-110g(c) requires the plaintiff to mail a copy of the complaint and any judgment or decree to both the Attorney General and the Commissioner of Consumer Protection.

Conn. Gen. Stat. § 42-110g(g) limits the right to a jury trial by a private litigant to compensatory damages. Punitive damages, injunctive relief and attorneys fees are awarded by the court.

*State need not show ascertainable loss

Remedies, cont.

In addition to actual damages, a CUTPA plaintiff may recover:

- Prejudgment interest in accordance to contract or statute (Conn. Gen. Stat. § 37-3a)
- Injunctive and other equitable relief
- Punitive damages—after meeting threshold requirement of an ascertainable loss
- Attorney’s fees and costs if plaintiff prevailed in a private action (Conn. Gen. Stat. §§ 42-110g(d), 42-110g(g)
- Prejudgment remedies (Conn. Gen. Stat. §§ 52-278a, 52-278n)
CUTPA and Business Torts

As previously noted, courts have used the framework for evaluating “unfair acts or practices” under the cigarette rule to establish non-antitrust type “unfair methods of competition.” Therefore, conduct that constitutes a CUTPA violation may not necessarily also trigger tort liability because the CUTPA claim in certain instances may not need to meet each of the elements of the business tort upon which it is premised, e.g., tortious interference. However, once tort liability is proven, rarely will a CUTPA violation not be found.


CUTPA and Business Torts, cont.

- **CUTPA and Trademarks/Tradenames**
  Conduct violating state/federal trademark laws are deemed violations of CUTPA.

- **CUTPA and Commercial Disparagement/Defamation**
  Courts have typically analyzed such common law claims, premised upon the same conduct, entirely separately from CUTPA claims.
  *IN Energy Solutions, Inc. v. Reaigy, LLC*, 114 Conn. App. 262, 969 A.2d 807 (2009);

- **Statutory Theft and Conversion**
  Numerous decisions have held that acts of statutory theft and conversion may also violate CUTPA.
CUTPA and Business Torts, cont.

• CUTPA and Economic Loss Doctrine-UCC

  Flagg Energy Development Corp. v. General Motors Corp., 244 Conn. 126, 709 A.2d 1075 (1998)

• CUTPA and Breaches of Fiduciary Duty

  Ostrowski v. Avery, 243 Conn. 355, 703 A.2d 117 (1997)

• CUTPA and the Connecticut Franchise Act


CUTPA and Business Torts, cont.

• CUTPA and Negligence


CUTPA and Business Torts, cont.

- **CUTPA and Breaches of Contract**
  
  *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988)
  
  
  
  *Paulus v. LaSala*, 56 Conn. App. 139, 742 A.2d 379 (1999)
  

Scope of CUTPA Outside the Act

- Over seventy statutes explicitly incorporate CUTPA for per se violations, including:
  
  - Home Improvement Act - Conn. Gen. Stat. § 20-427(b)
  
  - Health Club Act - Conn. Gen. Stat. § 21a-222(b)
  
  

*See, e.g., Woronecki v. Trappe*, 228 Conn. 574, 637 A.2d 783 (1993) (the failure to comply with the HIA is a per se violation of CUTPA…. Because the trial court found that the plaintiff’s actions had violated the HIA it was bound to render judgment for the defendant on the CUTPA claim).

- Interaction with Common Law

Scope of CUTPA Outside the Act, cont.

- CUTPA and Arbitration


- CUTPA and the Connecticut Products Liability Act


Government Enforcement

Phillip Rosario
Government Enforcement

Government Entities Responsible for CUTPA Enforcement

- The Commissioner of the Department of Consumer Protection (“DCP”)
- The Attorney General
- Their roles in CUTPA enforcement are both defined and flexible

Formal Investigations

Conn. Gen. Stat. § 42-110d

- Are conducted by the Commissioner of Consumer Protection or his “authorized representative”
- Can do field investigations, and subpoena witness testimony and documents
- The Commissioner can also issue civil investigative demands (“CIDs”) to:
  - any person the Commissioner suspects of using, having used or about to use an act or practice that violates CUTPA
  - any person from whom the Commissioner wants an assurance that CUTPA has not, is not or will not be violated


Conn. Gen. Stat. § 42-110k

- A court may order various remedies for failing to comply with a subpoena or CID among other things:
  - An order barring the advertising or sale of the commodity involved in CT
  - An order revoking corporate charter of a non-complying Connecticut corporation or suspending the certificate of authority of a foreign company to do business in this state, until it complies with the Commissioner’s investigation.
Government Enforcement, cont.

Assurance of Voluntary Compliance

Conn. Gen. Stat. § 42-110j

- Is a voluntary agreement from person alleged to have been violating or be engaged in violating CUTPA to comply with CUTPA
- May include remedies for alleged violation of CUTPA
- Not an admission of violation
- Can be reopened by the Commissioner

Government Enforcement, cont.

Administrative Hearings

Conn. Gen. Stat. § 42-110d(d)

- If Commissioner has reason to believe person has been or is violating CUTPA, he may proceed to have the Department of Consumer Protection hold an administrative hearing on the suspected violation.
- These administrative hearings are held in accordance with the Uniform Administrative Procedure Act, Conn. Gen. Stat. § 4-166 and pursuant to the Rules of Practice of the Department of Consumer Protection.

