CHAPTER 14

Products Liability Claims and Chapter 93A

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Scope Note

This chapter addresses the application of Chapter 93A to products liability claims. It reviews applicable regulations and case law and identifies key decisions on breach of warranty. It also discusses the necessary elements of Chapter 93A demand letters, strategic drafting considerations, and factors to consider when drafting a response. The chapter concludes with a discussion of attorney fee awards and recent case law developments.

§ 14.1 INTRODUCTION

This chapter explores the application of Chapter 93A to products liability cases. It provides a survey of the relevant case law and a discussion of some of the strategic considerations pertinent to products liability cases. Two exhibits are included: **Exhibit 14A** is an alphabetical listing and summary of the key products liability cases, and **Exhibit 14B** organizes the same cases by topic.

Section 14.2 discusses the current state of the law interpreting Chapter 93A as it relates to products liability cases. This section summarizes the nature of the conduct that constitutes a violation of Chapter 93A, and the potential difference between cases involving property damage and those involving personal injury.

Section 14.3 reviews what should be included in the demand letter required by G.L. c. 93A, § 9(3) and surveys some of the things that should be considered when drafting the demand letter or the response.

Section 14.4, Recovery of Attorney Fees and Costs, reviews the current state of the law regarding the right of a prevailing claimant to recover attorney fees and costs pursuant to Chapter 93A.

This chapter concludes with Section 14.5, which discusses recent decisions, one rejecting a separate Chapter 93A cause of action for spoliation and one discussing a statute of limitations issue.

§ 14.2 CHAPTER 93A AND PRODUCTS LIABILITY—STATE OF THE LAW

§ 14.2.1 Attorney General Regulations

(a) *Scope of Rulemaking Authority*

Section 2(c) of G.L. c. 93A authorizes the attorney general to promulgate rules and regulations interpreting and facilitating the enforcement of Section 2(a). This authority has been upheld repeatedly by the Supreme Judicial Court. *See, e.g., Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 396 n.18 (2004); *Am. Shooting Sports Council, Inc. v. Attorney Gen.*, 429 Mass. 871, 875 (1999) (attorney general has the authority to regulate handguns based on the statutory authority to prevent the deceptive or unfair sale or transfer of defective products); *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 775 (1980).

Courts have recognized that Section 2(c) "limits the Attorney General's rule-making power to be within the concepts of deception or unfairness, as guided by administrative and judicial interpretation of the [Federal Trade Commission] Act." *McGonagle v. Home Depot, U.S.A., Inc.*, 75 Mass. App. Ct. 593, 601–02 (2009) (quoting *Darviris v. Petros*, 442 Mass. 274, 281 (2004); *Am. Shooting Sports Council, Inc. v. Attorney Gen.*, 429 Mass. 871, 875 (1999)).

Pursuant to this authority, the attorney general has promulgated regulations interpreting Chapter 93A.

(b) *Regulations Concerning Breaches of Warranty*

Regarding products liability cases, the most significant regulation is 940 C.M.R. § 3.08(2), which provides that "[i]t shall be an unfair and deceptive act or practice to fail to perform or fulfill any promises or obligations arising under a warranty."

The regulations explicitly define "warranty" to include the implied warranty of merchantability and the implied warranty of fitness for a particular purpose, the most frequently implicated warranties in products liability cases. 940 C.M.R. § 3.01.

In the consumer context, "a breach of warranty constitutes a violation of G.L. c. 93A, § 2." *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193 (1990) (citing *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 378–79 (1990); *Calimlim v. Foreign Car Ctr., Inc.*, 392 Mass. 228, 235 (1984); *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 577 (1982)). Subsequent cases held *Maillet*'s ruling is limited to consumer claims brought under Section 9. *See Baker v. Goldman, Sachs & Co.*, 771 F.3d 37, 55–56 (1st Cir. 2014); *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. 737, 744–47 (1994). The *Knapp* court reasoned that 940 C.M.R. § 3.08(2) applied to consumers and "consumer transactions," not business-to-business transactions. *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. at 744–45 ("Where the bulk of the regulation applies only to consumers and their interests, and subsection (2) contains no language suggesting that it was meant to apply to a broader class of persons or interests, we conclude that the portion of subsection (2) at issue was not intended to encompass a contract dispute between businessmen based on a breach of . . . warranty."). In contrast, in *Limoliner, Inc. v. Dattco, Inc.*, 475 Mass. 420 (2016), the Supreme Judicial Court found that a Chapter 93A business plaintiff could base its claims on the motor vehicle repair and services regulations set forth at 940 C.M.R. § 5.05. (For a more detailed discussion of *Limoliner*, see chapter 1 of this book.)

(c) *Regulations Concerning the Protection of Public Health, Safety, and Welfare*

A potentially significant regulation in products liability cases is 940 C.M.R. § 3.16(3), which provides that a violation of a statute, rule, regulation, or law "meant for the protection of the public's health, safety, or welfare" violates Chapter 93A, § 2. 940 C.M.R. § 3.16(3).

Several cases hold that 940 C.M.R. § 3.16(3) does not transform a statutory or regulatory violation into a per se violation of Chapter 93A. *See Darviris v. Petros*, 442 Mass. 274, 281 (2004) (rejecting argument that every violation of G.L. c. 111, § 70E—which requires that patients give informed consent for medical procedures—violates Chapter 93A); *see also Swenson v. Yellow Transp., Inc.*, 317 F. Supp. 2d 51, 55 (D. Mass. 2004) ("despite the language of [940 C.M.R. § 3.16(3)], the case law is clear that a statutory violation is not a *per se* violation of ch. 93A"). The *Darviris* court found 940 C.M.R. § 3.16(3) invalid as applied to a negligent failure to obtain informed consent in violation of G.L. c. 111, § 70E, noting that it "could be interpreted to include a violation of any statute in the Commonwealth." *Darviris v. Petros*, 442 Mass. at 282 n.9.

Similarly, in a product liability case involving a claim premised on a violation of 940 C.M.R. § 3.16(3), the Superior Court stated that "[d]espite the sweeping

language of the Attorney General's regulation, courts have been hesitant to find automatic violations" and found that, instead, "the court must take into account all the facts and circumstances and determine whether the statutory violation involves unfair or deceptive conduct." *Zabilanksy v. Am. Bldg. Restoration Prods., Inc.*, No. 200101985, 2004 WL 2550458, at *15, 16 (Mass. Super. Ct. Oct. 13, 2004) (finding no Chapter 93A claim based on mislabeling of product in violation of EPA regulations, finding the mislabeling to be "of little consequence to consumers" and "inadvertent"), *aff'd*, 67 Mass. App. Ct. 1106 (2006).

§ 14.2.2 Brief History of Products Liability/ Chapter 93A Nexus

Until 1987, all of the Chapter 93A cases involving products liability involved claims for property damage rather than personal injuries. The first of the property damage cases was *Linthicum v. Archambault*, 379 Mass. 381, 382 (1979), in which the plaintiff asserted claims for breach of contract and breach of implied warranty in connection with the repair of her home. The court held that the plaintiff was entitled to an award of single damages, together with reasonable attorney fees and costs, because she proved that the defendant negligently breached a warranty. However, the court further explained that, because the breach was negligent and not intentional, the plaintiff was not entitled to an award of multiple damages. That is, a plaintiff's damages are limited to actual damages (plus reasonable attorney fees and costs) if the breach of warranty is not a willful or knowing violation of Section 2. *See Linthicum v. Archambault*, 379 Mass. at 388.

