

CHAPTER 93A CONSUMER PROTECTION:  
UNFAIR OR DECEPTIVE TRADE OR BUSINESS PRACTICES

**UNFAIR OR DECEPTIVE TRADE OR BUSINESS PRACTICES**

**Members of the jury, the plaintiff claims that the defendant has engaged in (an) unfair or deceptive act(s) or practice(s) in violation of General Laws, chapter 93A, § 9. In order for the plaintiff to succeed on this claim, the plaintiff must prove to you, by a preponderance of the evidence, the following three elements:**

***First:* That the defendant is engaged in trade or commerce; and**

***If stipulated:* The parties have agreed that the defendant is engaged in trade or commerce. Accordingly, this element has by agreement been proven.**

***Second:* That the defendant, through his (her) (its) conduct, has committed unfair or deceptive act(s) or practice(s) in the trade or commerce in which the defendant is engaged. In a moment, I will speak further on this element. But note, it is not necessary to prove that the defendant's conduct was *both* unfair *and* deceptive. It is sufficient to permit recovery if it is proven by the plaintiff that the defendant's conduct was *either* unfair or deceptive; and**

***Third:* The plaintiff must prove that the injury for which he (she) seeks**

**damages was caused by the defendant's unfair or deceptive act(s) or practice(s).**

**Should you find that the defendant's conduct was unfair or deceptive, you will also decide whether the defendant committed those unfair or deceptive actions wilfully or knowingly. I will instruct you on that point later, but let me talk now about what is meant by the phrase "unfair or deceptive act(s) or practice(s)" and how you determine whether the defendant's actions toward the plaintiff were "unfair or deceptive act(s) or practice(s)."**

**What do we mean when we use the phrase "unfair or deceptive act(s) or practice(s)?" Because there are infinite possibilities of business dealings the phrase is intentionally a broad and flexible one. The concept of "unfair or deceptive act(s) or practice(s)" allows you to balance the equities on both sides of a business transaction to consider whether or not a business person took unfair advantage of a consumer, and whether the consumer was defenseless or not. It is your determination of the balance that decides whether conduct is an "unfair or deceptive act(s) or practice(s)."**

**How do you determine whether the defendant's actions toward the plaintiff are "unfair or deceptive act(s) or practice(s)?" Let's first start with the standard for determining whether something is "deceptive." The**

standard is fairly easy to state. It includes any communication that is made with the intent to deceive another person. But intent to deceive is not always necessary. In this area, the law holds that any act or practice is deceptive if it could reasonably cause a person to act differently from the way he (she) would act if he (she) knew the truth about the matter.

Now we shall talk about how you are to decide whether an act or practice is “unfair.” In determining whether the defendant’s act(s) or practice(s) (is) (are) unfair you should consider the following factors:

*First:* Does it fall within some established concept of unfairness? For something to be unfair, it is not always necessary that it violate some other law or a government regulation; in fact, a practice can be technically legal under other laws but still unfair. But whether or not it is permitted by law is a good place to start your consideration of it.

*Second:* You should ask yourself whether the defendant’s actions toward the plaintiff were unethical, or oppressive, or unscrupulous, or otherwise unconscionable. That obviously involves you in a moral judgment about the ethics of the marketplace. You as the jury are the collective conscience of this community, and as such are well equipped to make that judgment. In deciding whether the defendant’s actions were oppressive or

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**unscrupulous, remember that you must decide that question in the context of the commercial marketplace where, on the one hand, people don't expect to be cheated but, on the other hand, they should expect to deal with each other prudently and responsibly.**

***Finally:* You should take into account public policy considerations whether the defendant's act or practice would cause substantial injury to the public or to consumers in general. If a practice is likely to injure many consumers substantially, that makes it more likely that it is an unfair practice.**

**Please remember, it is not necessary for the plaintiff to prove that the defendant's conduct was both unfair and deceptive. It is sufficient to permit recovery if it is proven by the plaintiff that the defendant's conduct was either unfair or deceptive.**

## Notes:

1. Parties to Chapter 93A claims are not entitled to have their claims tried before juries; however, the trial judge may, in his or her discretion, present these claims to a jury for an advisory verdict. The trial judge may give such advisory verdict whatever weight he or she deems appropriate. *Travis v. McDonald*, 397 Mass. 230, 490 N.E.2d 1169 (1986).