Connecticut General Statute § 42-110n

- After issuance of an administrative complaint and In lieu of a hearing, the Commissioner can accept a consent order.
Government Enforcement, cont.

Enforcement by the Attorney General’s Office

Attorney General Monitoring of Marketplace

Conn. Gen. Stat. § 42-110g(c)

- AG like DCP receives copies of private CUTPA lawsuits

In addition, AG receives thousands of individual consumer and business CUTPA complaints each year

Amicus Briefs

- After receiving copy of private lawsuit, AG may seek to file amicus briefs on CUTPA legal issues in private CUTPA actions

Informal Investigations and Mediation

- Each year the Attorney General informally investigates and resolves thousands of isolated consumer complaints
- It is an effective option for resolving many small isolated cases, and your clients may want to avail themselves of it
Government Enforcement, cont.

Participation with DCP in Formal CUTPA investigations

– Indeed, the Attorney General routinely works with the Commissioner:
  – After receiving copy of a private lawsuit AG In coordination with DCP, may also commence inquiry into subject matter of private lawsuit (e.g., where lawsuit alleges misconduct that could affect consumers not party to the suit)
  – In conducting formal CUTPA investigations under § 42-110d as his legal and authorized representative
  – In pursuing court actions under § 42-110k to enforce compliance with the Commissioner’s investigations

Government Enforcement, cont.

Sovereign Enforcement Actions & Recommendations

Conn. Gen. Stat. § 42-110m

– When the Commissioner has a reason to believe CUTPA has been or is being violated he can, instead of holding an administrative hearing, ask the AG to bring a sovereign enforcement action in court
– The Commissioner’s reason to believe can come from a recommendation from the AG.  
– AG assists DCP in recommendation on CUTPA lawsuits and resolution of CUTPA matters
Government Enforcement, cont.

Remedies Available to Government When Enforcing CUTPA

- Cease and Desist Orders, Consent Orders, Orders of Restitution, civil penalties, injunctive relief, receivership, corporate dissolution, and disgorgement, other equitable relief
- Government does not have to prove ascertainable loss

Allocation of remedies between DCP and the Attorney General

Restitution
Conn. Gen. Stat. § 42-110d(d)
- In an administrative hearing DCP can order up to $5000 in restitution.

Conn. Gen. Stat. § 42-110m
- Amount of Restitution the AG can seek in a sovereign enforcement action depends on facts of case and is not statutorily limited.

Civil Penalties
Conn. Gen. Stat. § 42-110o(a)
- Allowed in Actions to enforce injunctions issued by courts to enforce DCP consent orders
- If AG on behalf of commissioner obtains an injunction pursuant to Conn. Gen. Stat. § 42-110d(e),(f) to enforce cease and desist order issued by Commissioner, and the terms of the injunction are violated then the AG may seek an order from court of up to $25,000 for each violation.

Conn. Gen. Stat. § 42-110o(b)
- Allowed In Sovereign Enforcement Court Actions
- Allows AG to seek up to $5000 for each willful violation in a sovereign enforcement action

Conn. Gen. Stat. § 42-110o(a)
- Allowed in Actions to enforce injunctions issued by courts in § 42-110m sovereign enforcement action
- If AG obtains an injunction pursuant to Conn. Gen. Stat. § 42-110m in a sovereign enforcement action which is later violated AG can seek award from court of up to $25,000 for each such violation.
Government Enforcement, cont.

Many investigations are resolved by stipulated judgment or AVC (attendees may request the following samples from Bob Langer at rlanger@wiggin.com).

State v. Approved Mortgages, et al.
It is not unusual for a State’s complaint under CUTPA to be brought in an action with a count regulating an agency’s substantive law. Here, AG brought suit on behalf of the State for CUTPA and the commissioner of banking against participants in “one stop shopping” predatory lending scheme involving a real estate broker, mortgage broker and builder of new homes. State obtained restitution, contingent forfeitures for amounts not distributed and mortgage broker and principal agreed not to offer mortgage brokerage services in Connecticut.

State v. F&S, et al.
In 2008, State sued F&S and several related companies for allegedly soliciting prepaid oil contracts and accepting consumer deposits for prepaid oil at a time when defendants knew or should have known that, because of their financial condition and lack of backup future oil contracts required by law, defendants could not deliver the oil to consumers. The State obtained the appointment of a receiver in the action and consumers eventually received an agreed upon distribution of $1 million in restitution.

State v. CVS
Some agreements can provide for substantial improvements to internal workings for company to avoid future problems. State alleged defendants sold expired over the counter drugs and some food items. State obtained a stipulated judgment prohibiting sale of such expired products—requiring the retailer to set up internal programs to monitor and detect such expired items and set up a program that allowed for consumers who found expired goods and brought them to the attention of store employees to receive a store coupon worth $2.00 off any item bought in the store. Although consumers could only receive one coupon per expired item presented to a store employee, there is no limit on the number of expired coupons consumers can receive. Agreement also included monetary payment to the State.