The holding in *Linthicum* was applied in a series of cases involving breach of warranty claims based on property damage. *See, e.g., Calimlim v. Foreign Car Ctr., Inc.*, 392 Mass. 228, 235–36 (1984); *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 582 (1982); *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 820–21 (1982). In *Hannon*, the Supreme Judicial Court held that one of the attorney general's regulations proscribing the "utilization of a deceptive warranty" extended to those warranties set forth in the Uniform Commercial Code, G.L. c. 106, including express warranties (§ 2-313), implied warranty of merchantability (§ 2-314) and implied warranty of fitness for a particular purpose (§ 2-315). However, no violation of the act was found to have been committed in *Hannon*. *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. at 821.

Then, in *Calimlim v. Foreign Car Center, Inc.*, 392 Mass. 228 (1984), the Supreme Judicial Court ruled that purchasers of a defective used car could recover under Chapter 93A by establishing that the warranty accompanying the sale of the vehicle had been breached. The court affirmed the trial court's decision to award the plaintiffs multiple damages, attorney fees, and costs. *Calimlim v. Foreign Car Ctr., Inc.*, 392 Mass. at 235. However, the court also ruled that the

plaintiffs could not collect separate damages for the breaches of the warranties of merchantability and fitness, at least without showing there were facts independent of those upon which the damages for violating Chapter 93A were based. *Calimlim v. Foreign Car Ctr., Inc.*, 392 Mass. at 235–36.

Courts then began to find a nexus between Chapter 93A and products liability cases involving personal injuries. The first of these was *Wood v. Gen. Motors Corp.*, 673 F. Supp. 1108 (D. Mass. 1987), *rev'd on other grounds*, 865 F.2d 395 (1st Cir. 1988).

In *Wood*, the plaintiffs, the parents of a passenger injured in a motor vehicle accident, and the passenger herself, sued the vehicle manufacturer, alleging that the vehicle was defective due to the manufacturer's failure to install a passive restraint system. *Wood v. Gen. Motors Corp.*, 673 F. Supp. at 1109. They pleaded negligence, loss of consortium, breach of implied warranties of merchantability, and violation of Chapter 93A. *Wood v. Gen. Motors Corp.*, 673 F. Supp. at 1109–10. In denying the defendant's motion for summary judgment as it related to the Chapter 93A claim, the court held that "a finding by the jury that General Motors breached an implied warranty of merchantability would conclusively decide that G.L. c. 93A, § 2 was violated." *Wood v. Gen. Motors Corp.*, 673 F. Supp. at 1120. In reaching that result, Judge Young relied on the earlier property damage cases, including *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 581 (1982), and *Hannon v. Original Gunite Aquatech Pools, Inc.*, 385 Mass. 813, 821 (1982), as well as *Goldstein Oil Co. v. C.K. Smith Co.*, 20 Mass. App. Ct. 243, 247 (1985). *Wood v. Gen. Motors Corp.*, 673 F. Supp. at 1120–21.

Three years later, in *Maillet v. ATF-Davidson Co.*, 407 Mass. 185 (1990), the Supreme Judicial Court held that Chapter 93A applies to personal injuries in products liability actions. *Maillet* remains a leading case, applying Chapter 93A to products liability cases involving personal injury.

The plaintiff in *Maillet* was a printing press operator who suffered a severe injury to his hand after it was caught in the press. He sued the manufacturer of the press, alleging that the defendant had been negligent and had violated its implied warranty of merchantability. The jury found in his favor and awarded compensatory damages. *Maillet v. ATF-Davidson Co.*, 407 Mass. at 186. The trial judge, after a separate hearing, found that the defendant had violated Chapter 93A, and awarded attorney fees and costs. *Maillet v. ATF-Davidson Co.*, 407 Mass. at 189. Among the arguments raised by the defendant on appeal were that, in products liability actions,

- "liability should not be imposed automatically under G.L. 93A whenever a defendant has violated the warranty of merchantability," *Maillet v. ATF-Davidson Co.*, 407 Mass. at 190;

- the plaintiff was not in privity with the manufacturer, and therefore was not entitled to relief pursuant to Chapter 93A, *Maillet v. ATF-Davidson Co.*, 407 Mass. at 190–91; and

- the defendant had done nothing unfair or deceptive, *Maillet v. ATF-Davidson Co.*, 407 Mass. at 193–94.

The Supreme Judicial Court reiterated that lack of privity is not a defense under Chapter 93A and held that joint findings of breach of the implied warranty of merchantability and negligence were sufficient to constitute a violation of Chapter 93A. *Maillet v. ATF-Davidson Co.*, 407 Mass. at 190–91 (citing *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671 (1983); *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575 (1982)). The court declined to decide whether a breach of warranty in the absence of negligence violates Chapter 93A. *Maillet v. ATF-Davidson Co.*, 407 Mass. at 191.

The court held that Chapter 93A applies to products liability cases involving personal injury, explaining that Chapter 93A provides a cause of action to "[a]ny person . . . who has been injured by another person's use of an unfair or deceptive trade practice, no longer requiring a showing that plaintiffs show a loss of money or property." *Maillet v. ATF-Davidson Co.*, 407 Mass. at 192. (A previous version of the Consumer Protection Act required that the plaintiff establish a "loss of money or property." *See Maillet v. ATF-Davidson Co.*, 407 Mass. at 190–92 & n.8. Section 9, but not Section 11, was amended afterwards, and the current statute requires only that the plaintiff demonstrate that he or she is a person "who has been injured." *Maillet v. ATF-Davidson Co.*, 407 Mass. at 192 & n.8.) The court saw "no reason to exclude injury to the person from the category of injuries cognizable under G.L. c. 93A." *Maillet v. ATF-Davidson Co.*, 407 Mass. at 192.

After *Maillet*, it is clear that a defendant's breach of warranty, at least in the presence of negligence, constitutes a violation of Chapter 93A in cases brought under Section 9. This is so regardless of whether the plaintiff seeks recovery for personal injury or property damage.

The Supreme Judicial Court recently reaffirmed that *Maillet* did not decide "whether liability should be 'imposed automatically under G.L. c. 93A whenever a defendant has violated the warranty of merchantability,' even where there is no finding of negligence." *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 465 n.25 (2013) (treating the issue as undecided; declining to extend) (citing *Maillet v. ATF-Davidson Co.*, 407 Mass. at 190).

Cases brought under Section 11 are subject to a different standard. A Section 11 plaintiff must show something more than a mere breach of warranty to adequately

plead a claim for unfair or deceptive trade practices under Chapter 93A. *Utica Nat'l Ins. Group v. BMW of N. Am., LLC*, 45 F. Supp. 3d 157, 160–61 (D. Mass. 2014). A Section 11 plaintiff "must allege a breach of warranty 'plus,' where that 'plus' is conduct by [the defendant] which, if true, would render the breach repugnant to the milieu of the commercial marketplace." *Utica Nat'l Ins. Group v. BMW of N. Am., LLC*, 45 F. Supp. 3d at 161 (citing *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. 737 (1994)).

The *Knapp* case involved a requirements contract between a shoe manufacturer (Sylvania) and a retailer (Knapp), parties that the trial judge found to have equal bargaining positions. *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. at 739. The trial court had found there was a defect rate of 3 percent in the shoes manufactured by Sylvania for Knapp, and that this defect rate constituted a breach of the implied warranty of merchantability. *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. at 739–40. The Supreme Judicial Court held that this breach of warranty, however, did not give rise to a violation of Chapter 93A. *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. at 745.