2. Trade or commerce: The following acts or practices have been held not to be "trade or commerce" as a matter of law:

- stockholder derivative suits, *Riseman v. Orion Research, Inc.*, 394 Mass. at 313–14, 475 N.E.2d at 399 (1985);
- a family selling off a single tract of land to finance a child's education, *Nei v. Burley*, 388 Mass. at 317–18, 446 N.E.2d at 680 (1983);
- an employee's conduct toward an employer, *Weeks v. Harbor Nat'l Bank*, 388 Mass. 141, 445 N.E.2d 605 (1983);
- an employer's conduct toward an employee, *Manning v. Zuckerman*, 388 Mass. 8, 12, 444 N.E.2d 1262, 1265 (1983);

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- the rental of an apartment by the owner-occupant of a three-family house, *Young v. Patukonis*, 24 Mass.App.Ct. 907, 910, 506 N.E.2d 1164, 1167–68 (1987);
- private home sales, *Lantner v. Carson*, 374 Mass. 606, 373 N.E.2d 973 (1978);
- provision of service by a government-created and -controlled entity, *Poznik v. Massachusetts Medical Prof. Ins. Assoc.*, 417 Mass. 48, 51–52, 628 N.E.2d 1, 3 (1994); and
- dealings confined to members of a single entity, such as a partnership, *Szalla v. Lock*, 37 Mass.App.Ct. 346, 354, 639 N.E.2d 1096, 1101 (citing *Newton v. Moffie*, 13 Mass.App.Ct. 462, 467, 434 N.E.2d 656, 659 (1982)), or corporation (*Riseman v. Orion Research, Inc.*, 394 Mass. 311, 313, 475 N.E.2d 398, 399 (1985)).

For an example of a case in which an isolated sale of a business constituted “trade or commerce,” see *Rex Lumber Co. v. Acton Block Co.*, 29 Mass.App.Ct. 510, 519, 562 N.E.2d 845, 850 (1990).

See also *Begelfer v. Najarian*, 381 Mass. 177, 190–91, 409 N.E.2d 167, 175–76 (1980). See, e.g., *All Seasons Servs., Inc. v. Commissioner of Health & Hosps.*, 416 Mass. 269, 271, 620 N.E.2d 778, 779 (1993) (incidental transactions of a charitable hospital are not conducted within a business context); *Planned Parenthood Fed’n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 398 Mass. 480, 491–94, 498 N.E.2d 1044, 1050–53 (1986) (providing pregnancy-related services free of charge does not constitute trade or commerce for Chapter 93A purposes); Cf. *Miller v. Risk Management Found.*, 36 Mass.App.Ct. 411, 416, 632 N.E.2d 841, 845 (1994) (a nominally charitable organization acting in a business context is subject to the provisions of Chapter 93A).

3. Unfair or deceptive act or practice: G.L. c. 93A, § 2(a). *Commonwealth v. DeCotis*, 366 Mass. 234, 242, 316 N.E.2d 748, 754 (1974). *Mechanics Nat’l Bank of Worcester v. Killeen*, 377 Mass. 100, 110, 384 N.E.2d 1231, 1237 (1979). *Martin v. Factory Mut. Research Corp.*, 401 Mass. 621, 623, 518 N.E.2d 846, 847 (1988).

4. Deceptive act: 940 C.M.R. § 3.16(2); *Sargent v. Koullisas*, 29 Mass.App.Ct. 956, 958, 560 N.E.2d 569, 571 (1990) (citing *Mongeau v. Boutelle*, 10 Mass.App.Ct. 246, 248, 407 N.E.2d 352, 355 (1980)). *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193, 552 N.E.2d 95, 100 (1990).

5. Unfair act: The test of whether an act or practice is “unfair” is generally held to be whether it:
- a. falls “within, at least, the penumbra of some common-law, statutory, or other established concept of unfairness”;
  - b. “is immoral, unethical, oppressive or unscrupulous”; or
  - c. “causes substantial injury [to] competitors or other businesspersons.”

*Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 778, 489 N.E.2d 185, 196 (1986) (quoting *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596, 321 N.E.2d 915, 917 (1975)).

A material misrepresentation falls within an established basis of unfairness. See *VMark Software, Inc. v. EMC Corp.*, 37 Mass.App.Ct. at 620, 642 N.E.2d at 594 (1994).

“The second factor does not contemplate an overly precious standard of ethical or moral behavior. It is the standard of the commercial market place and . . . that conduct does not qualify as unethical or unscrupulous unless it attains a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.” *Wasserman v. Agnostopoulos*, 22 Mass.App.Ct. 672, 679, 497 N.E.2d 19, 23 (1986) (citing *Levings v. Forbes & Wallace Inc.*, 8 Mass.App.Ct. 498, 504, 396 N.E.2d 149, 153 (1979)). But see *Massachusetts Employers Ins. Exch. v. Propac-Mass. Inc.*, 420 Mass. 39, 42, 648 N.E.2d 435, 438 (1995).