In re Cardio Express
Some in state AVCs can allow a matter to be resolved quickly. State alleged defendant had been advertising instructor-led stationary bicycle “spinning” classes at no additional cost with “basic” ($10 per month) memberships. When basic members went to sign up for the instructor-led spinning classes, however, defendant allegedly informed them that they would need to raise their memberships to a higher, $20 per month, level in order to participate in the classes. Under the terms of the AVC, defendant agreed to allow consumers who became basic members during the time of the promotion to upgrade to memberships that allowed them access to spinning classes at no additional cost. Any former member of the health club who would have otherwise qualified for relief had they remained a member was entitled to full refund of their membership (if they cancelled membership before January 1, 2010).
Class Actions

Robert M. Langer

Conn. Gen. Stat. § 42-110g(b):

“Persons entitled to bring an action under subsection (a) of this section may . . . bring a class action on behalf of themselves and other persons similarly situated who are resident of this state or injured in this state to recover damages.”

Conn. Gen. Stat. § 42-110h contains the language for timing of class certification, which was adopted from Fed. R. Civ. P. 23(c)(1)(A): “an early practicable time”
Class Actions, cont.

Class Action Fairness Act and CUTPA

• Court reform – not tort reform – to avoid forum shopping
• Applies to class action suits – but not to AG enforcement actions because the AG is not deemed a citizen for purposes of diversity jurisdiction. See State of Connecticut v. Moody’s Corp., 664 F. Supp. 2d 196 (D. Conn. 2009).
• Applies to suits after enactment of CAFA only - 2/18/05
  – See Pritchett v. Office Depot, 404 F.3d 1232 (10th Cir. 2005)
  – Operative act - when filed in state court - not when removed

Class Actions, cont.

• Change in diversity requirement is key provision:
  Original federal court jurisdiction if the suit is more than $5 million, 100 class members and minimal diversity - any plaintiff and any defendant
• Exceptions – Non-discretionary
  – Fewer than 100 class members
  – State court primary defendant
  – Primary defendant and at least 2/3 of class are citizens of state
  – 2/3 of class are citizens of state and at least one in-state defendant significantly contributed to harm and principal injuries occur in state and no other class action in past (3) years against same defendants
Class Actions, cont.

• Exception - Discretionary

1/3 – 2/3 of class members and primary defendants are citizens of state – if so then factors are: is there national/interstate interest; do laws of forum state apply; is it pleaded to avoid federal jurisdiction; is there a nexus to the forum state; what is geographic dispersion of class members; and have other comparable class actions been filed within last 3 years

• Mass Torts
  – 100 people or more – treated as class but still need to meet $75,000 threshold
  – single sudden accident exception
  – cannot be MDL’d unless majority of plaintiffs request

Class Actions, cont.

• Removal
  – Now permitted even if defendant is a citizen of forum state
  – A defendant can remove without consent of all defendants
  – Eliminates 1 year rule
  – Remand reviewable if within (7) days of order
• Coupons – Compact Disc, 2005 WL 1030151 (D. Me. 2005)
  – Attorney’s fees in coupon settlements based on time expended or amount actually redeemed
Class Actions, cont.

• Notice of Settlement
  – To appropriate federal and state officials - to ‘each’ state’s primary regulator or person with supervisory responsibility or to attorney general—where a class member resides. Does this mean intervention or comment?
  – Must serve on government officials within (10) days of filing of class action settlement document with court
  – Approval cannot occur in less than (90) days
  – Comprehensive list of what needs to be provided to the feds and each state
  – Non-compliance means class members not bound

Connecticut has done a significant job carving out the nuances of CUTPA, and its application to class actions. Below are some takeaway cases:

• In Federal Court, although the CUTPA statute does not distinguish between residents and nonresidents, nonresidents harmed outside the state from conduct inside the state may bring individual action, BUT may not bring a class action
• Rule 23 is not a pleading standard; Rule 23 requirements are determined in factual and legal issues compressing the cause of action and, on occasion, beyond the pleadings
• Typicality: Claims must arise from same course of events, and each class member makes similar arguments—same degree of centrality
Class Actions, cont.

• Numerosity: no need to show exact size of class but court should be able to draw reasonable inferences as to approximate size and infeasibility

• Commonality: only need common issues to exist, not predominate—complete identity of legal/factual issues

• However, individual issues should not predominate over common ones. Predominance Inquiry: (i) review of elements of causes of action being asserted; (ii) determined whether generalized evidence could be offered to prove elements on class-wide basis or whether individualized proof is needed; and (iii) weight common issues subject to general or individualized proof

Class Actions, cont.

• Adequacy of Representation: competency of class counsel and conflicts of interests; representative plaintiff has such a substantial stake, he assures the court he will put up a “real fight”—minimal level of interest, familiarity with challenged practices and ability to assist in decision-making in conduct of litigation. Representative Plaintiff only need to be willing to pay his or her pro rata share of expenses.
The Connecticut Practice Book is more flexible on notice requirements to class members than Rule 23. The Practice Book does not require notice, nor does it make a distinction among types of class actions. It only lists the points during the proceeding in which the court may order notice in the manner it directs. For Connecticut, class members who do not receive notice do not suffer due process consequences for lack of notice since they can exercise their right to opt out of the class at a later time.


Overall, you may have noticed that *Campbell* and the two *Collins* cases were repeated twice or more. Within those cases, the Connecticut Supreme Court spent a significant amount of time discussing and developing the bare bone rules and concepts for CUTPA class actions.
Privacy Protection Laws

Robert M. Langer

Connecticut Privacy Laws

Credit Security Freezes, Conn. Gen. Stat. §§ 36a-701, 36a-701a and 36a-701b
CT Data Breach Notification Law, Conn. Gen. Stat. § 36a-701b

There is a significant variation among states
  – Onerous: Massachusetts
  – Middle of the road: Connecticut
  – More general/less specific: Rhode Island, New York

CT considered the leading state in enforcement

Generally, the laws require:
  – Written privacy policy
  – Careful disposal of protected data
  – Notice of breach
Connecticut Privacy Laws, cont.