The Supreme Judicial Court held that the attorney general's warranty regulation does not apply to cases brought by businesses under Section 11, and that a breach of warranty proven in a suit brought pursuant to Section 11 does not establish a per se violation of G.L. c. 93A, § 2. *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. at 746. Instead, whether such a breach violates Section 11 must be resolved by what the court described as "reference to general principles of liability under § 11." *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 418 Mass. at 747 (citing nonwarranty cases: *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 474–76 (1991); *Mass. Farm Bureau Fed'n, Inc. v. Blue Cross of Mass., Inc.*, 403 Mass. 722, 729 (1989); *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 595–98 (1975)). Stated differently, it is now the law that more must be shown than a simple breach of warranty to establish a violation of Chapter 93A in Section 11 cases.

The stricter standards of Section 11 also apply to a manufacturer's duty to warn. In *Cummings v. HPG International, Inc.*, 244 F.3d 16, 26 (1st Cir. 2001), the U.S. Court of Appeals for the First Circuit held that a Section 11 claim premised on a manufacturer's alleged breach of warranty by way of a breach of its duty to warn requires a further showing that the failure to warn, under the circumstances, was "unethical" or "unscrupulous."

§ 14.3 THE DEMAND LETTER

§ 14.3.1 Strategic Considerations Before Sending a Chapter 93A Demand Letter

Products liability cases are almost invariably very expensive and time-consuming, and it behooves counsel to do a thorough investigation before accepting a case and before sending a Chapter 93A demand letter. This section outlines steps to be considered in the investigation process.

Any such investigation must be undertaken with great care. The investigation should include a meeting with the client and the client's family to develop a clear understanding of who they are, what happened to them, and how the accident has affected their lives.

It is important that the product that the claim is based on be preserved in its current condition. The attorney should consider retaining an appropriate expert and having the expert examine the product. Counsel should be present at the inspection and should make certain that nothing is done during the inspection that alters the condition of the product. Videotaping the inspection helps establish that no changes have occurred, should the issue be raised during the litigation. The attorney should also consider notifying any potential defendants of the inspection and inviting them to attend. Counsel should carefully document all communications with potential defendants relating to the inspection.

Along with the investigation of the product, counsel should conduct further factual investigation. If the scene of the incident is pertinent, the attorney and an expert should inspect it. All witnesses should be interviewed, if possible, even if the witnesses gave prior statements to the police or other authorities. Understanding what the witnesses observed is vital because how the event happened—even if it took place within only a few seconds—may be critical to the case.

If the attorney uses an investigator, the investigator must have an understanding of the issues involved so he or she can properly interview the witnesses. To get complete statements from each witness and to be of assistance to the attorney, the investigator must first know which questions to ask. Questions common to all products cases pertain to

- how the accident happened;
- any modifications that may have been made to the product;
- any history of problems with the product;

- any possible misuse of the product;
- any statements made by the plaintiff and other witnesses immediately after the accident;
- the condition of the product before, during, and after the salient events; and
- the identity of anyone who may have probative information.

The attorney should obtain the plaintiff's medical records, including, if pertinent, any diagnostic films. An appropriate medical expert should review these records if there is any question about how the injury occurred or about the nature, extent, or permanence of the injuries sustained by the plaintiff. In automotive product cases, if the manner in which the client was injured is pertinent, an expert in biomechanics may work with experts in medicine and engineering to assist in making this determination.

It is also important to uncover any aspects of the client's preaccident (or postaccident) medical history that may be significant to the case. Counsel should know whether the prospective client has a history of other injuries to the same area of the body or a history of psychological treatment, because these may be significant to the ultimate outcome, even if the product is defective.

Finally, it is very important for the attorney to discuss the litigation process with prospective clients before undertaking representation and sending the demand letter. The attorney should be sure that the client has realistic expectations about how long it will take to litigate the case and about the prospects of successfully prosecuting the case, including any recovery of multiple damages and attorney fees and costs.

§ 14.3.2 Required Elements of the Demand Letter

Usually Chapter 93A requires that a person claiming violation of Section 9 must serve a demand letter on the manufacturer of the product that "reasonably describ[es] the unfair or deceptive act or practice relied upon and the injury suffered." G.L. c. 93A, § 9(3). No demand letter is required in cases brought under Section 11. Also, no demand letter is required in Section 9 cases "if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth." G.L. c. 93A, § 9(3); *see also Williams v. Perrault*, 82 Mass. App. Ct. 1117 (2012) (unpublished decision; text available at 2012 WL 4936612) (no written demand required where the defendant lacks assets or place of business

within the Commonwealth); *Paisley v. GMAC Mortgage, LLC*, 28 Mass. L. Rptr. 2212 (Super. Ct. 2011). The purposes of the Chapter 93A demand letter are to encourage negotiation and settlement and to control the damages that are recoverable by the claimant. *See Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704 (1975); *Hugenberger v. Alpha Mgmt. Co.*, 83 Mass. App. Ct. 910, 911 (2013).

The demand letter must comply with the requirements set forth in **Exhibit 14C**.

Counsel should consult the *Cassano* case, which discusses the required elements of the demand letter. "Specificity is required to describe the practices complained of, not the legal basis for the claim." *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 506 (2011) (Chapter "93A does not require claimants to set forth every specific statutory or regulatory violation alleged, so long as it fairly notifies the prospective respondent of the actions or practices of the respondent and the injury suffered by those actions.") (citing *Cohen v. Liberty Mut. Ins. Co.*, 41 Mass. App. Ct. 748, 756 (1996) (demand letter alleging unfair settlement practices but omitting reference to subsection of G.L. c. 176D, § 3, was sufficient)). Also, sometimes the demand letter may be sent after suit, asserting that claims other than Chapter 93A claims have been filed. For a recent discussion, see *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. 380 (1999).

Given these requirements, the attorney must craft the language of the demand letter with care. The demand letter should identify the claimant and other family members who may be entitled to recover for emotional distress or loss of consortium. A "safe harbor" was provided by *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 23 (1998), in which the Supreme Judicial Court stated that the fact that the plaintiff's husband had not been included in the demand letter sent pursuant to G.L. c. 93A, § 9, caused the defendants no prejudice because the award of attorney fees and costs would be attributable entirely to the Chapter 93A claim of the wife. However, the better practice is to include any consortium claim in the demand letter.

In drafting the demand letter, it is important to describe the violation with reasonable particularity but without being overspecific. Stating that "the vehicle failed to provide adequate protection to occupants in foreseeable accidents, such as the one in which the claimant was injured" is adequate and provides more leeway in discovering particular theories of liability than stating "the A-pillar was not equipped with adequate energy-absorbing padding." The letter provides reasonable notice, but it is unrealistic to set out all of the precise details of the claim at the time that the demand letter is sent, even if a thorough investigation already has been conducted or completed. The risk of being too specific is that the defendant will later contend that the demand letter did not cover a particular theory and that the Chapter 93A claim should be dismissed regarding that theory.

Practice Note

Counsel should consider sending a further demand letter later in the case if it appears that the original letter did not adequately cover the defect theories that will ultimately be tried.

