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C H A P T E R 8

Consumer Protection

§8.1. Introduction. During the 1969 SURVEY year, two very important and extremely significant items of consumer protection became law in the Commonwealth. Effective November 13, 1969, Chapter 690 of the Acts of 1969 (entitled "An Act providing civil remedies to a person injured by any act or practice declared unfair or deceptive by the Consumer Protection Act") allows consumers, both individually and as a class, to institute actions for multiple damages and/or equitable relief where unfair or deceptive practices have been employed. Chapter 690 adds Sections 9 and 10 to Chapter 93A of the General Laws.

Effective 13 days after Chapter 690, Chapter 814 of the Acts of 1969 (entitled "An Act amending the Consumer Protection Act and providing restitution to a consumer who has suffered loss due to a deceptive act or practice") also amends Chapter 93A of the General Laws. It adds four new sections — Sections 4, 5, 6 and 7 — and amends Sections 1 and 3(2). The new sections grant authority to the attorney general to file suits or pursue other action to protect injured consumers.

The two acts are complementary. Under Chapter 690, permanent injunctions or court orders which are granted under Chapter 814 are prima facie evidence of unfair or deceptive acts or practices when alleged in litigation commenced under Chapter 690. The two acts were the first such state acts in the United States. Since their enactment North Carolina has enacted a similar statute.¹ Both the North Carolina and the Massachusetts acts provide broad, comprehensive consumer protection, something long needed to balance the weight of caveat emptor.

A. SCOPE AND COVERAGE

§8.2. Scope and coverage of actions under G.L., c. 93A. Although no actions have as yet been initiated under Chapter 93A¹ of the General Laws [hereinafter the Act], it would seem certain that any and all legal entities are subject to action thereunder. Section 1(a) of the

This chapter was written by MARC A. COMRAS, a student at Boston College Law School and a staff assistant at the National Consumer Law Center. He was assisted by the personnel of the National Consumer Law Center in preparing this chapter.

§8.1. ¹ N.C. Gen. Stat. §0-0 (1969).

§8.2. ¹ G.L., c. 93A, is known as the Massachusetts deceptive practices act.

Act defines a "person" subject to its coverage as including: natural persons, corporations, trusts, partnerships and any other legal entity. The catchall phrase, "any other legal entity," would seem to assure broad and complete applicability.

As to the scope of the coverage of the Act, Section 2(a) declares that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, as defined in Section 1(b), are unlawful. Section 2(b) states the legislative intent behind the Act. The General Court specifically required the courts in construing the Act to be guided by federal court decisions, and by the interpretations of the Federal Trade Commission in construing Section 5(a)(1) of the Federal Trade Commission Act.² Various practices have been declared to be unlawful. Among them are "commercial" bribery;³ payola;⁴ coercion or intimidation of customers;⁵ scare tactics to make sales;⁶ threatening to initiate collection suits;⁷ sales or payments wrongfully forced;⁸ damaging or withholding customers' property;⁹ lotteries or lottery devices in sales;¹⁰ failure to fill orders promptly;¹¹ shipment of unordered goods;¹² and substitution of goods.¹³ Disclosure has been required where there is a change in a product;¹⁴ deceptive appearance as to composition;¹⁵ danger in the use of a product;¹⁶ foreign origin of a product;¹⁷ imperfect and rejected goods;¹⁸ a limited number of products available;¹⁹ and old, used, or second-hand goods.²⁰ Representations as to financial standing,

² 15 U.S.C. §45(a)(1).

³ American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 582 (7th Cir. 1939).

⁴ FTC Dockets 7825-7829, 7894-7902.

⁵ Stokely-Van Camp, Inc. v. FTC, 246 F.2d 458 (7th Cir. 1957).

⁶ FTC Dockets 6489 and 6712 (concerning fire alarms); FTC Dockets 8851-8852 (garbage disposals); FTC Docket 6827 (shampoo); and Holland Furnace Co. v. FTC, 295 F.2d 302 (7th Cir. 1961) (furnaces).

⁷ Dorfman v. FTC, 144 F.2d 737 (8th Cir. 1944) (rug sales).

⁸ See Holland, note 6 *supra*.

⁹ FTC Dockets 3011, 4951 and 6101.

¹⁰ FTC v. R. F. Keppel & Brother, Inc., 291 U.S. 304 (1934) (candy); Chicago Silk Co. v. FTC, 90 F.2d 689 (7th Cir. 1937), cert. denied, 302 U.S. 753 (1937) (punchboards used for nylon stocking sales).

¹¹ FTC Dockets 6116 (air-conditioners and television sets), 6678 (books), and 5566 and 6006 (magazines).

¹² Consumers Home Equipment Co. v. FTC, 164 F.2d 972 (6th Cir. 1947).

¹³ FTC v. Algoma Lumber Co., 291 U.S. 67 (1934) (lumber); National Trade Publications Service, Inc. v. FTC, 300 F.2d 790 (8th Cir. 1962) (magazines).

¹⁴ Royal Baking Powder Co. v. FTC, 281 F. 744 (2d Cir. 1922).

¹⁵ Delaware Watch Co. v. FTC, 332 F.2d 745 (2d Cir. 1964) (watches); Haskelite Mfg. Corp. v. FTC, 127 F.2d 765 (7th Cir. 1942) (paper trays).