Generally requires:
• Written privacy policy with safeguards to protect personal information
• Social Security number privacy policy that is “published” or “publicly displayed”
• Proper disposal of personal information
• Any person or business that collects or possesses personal information about a state resident must comply
• Exemption for entities regulated by other agencies, such as insurers and healthcare providers
• Breach notification
  – Failure to notify is a CUTPA violation that is enforced by the AG, see Conn. Gen. Stat. § 36a-701b(g)
  – Failure to comply with § 42-470 may subject one to administrative action by DCP or court action by AG

Note that this is a high-level summary and does not cover all CT law.

Connecticut Privacy Laws, cont.

Recent Laws and Open Questions

• Do I need to comply with laws of other states?
  – On their face, laws require compliance by anyone collecting personal information from state residents
  – Legal question about how far the States’ authority reaches and what the States are able to enforce
  – Never been challenged
  – Unfair trade risks – if everyone else complies . . .
  – What makes good business sense
  – BOTTOM LINE: Unsettled question, need to make a business decision about risk
• What does enforcement look like?
  – CT law imposes fine of $500 per intentional violation, but what is intentional (and what is a single violation)?
  – As a matter of practice, what will interest the CT AGOs?
Helpful Links

- CT Department of Consumer Protection
  www.ct.gov/dcp
- CT Attorney General
  www.ct.gov/ag
- CT Statutes
  www.cga.ct.gov/asp/menu/statutes.asp

Enforcement and Litigation Trends in Massachusetts
An Overview of Massachusetts Consumer Protection Laws

Robert M. Langer
The Regulation of Business Practices for Consumers’ Protection
M.G.L.A. c.93A

Roadmap:
A. 93A Prohibition
B. §9—Consumer Actions
C. §11—Business Actions
D. Overview of Unfair or Deceptive Acts or Practices
E. Definition: unfair
F. Definition: deceptive
G. Standard: duty to disclose
H. Definition: unfair method of competition
I. Definition: trade and commerce
J. Jurisdiction on 93A claims
K. Relationship to FTC
L. Injury and Causation
M. Defenses
N. Exemptions and Preemptions
O. Remedies
P. 93A and Business Torts

Purpose and Construction, cont.

Chapter 93A changed the standard for commercial liability by assessing actual commercial injury without regard to the state of mind.
– M.G.L.A. c.93A, §9 (Consumer Actions)
  • An individual participating in business transactions but not engaged in trade or commerce
– M.G.L.A. c.93A, §11 (Business Actions)
  • A business person participating in business transactions AND at the same time engaged in trade or commerce
Substantive Prohibitions

M.G.L.A. c.93A, § 2(a):
unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful

M.G.L.A. c.93A, §1(a) defines person as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity”

§9—Consumer Actions

Standing:
c.93A, §9(1) provides a consumer plaintiff to be:
Any person, other than a person entitled to bring action under [§11] . . . who has been injured by another person’s use or employment of any method, act or practice declared to be unlawful by [§2] . . .

Here, only defendant is required to have engaged in trade or commerce.

c.93A, § 9(3A)-District Court application
- No equitable relief allowed (except to district courts in Norfolk and Middlesex counties); otherwise only monetary damages. See Herman v. Home Depot, 436 Mass. 210, 763 N.E.2d 512 (2002).
- Also, plaintiff in district court is not entitled to bring a class action
§9—Consumer Actions, cont.

There are greater procedural hurdles here for plaintiff than in §11. To determine if plaintiff is a §9 plaintiff, the focus is on the nature or conduct of plaintiff.

c.93A, §§9(6) and (7) provides a complex procedure where defendant is able to compel plaintiff to exhaust administrative remedies.

c.93A, §9(3)(sent. 1) proscribes a jurisdictional requirement on §9 plaintiff. As a prerequisite to filing suit, plaintiff must send a demand letter to each prospective defendant 30 days prior to filing suit—describing with reasonable specificity that acts complained of, the injury suffered and reasonable notice that demand is being made under 93A.

Plaintiff will then allege in the complaint that a §9 demand letter was sent, and prove such at trial.

§9—Consumer Actions, cont.

The burden is on defendant to raise an issue of sufficiency of the demand letter. The court may not raise this issue on its own when defendant fails to do so.


A demand letter is not required if:

– Plaintiff is asserting a claim by way of counter-claim or cross-claim;
– Prospective defendant does not maintain a place of business or keeps assets within Massachusetts

In response, when a demand letter is sent when it is not required, defendant may follow the provisions for making a written tender of settlement as soon as practicable after receiving notice.
§9—Consumer Actions, cont.

Demand Letter’s Dual Purpose

– Encourage Settlement: notice to and opportunity by defendant to limit damages
– Increase Punishment: mere failure to tender reasonable settlement creates a basis for recovery of multiple damages and attorney’s fees. The reasonable settlement mechanism is provided in c.93A, §9(3)(sent. 2).