The demand letter should identify specific physical injuries rather than being limited to general statements about the injuries and damages. In *Thorpe v. Mutual of Omaha Insurance Co.*, 984 F.2d 541, 544 (1st Cir. 1993), the plaintiff's demand letter asserted that the defendant's actions inflicted on the plaintiff "severe emotional distress, as well as physical injuries, great pain of body and mind, and mental anguish." There was no identification of any physical injuries, and the plaintiff did not respond to the defendant's invitation to identify and provide evidence of "any specific injury or harm" to the plaintiff. *Thorpe v. Mut. of Omaha Ins. Co.*, 984 F.2d at 544. The demand letter also failed to set forth any damage figure that might have provided the defendant with some dimension of the plaintiff's claim. Affirming the trial court's determination that the demand letter was insufficient and that summary judgment for the defendant was warranted on the Chapter 93A claim, the First Circuit held that plaintiff's letter did not satisfy G.L. c. 93A, § 9(3), because it provided no adequate basis for the defendant to appraise the value of the claim or to frame a settlement offer. *Thorpe v. Mut. of Omaha Ins. Co.*, 984 F.2d at 544.

Similarly, in *Moynihan v. Life Care Centers of America, Inc.*, 60 Mass. App. Ct. 1102 (2003) (unpublished opinion; text available at 2003 WL 22717663, at *1), the court noted that "[a]n adequate demand letter . . . must recite facts and circumstances that make the cause and extent of the injury reasonably apparent to the defendant." The court affirmed the dismissal of the Chapter 93A claims because "the letter contained neither a reasonable description of the plaintiff's injuries nor a damage figure of an amount which would enable the defendant to assess the plaintiff's claim." *Moynihan v. Life Care Ctrs. of Am., Inc.*, 2003 WL 22717663 at *1. Compare *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. 380 (1999), in which the court held that a Chapter 93A demand letter was sufficient, even though it did not specify the dollar amount demanded, because the letter was otherwise comprehensive and detailed.

The demand amount should be a figure that will fully compensate the claimant, assuming the least optimistic medical endpoint if an endpoint has not yet been reached. It is important not to discount the demand amount based on what would be necessary in a worst-case scenario.

Although as a matter of good practice, the demand amount should be rational and defensible, there is nothing in the statute that requires that the demand be reasonable. Indeed, the Superior Court has held that, while "[a]n exorbitant demand for relief is not likely to promote negotiation and settlement[,] . . . a demand

letter may satisfy the requirements of the statute even where the damages claimed grossly exceed the amount justified by the evidence." *Zabilanksy v. Am. Bldg. Restoration Prods., Inc.*, No. 200101985, 2004 WL 2550458, at *13, 14 (Mass. Super. Ct. Oct. 13, 2004) (demand letter sufficient because demand of $3 million "was not so exorbitant as to contravene the purposes of the statute, based on the injuries alleged at the outset of the case" even though jury rejected claims "for asthma, inability to work and inability to reside in [plaintiff's] home" and awarded plaintiff less than $10,000) (citation omitted), *aff'd*, 67 Mass. App. Ct. 1106 (2006). Defendants still are likely to point to the demand in connection with any litigation over whether the offer was reasonable. This is discussed further in § 14.3.3, Response to the Demand Letter, below.

Similarly, there is no requirement that a demand letter must be accompanied by documentation or other proof of the assertions made in it. *See Whelihan v. Markowski*, 37 Mass. App. Ct. 209, 214 (1994). In *Whelihan*, the plaintiff's claim under Chapter 93A was asserted by amendment to her complaint for negligence and breach of warranty. The complaint had been pending for almost a year with ongoing discovery. The court held that, in this situation, the defendants had, in fact, a greater opportunity for making a more informed offer than that normally provided by the 30-day time limit for a response to a demand. *Whelihan v. Markowski*, 37 Mass. App. Ct. at 214. *Whelihan* is consistent with Chapter 93A, which contains no requirement that documentation or proof be included with the demand letter.

Practice Note

Although the *Whelihan* court allowed the plaintiffs to assert a Chapter 93A claim by amendment to their complaint, counsel should be aware of any potential Chapter 93A claims from the very beginning of the case. In *Padilla v. Ames FS, Inc.*, No. 97-0595, 2000 Mass. Super. LEXIS 232 (Mar. 7, 2000) (Sosman, J.), for example, the court denied the plaintiffs' motion to substitute a third amended complaint to expand their Chapter 93A claims to other defendants. The court found that the plaintiffs offered no justification for the late assertion of their claims.

Finally, a recent decision of the Superior Court concluded that the "written demand for relief" required by Section 9(3) need not actually take the form of a letter, so long as it is written, is mailed or delivered, and otherwise meets the requirements of the statute. *See Farmer v. Fed. Nat. Mortgage Ass'n*, 31 Mass. L. Rptr. 204 (Super. Ct. 2013) (where the defendant in a Housing Court action included a Chapter 93A demand in his answer, that pleading satisfied the "written demand for relief" requirement for an affirmative claim for violation of Chapter 93A in a subsequent Superior Court proceeding against the plaintiff in the Housing Court action).

§ 14.3.3 Response to the Demand Letter

Section 9 of Chapter 93A provides that a party receiving a demand may respond to the demand letter within thirty days after the delivery or mailing of the letter. The Supreme Judicial Court, however, has found a response made more than thirty days after the demand letter timely because the plaintiff had extended the time to respond. *Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 652, 660 n.12 (2003). The Appeals Court has also rejected a claim against an insurance company for failure to respond to a Chapter 93A demand letter within thirty days on the grounds that the plaintiff did not show she was prejudiced by the delay or that the delay "was the result of bad faith or ulterior motives." *Zahiri v. Gen. Accident Ins. Co. of Am.*, 55 Mass. App. Ct. 1115 (2002) (unpublished opinion; text available at 2002 WL 2021576, at *4).

A respondent who makes a written offer of settlement rejected by the claimant may, in any subsequent action, file the written offer and an affidavit stating that it was rejected. By doing so, the party responding to the demand letter may limit the claimant's recovery to the relief it offered if the court finds that the respondent made an offer of settlement that was reasonable in relation to the injuries actually suffered by the claimant. However, this right of a respondent to limit damages by tendering a reasonable offer of settlement is limited to offers made within thirty days after the mailing or delivery of the original demand letter. *See* G.L. c. 93A, § 9(3). *But cf. Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 652, 660 n.12 (2003) (offer made more than thirty days after demand letter timely because plaintiff extended time); *Zahiri v. Gen. Accident Ins. Co. of Am.*, 55 Mass. App. Ct. 1115 (2002) (unpublished decision; text available at 2002 WL 2021576, at *4) (no claim against insurance company for failure to respond within thirty days because no prejudice to plaintiff or bad faith on part of defendant). If the plaintiff rejects an offer that the court later determines was reasonable, its recovery will be limited to the amount of that offer. *See Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704 (1975). Absent any other contrary evidence, a timely offer that "is not substantially less than" the jury's ultimate award is a reasonable one as a matter of law. *Bobick v. United States Fid. & Guar. Co.*, 439 Mass. at 662.

If the respondent fails to make a reasonable offer within thirty days, then the claimant may recover multiple damages *if* the respondent's conduct was knowing or willful *or* if the refusal to settle was made in bad faith with knowledge or reason to know that the act or practice constituted unfair or deceptive acts or practices under G.L. c. 93A, § 2(a). A "defendant's refusal to tender relief without an opportunity for a proper investigation of the circumstances surrounding the claim and, indeed, to ascertain whether it was liable at all does not warrant the multiplication of damages." *Aviolizi v. Bradford White Corp.*, 2003 Mass.

App. Div. 93 (vacating multiple damages award where spoliation by plaintiff's expert prevented defendant from testing product); *see also Polycarbon Indus., Inc. v. Advantage Eng'g, Inc.*, 260 F. Supp. 2d 296, 307 n.3 (D. Mass. 2003) ("delay in responding to [plaintiff's] demand letter [for more than four years until the eve of trial] and an initial low offer [did not] necessarily constitute[] bad faith warranting the award of multiple damages against" defendant where defendant did not "timely receive all of [plaintiff's] medical information").