§11—Business Actions

Standing:
c.93A, §11 (para. 1) provides a business plaintiff to be:

Any person who engaged in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engaged in any trade or commerce of an unfair method of competition or any unfair or deceptive act or practice declared unlawful by [§2] . . .

Here both plaintiff and defendant are required to have engaged in trade or commerce.

c.93A, §11 (para. 4)-District Court application
– Similar to application of §9 consumer actions
§11—Business Actions, cont.

Typically, no governmental entities have standing because §4 by nature allows the Attorney General to protect the interests of town citizens. However, governmental entities involved in trade or commerce may bring suit under §11.


The United States would also have standing under §11 for business relationship transactions, but not for any law enforcement.


There is no demand letter requirement in §11, but plaintiff may send a “courtesy demand letter” to have it serve as an independent basis for multiple damages or evidence of continuing willful or knowing conduct.


Nonetheless, a §11 plaintiff is required to give fair notice in the complaint of the precise nature of the allegations against defendant.

§11—Business Actions, cont.

Principles governing the tender of a settlement if a demand letter is sent is provided in c.93A, §11(para. 5)—which will allow a tender to counteract plaintiff’s right to multiple damages or attorney’s fees.

Also, unlike §9, §11 has no provision for waiving exhaustion of administrative remedies. In fact, if a §11 plaintiff is entitled to an administrative remedy, the case will be dismissed and referred to the administrative agency, unless damages that are being sought are for past conduct which cannot be awarded by the administrative agency.


Overview of Unfair or Deceptive Acts or Practices

The terms “unfair” or “deceptive” have no statutory definition, and Massachusetts courts have declined to adopt one. The meaning of these terms are open ended, fact-specific, and are progressively defined based on the developing conscience of the community.

However, conduct in §11 business actions are judged with a higher standard because certain conduct common between businesses are unfair if practiced upon a commercial innocent.
Unfair Acts or Practices

Generally, unfair is defined as acts that are unfair, although not necessarily deceptive or fraudulent. Massachusetts applies an objective standard to this application.

§9 Consumer Actions require a general unfairness standard—analyzing the standpoint of individual acts or widespread practice—and an equity standard—analyzing whether both plaintiff and defendant acted in an equitable manner.

§11 Business Actions require a violation of an established concept of unfairness, and an assessment of equities between the parties, including the knowledge and bargaining power of plaintiff.

The most common unfairness test is:

– Whether the practice, without necessarily having been previously declared unlawful, offends public policy as it has been established by statutes, the common law or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
– Whether it is immoral, unethical, oppressive or unscrupulous; or
– Whether it causes substantial injury to consumers (or competitors or other businessmen).


The third prong of the unfairness test is “substantial injury”—which is a three prong conjunctive test.
– It must be substantial;
– It must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and
– It must be an injury that consumers themselves could not reasonably have avoided.
Unfair Acts or Practices, cont.

However, in *Lambert v. Fleet National Bank*, the Supreme Judicial Court moved away from the unfairness test, and established that unfairness is shown by an act or practice that is “within at least the penumbra of some common-law, statutory, or other established concept of unfairness”.


Deceptive Acts or Practices

Generally deception involves conduct—although not false—that is likely to mislead a plaintiff. There was a split on whether conduct having the capacity or tendency to deceive would also violate 93A. The Supreme Judicial Court determined it would, and followed a capacity to mislead test and adopted the requirement that the consumer acted reasonable under the circumstances.


For §9 claims, plaintiff need not rely on deception but in §11 claims Massachusetts authority is divided.
Duty to Disclose

Chapter 93A contains a general duty of disclosure that applies to §§ 4 and 9 defendants. It occasionally applies to § 11 defendants depending on the circumstances—such as the sophisticated § 11 plaintiff or contract type.

This stems from regulation by the Attorney General in 940 Code Mass. Regs. §3.16(2) that provides for a c.93A §2 violation, if:

Any person or other legal entity subject to this act **fails to disclose** to a buyer or prospective purchaser any fact, the disclosure of which **may have influenced** the buyer or prospective buyer **not to enter into the transaction**.


Unfair Method of Competition

This portion of the statute is brought by a business usually against a competitor. It is defined to the extent provided in common law or authority in the Unfair Deceptive Trade Practices Act—which is not enacted in Massachusetts. It must also meet the general test for unfairness enumerated in *PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 321 N.E.2d 915 (1975).

The court is also guided by the Massachusetts Antitrust Act for § 11 claims. §9 claims do not need to satisfy elements typically found in antitrust claims to be viable under 93A since those plaintiffs are not engaging in trade or commerce.
Trade and Commerce

All plaintiffs must pled and prove that defendant engaged in “trade” or commerce

c.93A, §1(b) defines as “the advertising, the offering for sale, rent or lease, the sale, rent, lease, or distribution of any services and any property, tangible or intangible, real, person or mixed, any security as defined in [c.110A, § 401(k)] . . . and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth”

Trade and Commerce, cont.

The complained transaction must take place in the context of defendant’s business. Factors considered are:

– Character of parties—individuals/business people
– Nature of transaction and extent of defendant’s involvement
– Was defendant acting in transaction in course of any trade or commerce
– Was defendant motivated in transaction by business or personal reasons

Massachusetts Jurisdiction on c.93A Claims

Majority of claims are governed by MA long-arm statute, M.G.L.A. c.223A, §3—allowing consumers and the Attorney General to sue businesses not located in Massachusetts. However, business actions under §11 must meet the “Primarily and Substantially” test.

c.93A, §11 (para. 8) provides:
No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth.