Practice Note

Although there is no requirement that a claimant under G.L. c. 93A, § 11, needs to send a presuit demand letter, a Section 11 defendant may tender with its answer a written offer of settlement for single damages. Such a tender limits recovery to the amount of the offer, if the court determines that the relief tendered was reasonable in relation to the injury suffered.

Practice Note

Although there is nothing in the text of Chapter 93A addressing this issue, the defendant should consider requesting (and the plaintiff should consider agreeing to) a stipulation that more information will be provided to allow the defendant to evaluate the case. This agreement may also allow the defendant to have an additional period of time to evaluate the case.

The plaintiff should consider providing a reasonable amount of information so the defendant can adequately assess the value of the plaintiff's damages. Such information may include medical records and access to the product being claimed as defective. However, the plaintiff should not be put into a position of having to prove the case—e.g., by granting access to his or her experts on liability and damages.

§ 14.4 RECOVERY OF ATTORNEY FEES AND COSTS

Both Section 9 and Section 11 of Chapter 93A provide that a prevailing plaintiff is entitled to a recovery of reasonable attorney fees and costs. This is so even if the recovery is limited to single damages. *Linthicum v. Archambault*, 379 Mass. 381, 388 (1979). It has been "long recognized that the award of attorney's fees and costs in consumer actions can be essential to the enforcement of G.L. c. 93A and the important public policy which it serves." *Barron v. Fid. Magellan Fund*, 57 Mass. App. Ct. 507, 517 (2003). Section 9(4) does not make an award of attorney fees and costs "contingent on bad faith on the part of defendant."

O'Connor v. Brophy, 55 Mass. App. Ct. 909, 910 (2002). However, under Section 9, no attorney fees or costs incurred after the rejection of a reasonable offer of settlement "made within thirty days of the mailing or delivery of the written demand for relief" may be awarded. G.L. c. 93A, § 9; *see also Barron v. Fid. Magellan Fund*, 57 Mass. App. Ct. at 517 n.21. There is no such limitation under Section 11.

Although the judge has the discretion to decide the amount of attorney fees to award, the factors he or she must consider include

> the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.

Linthicum v. Archambault, 379 Mass. at 388–89 (citing *Darmetko v. Boston Hous. Auth.*, 378 Mass. 758, 764 (1979)); *see also Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 194 (1990). A U.S. district court has found that "[p]roduct liability cases are complex and require a great deal of investigation through requests for documents, depositions and development of facts independent of the normal discovery tools available to litigants" and "require the hiring of experts who are expensive and who deal with complicated issues, not normally understood by lay persons." *Polycarbon Indus., Inc. v. Advantage Eng'g, Inc.*, 260 F. Supp. 2d 296, 309 (D. Mass. 2003).

The Superior Court has found support for enhancing an award of attorney fees under Chapter 93A because that matter was taken on contingency and had "a definite risk of nonpayment." *Snowden v. Chase Manhattan Mortgage Corp.*, No. 030001, 2004 WL 1194656, at *6 (Mass. Super. Ct. Apr. 27, 2004). In addition, the Superior Court also has noted that some possibility that plaintiff's counsel has overprepared does "not detract from the reasonableness of the fees and costs." *United Rug Auctioneers, Inc. v. Arsalen*, No. 030347, 2003 WL 22133172, at *1 (Mass. Super. Ct. July 31, 2003). When "separate counts of a complaint alleging G.L. c. 93A . . . arise from a single chain of events or involve a common core of facts" attorney fees "need not be apportioned" among the separate counts. *Office One, Inc. v. Lopez*, 437 Mass. 113, 126 n.17 (2002); *see also Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 430 (2005); *Clamp-All Corp. v. Foresta*, 53 Mass. App. Ct. 795, 813 (2002). When a fee petition is accompanied by voluminous itemized time records, the court was not "required to review and allow or disallow each individual item in the bill, but could consider the bill as a whole." *Twin Fires Inv., LLC v. Morgan*

Stanley Dean Witter & Co., 445 Mass. at 431 (quoting *Berman v. Linnane*, 434 Mass. 301, 303 (2001) (internal quotation marks omitted)).

A successful Chapter 93A claimant is also entitled to an award of costs. Under Chapter 93A, the recoverable costs include reasonable expert witness fees. *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 194 (1990); *Linthicum v. Archambault*, 379 Mass. 381, 389 (1979). Fees and costs are recoverable by a successful claimant because the statute expressly authorizes the recovery, and the purpose of the recovery is to "vindicate the policies" of Chapter 93A.

Awards of attorney fees may include services provided by in-house counsel related to the 93A claim. *Holland v. Jachmann*, 85 Mass. App. Ct. 292, 298–99 (2014). Note that where the complaint has been amended to add a Chapter 93A claim, a prevailing plaintiff is not entitled to an award of attorney fees for the period before the amendment. *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. 380, 392 (1999).

§ 14.5 MISCELLANEOUS

§ 14.5.1 Permitted Practices

The "permitted practices" exemption is a developing area of products liability law and the law of Chapter 93A. Section 3 provides in part that "[n]othing in this chapter shall apply to transactions or actions otherwise permitted . . . by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States." Conduct that otherwise violates Chapter 93A is exempted to the extent the defendant proves that a regulatory scheme "affirmatively *permits* the practice which is alleged to be unfair or deceptive." *Aspinall v. Philip Morris, Inc.*, 453 Mass. 431, 434–35 (2009). The defendant must prove application of the exemption, and this burden is described as "a heavy one." *Aspinall v. Philip Morris, Inc.*, 453 Mass. at 434 (citing *Fleming v. Nat'l Union Fire Ins. Co.*, 445 Mass. 381, 389 (2005)). It requires "more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction"; the practice must be affirmatively authorized.

In *Aspinall v. Philip Morris, Inc.*, the defendant argued that this exemption applied to its use of descriptors such as "light" and "lower tar and nicotine" on cigarette packages, terms the plaintiff alleged were misleading to consumers, because the Federal Trade Commission (FTC) had condoned the use of these labels through its inaction. *Aspinall v. Philip Morris, Inc.*, 453 Mass. at 435–36. The Supreme Judicial Court found, however, that the FTC had not taken an official position on the use of these terms, and concluded that mere tacit authority

and regulatory inaction are insufficient to prove a permitted practice under Section 3. *Aspinall v. Philip Morris, Inc.*, 453 Mass. at 436 ("Inferences cannot be the basis for satisfying the defendants' heavy burden under the statute.").

In a recent unpublished Superior Court decision, *Reckis v. Johnson & Johnson, MCNEIL-PPC, Inc.*, PLCV2007-00064, the trial court applied the permitted practices exemption to conduct it otherwise found violated Chapter 93A. The plaintiffs in *Reckis* were the parents of a minor who, through the consumption of over-the-counter Children's Motrin, had developed Toxic Epidermal Necrolysis (TEN), a permanently debilitating and near fatal condition that caused lesions on 85 percent of her skin and chronic respiratory failure and left her legally blind. *Findings of Fact, Rulings of Law and Order for Judgment on 93A*, at 6–7 (June 26, 2013) [hereinafter *Reckis* Findings]. The plaintiffs' theory of liability was that Johnson & Johnson was aware of the causal connection between Children's Motrin and TEN but knowingly failed to provide an adequate warning to discontinue use in the event of symptoms consistent with that condition. *Reckis* Findings at 13. After adopting the jury's findings of negligence, breach of warranty, and medical causation, the court found that failing to provide an adequate warning was an unfair and deceptive act within the purview of G.L. c. 93A, *Reckis* Findings at 15, and that the defendant's conduct was willful or knowing, *Reckis* Findings at 15–19. Ultimately, however, the court held that Johnson & Johnson carried its burden on the permitted practices exception because the exact text of its label had been preapproved for use by the Food and Drug Administration (FDA) following a lengthy review and approval process. *Reckis* Findings at 19–21.

§ 14.5.2 Spoliation

The Supreme Judicial Court has "expressly" held there is "no cause of action for spoliation of evidence under G.L. c. 93A." *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 498 (2003).

§ 14.5.3 Connection to Underlying Claims

In *Fine v. Huygens, DiMella, Shaffer & Associates*, 57 Mass. App. Ct. 397, 404–05 (2003), the Appeals Court reversed the dismissal of Chapter 93A claims even though it found the underlying breach of implied warranty claims properly dismissed as untimely filed, "reject[ing] the contention that a c. 93A claim necessarily fails because the underlying claim upon which it depends has been dismissed as not timely filed."

MCLE thanks Sherry L. Rajaniemi-Gregg, Esq., and Michael D. Weisman, Esq., for their earlier contributions to this chapter.

Guerra v. Easco Aluminum Corp., No. 96-2657, 2000 WL 33170959 (Nov. 20, 2000) (Botsford, J.). Having ruled that the plaintiff's breach of implied warranty of merchantability claim remained viable, the court found that the plaintiff's Chapter 93A claim remained viable as well, "since breach of this implied warranty may also be a violation of c. 93A." *Guerra v. Easco Aluminum Corp.*, 2000 WL 33170959, at *4 (citations omitted).

Hannon v. Original Gunite Aquatech Pools, Inc., 385 Mass. 813, 823 (1982). In a claim for property damage, breach of implied warranty of merchantability and negligence, the court found that such acts could constitute a violation of Chapter 93A even though the factual record did not support such a finding in the instant case.

Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 628–31 (1978). Where the plaintiffs' demand letter specifically set out the text of G.L. c. 93A, § 2 and the applicable Attorney General's regulations, as well as a detailed explanation of the facts that constituted a violation of Chapter 93A, and where the defendant failed to make a reasonable settlement offer in response, the court held that the award of multiple damages, attorney fees and costs was proper.

Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008). The plaintiffs alleged that the door handles on the defendant's vehicles were defective and failed to comply with federal safety regulations. In concluding that the nature of the plaintiffs' injury or loss would be sufficient to sustain a claim under Chapter 93A, the court found that if the plaintiff's allegations were true they "paid for more (viz., safety regulation–compliant vehicles) than they received." *Iannacchino v. Ford Motor Co.*, 451 Mass. at 886. "Such an overpayment," the court found, "would represent an economic loss—measurable by the cost to bring the vehicles into compliance—for which the plaintiffs could seek redress under G.L. c. 93A, § 9." *Iannacchino v. Ford Motor Co.*, 451 Mass. at 886–87; *cf. Rule v. Fort Dodge Animal Health, Inc.*, 607 F.3d 250 (1st Cir. 2010) (distinguishing the car owner plaintiffs in *Iannacchino* from a plaintiff who had purchased and entirely used up an allegedly unsafe canine heartworm medication without her dog suffering any ill effects).

Jones v. Walter Kidde Portable Equip., Inc., 183 F.3d 67 (1st Cir. 1999). Because the plaintiff's breach of warranty claim failed, so did her Chapter 93A claim, where the Chapter 93A claim had no basis short of breach of warranty.

Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737, 746–47 (1994). The plaintiff brought a breach of implied warranty of merchantability and claim of violation of G.L. c. 93A, § 11. The court held that the regulation providing that it is an unfair and deceptive trade practice to fail to perform promises or

obligations arising under warranty did not apply to a contract dispute between businessmen based on a breach of implied warranty of merchantability.

Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 799 (1976). This case describes how the response to a demand letter, which conveys a reasonable settlement offer, limits the defendant's exposure even if the defendant committed a willful and knowing violation of the act.

Kyte v. Philip Morris, Inc., 408 Mass. 162 (1990). In denying the defendant's motion for summary judgment on the plaintiffs' Chapter 93A claim, the court implicitly accepted the plaintiffs' argument that a breach of warranty would give rise to a violation of Chapter 93A.

Lally v. Volkswagen Aktiengesellschaft, 45 Mass. App. Ct. 317, 336 (1998). In a crashworthiness case alleging a breach of warranty, negligence, deceit and violation of Chapter 93A, the court held that the trial court properly concluded that there was no violation of Chapter 93A because there was insufficient evidence that the vehicle in question was defective.

Lewis v. Ariens Co., 434 Mass. 643 (2001). In a case involving a claim under Chapter 93A, the Supreme Judicial Court found that the principles of the Restatement (Third) of Torts: Products Liability §10 (1998) "represent a logical and balanced embodiment of the continuing duty rule" set forth in *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1 (1998). Nevertheless, the court found that the manufacturer had no duty to warn the plaintiff, who "purchased the product at least second hand, sixteen years after it was originally sold, and did not own the product until years after a duty to provide additional warnings arguably arose." *Lewis v. Ariens Co.*, 434 Mass. at 649. In these circumstances, the court found, the plaintiff was a "member of a universe too diffuse and too large for manufacturers or sellers of original equipment to identify." *Lewis v. Ariens Co.*, 434 Mass. at 649 (quoting Appeals Court opinion). The court also noted that the breach of implied warranty in this case took place at the time of the original sale, which was nearly two years before the enactment of Chapter 93A, and therefore could not form the basis for Chapter 93A liability. *Lewis v. Ariens Co.*, 434 Mass. at 650 n.19.

Liberty Mut. Ins. Co. v. M.C.K., Inc., 62 Mass. App. Ct. 1103 (2004) (unpublished opinion; text available at 2004 WL 2158012, at *6). In a case where defendant made misrepresentations in applying for workers' compensation insurance, the court found that the plaintiff was able to recover as damages the costs of its investigation (an independent audit).

Limoliner, Inc. v. Dattco, Inc., 475 Mass. 420 (2016). The court found that a Chapter 93A business plaintiff could base its claims on the motor vehicle repair

and services regulations set forth at 940 C.M.R. § 5.05. The court focused on indications of the attorney general's intent, including the language of the repair and services provisions and the fact that the regulations were promulgated some four years after the adoption of Section 11, and contrasted Section 5.05 with the general regulations at issue in *Knapp Shoes* (940 C.M.R. § 3.00), which "were intended to counteract disparities in bargaining power and sophistication often present in transactions between businesses and consumers."

Linthicum v. Archambault, 379 Mass. 381 (1979), *overruled in part on other grounds by Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp*., 418 Mass. 737 (1994). In a case involving a breach of contract and breach of implied warranty in connection with the repair of a home, the trial court found a Chapter 93A violation. This case provides an explanation of the method by which a claim for attorney fees should be calculated. (The Supreme Judicial Court instructed the trial court to consider the time and labor required; the amount of damages involved; the result obtained; the experience, reputation and ability of the attorney; the usual price charged for similar services by other attorneys; and the amount of awards in similar cases.)

Logan v. Arbella Mut. Ins. Co., 8 Mass. L. Rptr. 515 (Mass. Super. Ct. 1998) (Fremont-Smith, J.). The court held that a demand letter simply stating that liability was clear, and attaching copies of medical expenses and a warning that a Chapter 93A claim would be prosecuted, is insufficient even though the basis for the claim was apparent from other correspondence between the parties.