A functional approach is taken in applying the test by focusing on where the “preponderance of the wrongful conduct took place.”

The burden of proof is on the person claiming that the conduct did NOT OCCUR within the commonwealth—which is a contrary burden to traditional jurisdiction analysis.

Relationship to FTC

c.93A, §2(b) states that “[i]t is the intent of the legislature that in construing paragraph (a) of this section 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 USCS 45(a)(1)), as from time to time amended.”
Injury/Causation

Generally for §9 damages, §9(1), requires plaintiff to have been “injured” by a 93A violation.
- Injured is defined as invasion of a legally protected interest, but no harm for which actual damages can be awarded
- If plaintiff cannot quantify an amount but can establish a cognizable loss, then plaintiff is at least entitled to $25, the statutory minimum for damages


For §11 damages, §11(para. 1) expressly requires plaintiff to have “suffered a loss of money or property”
- Money means “money not time”—therefore, mere delay is not enough; you must actually lose money.
- Property is the kind of property that is purchased or leased, not such intangibles as a right to a sense of security, peace of mind or personal liberty


An exception to §11 damages is if plaintiff seeks only injunctive relief.

Injury/Causation, cont.

Although §11 plaintiff may not need to prove reliance, both §§ 9 and 11 plaintiff must prove causation—cause-in-fact and proximate cause.
- Causation is not shown where the act/practice complained of was merely technical and not causally related to loss sustained or where plaintiff disregarded a defense or defense action which could have avoided liability


- And in some instances, loss must be a foreseeable consequence

Defenses

- §11-Sophisticated Plaintiff
- Most common law defenses are unavailable
- Statute of Limitations, c.260, §5A—4 years
  - Inapplicable if 93A claim is based on violation of some other statute protecting noneconomic harms, e.g., physical injury
- “State Action Defense”: although lawful conduct is a bar to 93A claims, it fails if the conduct was an intentional or unjustified abuse of permitted practices
- Contractual Defenses
  - §9 claims override such defenses
  - §11 claims DO NOT override such defenses, unless the §11 claim contains an allegation equivalent to common law fraud
- Acting in good faith upon advise of counsel

Exemption and Preemption

Exemptions fall into categories that are not “trade” or “commerce”
- Private, nonprofessional transactions
  - e.g., certain real estate transactions, actions of trustee, or acts of charitable organizations
- Employer/Employee relationships
- Some partnership disputes
- Internal corporate governance
Exemption and Preemption, cont.

Only two limited circumstances where Massachusetts Law preempts 93A:
- (Industry-wide Statutes) Conflicting statute is self-contained and industry specific
  - e.g., M.G.L.A. c.93B prohibits unfair or deceptive practices by manufacturers in connection with automobile dealer franchises

But the following are examples of statutes that do not preempt: MA Antitrust Act or Workers Compensation Act
- (Transaction-specific Statutes): c.93A, §3 (para.1) provides where 93A conflicts with transactions permitted under other Massachusetts law
  - Sometimes known as the “State Action Defense”

Remedies

§§ 9(3)(sent. 3) and 11(para. 5)(sent. 1) provides that if plaintiff established a 93A violation, then plaintiff can recover the amount of actual damages.

§9 has a minimum recovery of $25 if the actual damage is less than $25 or if none exists

Actual damages can be duplicative of common law damages if the same conduct comprised elements of both 93A and common law actions.
Remedies, cont.

Multiple damages (double or triple of actual damages) may be awarded if the violation was willful or done knowingly.

– An offer of a reasonable settlement can either prevent multiple damages or serve as a basis for it
– Determination of whether to double or triple damages depends on the degree of egregiousness of defendant’s conduct
– Each defendant is subject to liability for multiple damages


Remedies, cont.

§§ 9(4) and 11(para. 5) provides for an automatic award of attorney’s fees to the prevailing plaintiff.

– Defendant can defeat this by offering reasonable settlement
– Plaintiff only need to prove some injury or adverse effect before receipt of the award (no need to prove actual damages)


– Award is determined under reasonableness standard, but amount is largely discretionary


Remedies, cont.

Only post judgment interest allowed.


Costs are applied in the same manner as attorney's fees.

93A and Business Torts

93A does not effect the traditional standards in determining common law business torts. However, to bring 93A liability for a common law tort, the tort must take place in "trade" or "commerce" as defined in the statute.


- Conversion
  93A does not alter this standard, but as mentioned requires the conduct complained of took place in trade or commerce

- Trade secrets
  Plaintiff can make a 93A claim, even when it fails to make a strict trade secret claim.
  *Incase Inc. v. Timex Corp.*, 488 F.3d 46 (1st Cir. 2007).

- Business Defamation
  93A adds nothing to the conventional standard here
Government Enforcement

John M. Stephan

M.G.L. c.93A, §§4-8 provides the Attorney General with authority to:

- Issue regulations interpreting the provisions of Section 2(a).
- Issue civil investigative demands for testimony and/or documentary evidence.
- Commence actions in the name of the commonwealth
- Seek all manner of relief including injunctions, restitution, civil penalties, plus fees and costs of investigation.
- Accept assurances from defendant of discontinuance of unlawful conduct in lieu of suit
- Seek dissolution of defendant with habitual injunctive violations
Government Enforcement, cont.