Maillet v. ATF-Davidson Co., 407 Mass. 185 (1990). The court found a violation of implied warranty of merchantability and negligence; a violation of Chapter 93A was also found. The court expressly held that Chapter 93A applies to personal injuries. It also held that a plaintiff, pursuant to Chapter 93A, is entitled to recover reasonable attorney fees and costs, including the trial judge's discretion in awarding costs for reasonable expert witness fees.

Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236 (D. Mass. 1999) (O'Toole, J.). To prove a violation of Chapter 93A based on deception, the plaintiff must prove reliance as an "essential link" in the proof of causation. Since the complaint offered no basis for concluding that it was reasonable for the plaintiff to rely on the defendant's information as opposed to contradictory information from other public sources, the plaintiff's Chapter 93A claim was dismissed.

McGonagle v. Home Depot, U.S.A., Inc., 75 Mass. App. Ct. 593, 601–02 (2009). "An axiom of administrative law is that a regulation cannot expand the boundaries of its enabling statute; it can only fill in the landscape defined by the statute." It is not "a bottomless reservoir of ulterior public health, safety, and welfare

infractions regulated by separate programs of the police power." Section 2(c) "limits the Attorney General's rule-making power to be within the concepts of deception or unfairness, as guided by administrative and judicial interpretation of the [Federal Trade Commission] Act."

Moynihan v. Life Care Ctrs. of Am., Inc., 60 Mass. App. Ct. 1102 (2003) (unpublished opinion; text available at 2003 WL 22717663, at *1). The court upheld dismissal of Chapter 93A claims because of the demand letter's failure to give a "reasonable description of the plaintiff's injuries" and its lack of a damages figure.

Nickerson v. Nautilus Plus II, Inc., 1 Mass. L. Rptr. 363 (Mass. Super. Ct. 1993) (Graham, J.). In a case where a plaintiff alleged violations of Chapter 93A based on the fact that a breach of implied warranty is a per se violation of Chapter 93A, the court allowed summary judgment on the Chapter 93A claim because it awarded summary judgment on the breach of implied warranty claim.

O'Connor v. Brophy, 55 Mass. App. Ct. 909, 910 (2002). Chapter 93A, Section 9(4) does not make an award of attorney fees and costs "contingent on bad faith on the part of defendant."

Office One, Inc. v. Lopez, 437 Mass. 113, 126 n.17 (2002). The Supreme Judicial Court noted that attorney fees "need not be apportioned" between Chapter 93A and other counts of a complaint.

Padilla v. Ames FS Inc., No. 97-0595, 2000 Mass. Super. LEXIS 232 (Mar. 7, 2000) (Sosman, J.). Plaintiffs' motion to substitute a third amended complaint to expand their Chapter 93A claims to other defendants was denied because the plaintiffs offered no justification for the late assertion of their claims.

Patry v. Harmony Homes, Inc., 10 Mass. App. Ct. 1 (1980), *appeal after remand*, 15 Mass. App. Ct. 701 (1983) (affirming order of treble damages), *appeal after remand*, 18 Mass. App. Ct. 1102 (modifying order to strike award of attorney fees), *aff'd*, 394 Mass. 270 (1984). This case provides a useful explanation of the defendants' burden in responding to a demand letter, including a discussion of the "reasonableness" of a settlement offer.

Polycarbon Indus., Inc. v. Advantage Eng'g, Inc., 260 F. Supp. 2d 296, 307 n.3, 309 (D. Mass. 2003). In a product liability case, the court found that the defendant's "delay in responding to [plaintiff's] demand letter [for more than four years until the eve of trial] and an initial low offer [did not] necessarily constitute[] bad faith warranting the award of multiple damages against" defendant where defendant did not "timely receive all of [plaintiff's] medical information." The court also found that the nature of product liability cases supports larger awards of attorney fees.

R-1 Assocs., Inc. v. Goldberg-Zoino & Assocs., Inc., 4 Mass. L. Rptr. 219 (Mass. Super. Ct. 1995) (Doerfer, J.). In a case where the defendant moved for summary judgment on the plaintiff's Chapter 93A claim because it was "mere repetition of the claims for breach of contract and breach of warranty," the court denied the motion, holding that the plaintiff was entitled to claim alternative theories. The court also held that a breach of warranty constitutes a violation of Chapter 93A, and that it is not a defense to Chapter 93A that the defendant's conduct was negligent rather than intentional.

Reckis v. Johnson & Johnson, MCNEIL-PPC, Inc., PLCV2007-00064, *Findings of Fact, Rulings of Law and Order for Judgment on 93A* (Mass. Super. Ct. June 26, 2013) (unpublished decision). An insufficient warning on the labeling of over-the-counter medication constituted a breach of the implied warranty of merchantability, negligence, and an unfair or deceptive practice. Under the permitted practices exception set forth in G.L. c. 93A, § 3, however, the defendant's use of the label was exempted from 93A liability because the exact text of the label had been preapproved for use by the U.S. Food and Drug Administration following a lengthy review and approval process.

Roth v. Chrysler Corp., No. 94-0605C, 2000 Mass. Super. LEXIS 11 (Feb. 2, 2000) (Toomey, J.). A judge may make his or her own findings on a Chapter 93A claim without being constrained by the jury's finding of no breach of warranty. In addition, for a breach of implied warranty to give rise to a finding of an unfair or deceptive act or practice under Chapter 93A, the fact finder must conclude that the failure to comply with the warranty was substantial and material.

Sebago, Inc. v. Beazer E., Inc., 18 F. Supp. 2d 70 (D. Mass. 1998). The court held that proof of actual reliance on the defendant's misrepresentations concerning the performance of the product is not required to establish a Chapter 93A claim as long as evidence warrants finding a relationship between the misrepresentation and the injury to the plaintiff.

Sinicrope v. Keller Indus. Inc., 1997 WL 115841 (D. Mass. 1997). In a case alleging the design defect of a ladder, breach of implied warranties of fitness and merchantability and loss of consortium, the court denied summary judgment for the defendants, holding that a breach of warranty, even in a commercial context, may give rise to a Chapter 93A violation.

Snyder v. ADS Aviation Maint., 11 Mass. L. Rptr. 97 (2000) (Botsford, J.). The standard requiring that an unfair or deceptive act or practice occur "primarily and substantially" within the Commonwealth applies to business-to-business claims brought under Section 11. It does not apply to consumer claims brought under G.L. c. 93A, § 9, for which jurisdiction is determined under the Massachusetts long-arm statute.

Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704 (1975). The court in *Slaney* held that the demand letter in a Chapter 93A case serves two functions: (1) it encourages negotiation and settlement by notifying prospective defendants of claims arising from the allegedly unlawful conduct; and (2) it operates as a control on the amount of damages that the complainant can ultimately recover if his or her case is proven.

Snowden v. Chase Manhattan Mortgage Corp., No. 030001, 2004 WL 1194656, at *6 (Mass. Super. Ct. Apr. 27, 2004). The superior court found support for enhancing an attorney fees award under Chapter 93A because the matter was taken on contingency and had "a definite risk of nonpayment."

Southworth Mach. Co. v. F/V Corey Pride, 994 F.2d 37, 40 (1st Cir. 1993). In the context of a G.L. c. 93A, § 11 claim, this case stands for the proposition that a defendant does not act in bad faith by investigating the facts surrounding the demand letter before making a settlement offer in response to the letter.