- Violations of regulations constitute violations of Chapter 93A
- Selection of Regulations (940 C.M.R.)
  - 4.00 – Long term facilities
  - 5.00 – Motor vehicles (advertising, sales)
  - 6.00 – Retail advertising
  - 7.00 – Debt collection
  - 8.00 – Mortgage brokers & lenders
  - 10.00 – Manufactured housing
  - 15.00 – Travel services
  - 16.00 – Handgun sales
  - 25.00 – Foreclosure rescue transactions and related services
  - 30.00 – Illegal lotteries, sweepstakes, and de facto gambling establishments.

Government Enforcement, cont.

940 C.M.R. 3.16: conduct violates Chapter 93A if it:
- Is oppressive or otherwise unconscionable
- Fails to disclose to buyer or prospective buyer any fact, which may have influenced them not to enter into the transaction; or
- Fails to comply with existing statutes, rules or regulations or laws, meant for the protection of public health, safety, or welfare.

Yields broad 93A liability for other statutory violations.
Government Enforcement, cont.

- **Investigatory Authority**
  - Civil investigative demand (Sections 6 and 7)
  - Authorized when AG believes violation of 93A has occurred or is occurring.
  - CID enables AG to take testimony and demand production of documents
  - $5,000 penalty for failure to comply.
  - Some confidentiality protections extend to CID materials.

Government Enforcement, cont.

- **Initiation of Enforcement Actions**
  - Seek TRO followed by preliminary injunction
  - Initiate suit (requires issuance of 5-day letter)
  - Jurisdiction in Superior Court

- **TRO**
  - AG may seek TRO when violation is ongoing or about to occur, and where TRO is in the public interest. Note different standard for AG.
  - TRO to be granted where:
    - Likelihood of violation
    - Granting requested relief will not adversely affect the public
      
Government Enforcement, cont.

• Resolution
  – Judgment: by consent or otherwise
  – Assurance of Discontinuance (Section 5)
    • In lieu of instituting an action
    • Can include injunctive relief, costs, fees, restitution
  • Filed with Superior Court, Suffolk County
  • Violation of AOD is prima facie evidence of violation of Section 2 in any subsequent proceeding brought by AG.

• Remedies and Relief
  – Injunctive relief
    • Preliminary and permanent
  – Restitution: “ascertainable loss”
  – Civil penalties
    • If a knowing violation of 93A, no more than $5000, plus reasonable investigative costs of each violation and attorney’s fees
    • If there is an injunctive violation, no more than $10,000 each violation, plus attorney’s fees and costs

Recent Massachusetts Cases of Note

• Response to Mortgage Crisis
    • Action filed Dec. 1, 2011 against five largest mortgage servicers and MERS for unfair/deceptive loan modification, foreclosure, and mortgage registration practices.
  – Comm. v. Option One Mortgage Co.
    • Consent Judgment entered in unfair/deceptive loan origination case. Established standard of “presumptively unfair” mortgage loan. Also included civil rights claims.
  – Foreclosure rescue enforcement actions:
    • Comm. v. Desire. Successful civil prosecution of participants in foreclosure rescue scam
    • Comm. v. Greene. Consent judgment entered against attorneys involved in foreclosure rescue scam.
    • Comm. v. Hayes. Consent judgment entered against mortgage broker for illegal up-front fees charged for loan modification services in violation of Mass. regulations.
    • Comm. v. Loan Modification Group. Civil prosecution of entity collecting illegal up-front fees for loan modification services.
Recent Massachusetts Cases of Note, cont.

- Data Privacy
  - Comm. v. Briar Group: Consent judgment implementing injunctive relief and $110,000 penalty for restaurant group’s failure to implement basic security protections for credit card data.

- Deceptive Advertising
  - Dannon: Multistate enforcement of deceptive health claims associated with yogurt.
  - DirecTV: Multistate enforcement to address deceptive marketing and billing practices.

- Travel Schemes
  - LSC Associates/Reposa, Soundings Seaside Resort, Caliri matters: Injunctions and other relief obtained against travel services companies for unfair/deceptive practices associated with false promises of benefits

Class Actions

Robert M. Langer
Class Actions

c.93A, §§ 9(2) and 11(3), provides:

Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

Class Actions, cont.

These sections govern the certification of class actions under 93A over provisions in Mass. R. Civ. P. 23. Rule 23 requires the following before a class action is maintained:

– Numerosity
– Commonality
– Typicality
– Fairness and adequacy of representation

Whereas, 93A requires:

– Numerosity
– Fairness and adequacy of representation
– Similarly injured and situated

The Supreme Judicial Court has implied the commonality and typicality elements of Rule 23 into 93A. Thus, the complete test under 93A is Rule 23, plus similarity of “situation” and “injury”


Also, 93A expressly requires a “preliminary hearing” on class certification issues.
Privacy Protection Laws

Robert M. Langer

Massachusetts Privacy Laws

M.G.L.A. c. 93H and 93I and regulations thereunder: 201 CMR 17.00

There is a significant variation among states

- Comprehensive/strict: Massachusetts
- Middle of the road: Connecticut
- More general/less specific: Rhode Island, New York

MA currently considered the “gold standard”

Generally, the laws require:

- Written privacy policy
- Careful disposal of protected data
- Technological and physical safeguards (MA only)
- Notice of breach
Massachusetts Privacy Laws, cont.

Regulation requires:
• Designate employee to maintain privacy program
• Identify risks, including
  – Employee training (including temp and contract workers)
  – Employee compliance
  – Methods to identify system failures
• Develop policy for private data taken off-premises
• Impose discipline for violations
• Prevent unauthorized employees from accessing PI
• Oversee service providers
• Restrict physical access
• Monitor, review, and document compliance

MA Computer System Requirements

To the extent “technically feasible”, entities should:
  – Secure user authentication protocols
    • Control of user IDs
    • Passwords
    • Access for active users only
    • Blocking access after multiple unsuccessful login attempts
  – Access control
  – Encryption of all PI transmitted over public or wireless networks
    and on laptops and portable devices
  – Monitoring of systems
  – Up-to-date firewalls, patches, malware protection, and virus
    definition
  – Employee training
Massachusetts Privacy Laws, cont.

Recent Laws and Open Questions

- Do I need to comply with laws of other states?
  - On their face, laws require compliance by anyone collecting personal information from state residents
  - Legal question about how far the States’ authority reaches and what the States are able to enforce
  - Never been challenged
  - Unfair trade risks – if everyone else complies . . .
  - What makes good business sense
  - **BOTTOM LINE**: Unsettled question, need to make a business decision about risk

What does enforcement look like?

- MA law imposes fine of $5,000 per violation, but what is a single violation?
  - MA AGO position is each affected individual is a single violation.

- AGO Investigation will likely follow where:
  - Large number of affected residents
  - Failure to issue required notice upon discovery of breach
  - AGO discovers security procedures are inadequate despite receipt of covered information.
Helpful Links

- MA Office of Consumer Affairs and Regulations
  http://www.mass.gov/ocabr/
- MA Attorney General
- MA Statutes
  http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter93A

Panel Members

Alicia L. Downey is a partner in the Boston office of Bingham McCutchen LLP, where her practice includes both counseling and representation of clients in litigation involving antitrust, unfair competition and consumer protection claims. Alicia has been active in the Section of Antitrust Law of the American Bar Association in several different leadership capacities, and currently serves as vice chair of the Distribution and Franchising Committee and as a member of the Section Reserves Advisory Board.
Phillip Rosario is a graduate of the Georgetown University Law Center and has been a member of the Connecticut Bar since 1985. He has devoted most of his legal career to public service as an Assistant Attorney General with the Connecticut Attorney General’s Office (the “Connecticut AGO”). Since 1999, he has been the Department Head of the Connecticut AGO’s Consumer Protection Department.

John M. Stephan has been an Assistant Attorney General in the Consumer Protection Division of the Massachusetts Office of the Attorney General for the past four years. During that time, John has served as co-lead counsel for a number of significant predatory lending cases, including Commonwealth v. Fremont Investment & Loan, et al. He has briefed and argued foreclosure issues before the Massachusetts Supreme Judicial Court in U.S. Bank, N.A. v. Ibanez and Bevilacqua v. Rodriguez. He is presently co-lead counsel in Commonwealth v. Bank of America, et al., Massachusetts’ ongoing action against major banks and mortgage services for unfair and deceptive mortgage foreclosure practices. In addition, John has handled investigations into mortgage fraud, payday lending, and pawnbrokering. He has also brought significant enforcement actions under the Massachusetts False Claims Act.

Prior to joining the Office of the Attorney General, John spent eight years as an associate with the Boston office of Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., where he worked on numerous complex litigation matters in a variety of areas. He is a graduate of Boston College Law School.
Robert M. Langer is a partner at Wiggin & Dana LLP’s Litigation Department and head of the firm’s Antitrust and Consumer Protection Practice Group. Mr. Langer is involved in all aspects of antitrust, consumer protection and trade regulation counseling and litigation, including class actions, representing clients in both federal and state courts, and before the Federal Trade Commission, the Antitrust Division of the United States Department of Justice, as well as offices of state attorneys general throughout the United States.

Before joining Wiggin and Dana in 1994, Mr. Langer was the Assistant Attorney General in charge of the Antitrust and Consumer Protection Department of the Office of the Connecticut Attorney General. Mr. Langer also served as Chair of the National Association of Attorneys General (NAAG) Multistate Antitrust Task Force from 1990 to 1992.

Mr. Langer currently serves as Chair of the Janet D. Steiger Fellowship Project and as a member of the Technology Resources Task Force of the ABA Section of Antitrust Law. He previously served as the Section’s Finance Officer, a member of the Council, Chair of the Consumer Protection Committee, Co-Chair of the Legislation Committee, Co-Chair of the Federal and State Legislative Policy Task Force, Vice-Chair of the

Robert M. Langer (cont.) Continuing Legal Education Committee and Chair of the State Antitrust Enforcement Committee.

Since 1979, Mr. Langer has served as an Adjunct Professor at the University of Connecticut School of Business Administration, MBA Program, where he teaches constitutional, antitrust and trade regulation law.

Mr. Langer is the co-author of a treatise, entitled Unfair Trade Practices, Business Torts and Antitrust, published yearly by Thomson Reuters as Volume 12 of its Connecticut Practice Series.