Spilios v. Cohen, 38 Mass. App. Ct. 338, 342–43 (1995). In contrast to *Whelihan v. Markowski*, 37 Mass. App. Ct. 209 (1994), here the court held that the plaintiff's Chapter 93A claim failed because of her failure to comply with the requirements of the demand letter. The plaintiff failed to demonstrate that she sent a demand letter to the defendant, even though she filed an affidavit that she wrote and mailed the demand letter to the defendant attorney. The court noted that the plaintiff did not provide a copy of the demand letter, and that her affidavit was inadequate in establishing that the statutory prerequisites had been met.

Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 286–89 (1985). This case describes the plaintiff's burden in writing a demand letter, and holds that the demand letter must allege that the plaintiff was injured, describe the injury suffered, and request reasonable relief. Otherwise, it will not satisfy the jurisdictional prerequisite to suit under G.L. c. 93A, § 9.

Squeri v. McCarrick, 32 Mass. App. Ct. 203, 208 (1992). The court held that double or treble damages are proper where the defendant refuses to grant relief in bad faith (i.e., "with knowledge or reason to know that the act or practice complained of violated . . . section two"). The court, however, held that those determinations involve questions of fact that should be left to the jury.

Swenson v. Yellow Transp., Inc., 317 F. Supp. 2d 51, 55 (D. Mass. 2004). The court stated that "despite the language of [940 C.M.R. § 3.16(3)], the case law is clear that a statutory violation is not a per se violation of ch. 93A."

Tarpey v. Crescent Ridge Dairy, Inc., 47 Mass. App. Ct. 380 (1999). There are three holdings of note in this case. First, the court affirmed an allowance of a

motion to amend the complaint to add a Chapter 93A claim after suit was filed, recognizing that a demand before suit is often fruitless. *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. at 391. Second, the Chapter 93A letter was found to be sufficient, even though it did not specify the dollar amount demanded, because the letter was otherwise comprehensive and detailed. *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. at 391. Third, there was no award of attorney fees for the period before the complaint was amended to add the Chapter 93A claim or after the rejection of the defendant's reasonable offer of settlement. *Tarpey v. Crescent Ridge Dairy, Inc.*, 47 Mass. App. Ct. at 392.

United Rug Auctioneers, Inc. v. Arsalen, No. 030347, 2003 WL 22133172, at *1 (Mass. Super. Ct. July 31, 2003). The court found that "[t]o some extent the plaintiff's attorneys may have overprepared the case, but this does not detract from the reasonableness of the fees and costs."

Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 23 (1998). Among other things, the court held that the fact that the plaintiff's husband was not included in the demand letter caused the defendants no prejudice, because the award of attorney fees and costs could, in any event, be attributable in its entirety to the plaintiff's Chapter 93A claim. However, the trial judge could properly decline to assess additional compensatory damages on the Chapter 93A claim because such an assessment would duplicate the jury's award of damages.

Velleca v. Uniroyal Tire Co., 36 Mass. App. Ct. 247 (1994). In a case alleging a breach of warranty in the design and manufacture of a tire and rim, the trial court entered judgment on a jury verdict finding the defendants liable for breach of warranty, but found no violation of Chapter 93A. The Appeals Court affirmed the trial court's decision on Chapter 93A liability, holding that the defendants failed to establish an unreasonable use defense and that the trial court's decision that the plaintiff's "mishandling" of the tire and rim were the cause of the accident was not clearly erroneous. Note that this case stands for the proposition that, in deciding the Chapter 93A claim, the trial judge is not bound by the jury's verdict on negligence and warranty counts.

Waldman v. Am. Honda Motor Co., 413 Mass. 320, 321–24 (1992). The court held that a prevailing defendant in a Chapter 93A case is not entitled to an award of costs under Chapter 93A.

Whelihan v. Markowski, 37 Mass. App. Ct. 209, 215 (1994). *Whelihan* stands for the proposition that, in some factual scenarios, the purposes of a demand letter are not frustrated where a party fails to technically comply with all aspects of the demand letter requirements. In *Whelihan*, the court found that the prerequisites to the G.L. c. 93A, § 9 suit by the plaintiffs were met where the demand letter was sent to the defendants, who resided in Connecticut, in care of their Massachusetts

attorney, who had been active counsel of record for over 10 months. *But see Spilios v. Cohen*, 38 Mass. App. Ct. 338 (1995). In addition to its discussion of the plaintiff's burden in serving a demand letter, *Whelihan* illustrates the obligations of the defendant in formulating a reasonable response to the demand.

Wood v. Gen. Motors Corp., 673 F. Supp. 1108 (D. Mass. 1987), *rev'd on other grounds*, 865 F.2d 395 (1st Cir. 1988). The court held that a violation of implied warranty of merchantability would establish a violation of Chapter 93A.

York v. Sullivan, 369 Mass. 157, 162 (1975). The court held that a plaintiff's demand letter does not need to include information informing the defendants of facts that the defendants deceptively failed to disclose. More broadly, the case stands for the rule that information that serves no useful purpose is not required in a demand letter.

Zabilanksy v. Am. Bldg. Restoration Prods., Inc., No. 200101985, 2004 WL 2550458, at *13–16 (Mass. Super. Ct. Oct. 13, 2004), *aff'd*, 67 Mass. App. Ct. 1106 (2006). In a product liability case, the superior court held that a demand letter containing a $3 million demand was sufficient because it "was not so exorbitant as to contravene the purposes of the statute, based on the injuries alleged at the outset of the case," even though jury rejected claims "for asthma, inability to work and inability to reside in [plaintiff's] home" and awarded plaintiff less than $10,000. The court held that while "[a]n exorbitant demand for relief is not likely to promote negotiation and settlement[,] . . . a demand letter may satisfy the requirements of the statute even where the damages claimed grossly exceed the amount justified by the evidence." Addressing the 93A claims' reliance on 940 C.M.R. § 3.16(3), the court stated that "[d]espite the sweeping language of the Attorney General's regulation, courts have been hesitant to find automatic violations," and found that, instead, "the court must take into account all the facts and circumstances and determine whether the statutory violation involves unfair or deceptive conduct." The court found no Chapter 93A claim based on mislabeling of product in violation of EPA regulations where the mislabeling was "of little consequence to consumers" and "inadvertent."

Zahiri v. Gen. Accident Ins. Co. of Am., 55 Mass. App. Ct. 1115 (2002) (unpublished opinion; text available at 2002 WL 2021576, at *4). The court rejected a claim against an insurance company for failure to respond to a Chapter 93A demand letter within thirty days on the grounds that the plaintiff did not show that she was prejudiced by the delay or that the delay "was the result of bad faith or ulterior motives."

EXHIBIT 14C—Checklist: Required Elements of a Chapter 93A Demand Letter in a Products Liability Case

A Chapter 93A demand letter must comply with the following requirements:

- ❑ it must be sent at least thirty days before suit is filed;
- ❑ it must identify the claimant;
- ❑ it must, with reasonable specificity, describe the unfair or deceptive acts or practices that the claim is based on;
- ❑ it must reasonably describe the injuries suffered and the relief requested;
- ❑ it must be mailed or delivered to each potential defendant; and
- ❑ it must provide notice to each potential defendant that a claim under G.L. c. 93A is being asserted by the claimant; therefore, it should include an express statement that the letter is being sent pursuant to Chapter 93A, the Consumer Protection Act.

G.L. c. 93A, § 9(3); *see also Cassano v. Gogos*, 20 Mass. App. Ct. 348, 350–51 (1985).