¹⁶ American Medicinal Products, Inc. v. FTC, 136 F.2d 426 (9th Cir. 1943) (drugs); Ultra-Violet Products, Inc. v. FTC, 143 F.2d 814 (9th Cir. 1944).

¹⁷ Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir. 1963).

¹⁸ FTC Docket 7904 (television tubes).

¹⁹ See "Guides Against Bait Advertising," 16 C.F.R. §238.

²⁰ Kerran v. FTC, 265 F.2d 246 (10th Cir. 1959); Standard Distributors, Inc. v. FTC, 211 F.2d 7 (2d Cir. 1954).

reputation and time in business have been held unlawful practices²¹ as have those concerning business nature and trade status²² and affiliations and connections when such do not in truth exist.²³ Also unlawful are claims of disability;²⁴ government endorsements;²⁵ comparisons;²⁶ guarantees without disclosure of the nature and extent of the guarantee;²⁷ and therapeutic claims.²⁸

With the above practices as examples, although by no means exclusive, it is obvious that many unlawful acts take place and that many very common acts are unlawful. That the courts have found so many to be illegal is perhaps surprising, but this lends support to an optimistic outlook concerning the Massachusetts courts future application of the Act.

Section 2(c) of the Act provides that rules and regulations be promulgated by the attorney general which are to be used in interpreting the Act. These rules and regulations must be consistent with the rules, regulations and decisions of the federal courts and Federal Trade Commission, which interprets the provisions of the Federal Trade Commission Act. Pursuant to the legislative command in Section 2(c), the attorney general has promulgated rules and regulations interpreting the Act.²⁹ In addition to overlapping some of the matters covered by the federal courts and the Federal Trade Commission as previously listed, the attorney general has dealt with such areas as false advertising, deceptive pricing, general misrepresentations and referral schemes.

Although comprehensive, the Act does not cover all consumer transactions. Section 3 of the Act specifically exempts certain transactions. For example, transactions which are otherwise permitted under law as administered by any regulatory board or office, acting under the authority of the Commonwealth or of the United States is exempted under Section 3(1)(a). Trade or commerce, as defined in Section 1(b), by any person whose gross revenue consists of at least 20 percent derived from transactions in interstate commerce is exempted from coverage with two very important exceptions: (1) transactions and actions which occur primarily and substantially within the Commonwealth,³⁰ and (2) where the attorney general has notified

²¹ U.S. Retail Credit Assn. v. FTC, 303 F.2d 212 (4th Cir. 1962).

²² FTC v. Kelly, 87 F.2d 1004 (2d Cir. 1937) (unfair to represent seller as manufacturer where he was not).

²³ Lane v. FTC, 130 F.2d 48 (9th Cir. 1942); Park, Austin and Lipscomb, Inc. v. FTC, 142 F.2d 437 (2d Cir. 1944).

²⁴ Better Living, Inc. v. FTC, 259 F.2d 271 (3d Cir. 1958) (aluminum); Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964) (wax protection).

²⁵ United States Navy Weekly, Inc. v. FTC, 207 F.2d 17 (D.C. Cir. 1953).

²⁶ National Bakers Services, Inc. v. FTC, 329 F.2d 365 (7th Cir. 1964).

²⁷ Clinton Watch Co. v. FTC, 291 F.2d 838 (7th Cir. 1961).

²⁸ Steelco Stainless Steel, Inc. v. FTC, 187 F.2d 693 (7th Cir. 1951); Bristol-Meyers Co. v. FTC, 185 F.2d 58 (4th Cir. 1950); Sebrone Co. v. FTC, 135 F.2d 676 (7th Cir. 1943.)

²⁹ Atty. Gen. Rules and Regs. — (1969).

³⁰ G.L., c. 93A, §3(1)(b)(i).

the Federal Trade Commission, and the "merchant" of an alleged violation and of his intention to act, and the attorney general has not received written notification of the Federal Trade Commission's receipt of the notification.³¹ The transactions or actions of any person who shows that he has been served with a complaint by the Federal Trade Commission with regard to the same alleged violation as raised by the attorney general are exempted from coverage of the Act until disposition of the case by the Federal Trade Commission. The exemption continues until the FTC (1) dismisses the complaint, (2) secures an assurance of voluntary compliance, or (3) issues a cease and desist order pursuant to 15 U.S.C. §45(b). When any one of these three dispositions are made, the attorney general may proceed under the Act.

Of great significance in the application of the Act is the legislative placement of the burden of proof. Thus for any respondent to claim an exemption under the Act for any reason, he must prove that he falls within one of the exempted categories. If he fails to so prove, he is covered by the Act.³²

B. PRIVATE REMEDIES

§8.3. Individual and class actions. Section 9 of the Act provides the statutory basis for private suits. Section 9(1) applies to any person who purchases or leases goods or services for primarily personal, family or household purposes. If such person suffers any loss of money or property (real or personal) as a result of the use or employment of an unfair or deceptive act or practice¹ in any aspect of a purchase or lease transaction, he may bring an action in the superior court. The suit is brought in equity, and may request damages² in addition to any equitable relief which the court deems necessary and proper.

Section 9(2) of the Act allows any person entitled to bring an action under Section 9(1) to bring that action as a class action if the alleged unfair or deceptive act or practice has caused similar injury to numerous other persons under similar circumstances. If grounds for a class action are alleged, a preliminary hearing must be scheduled in order to decide whether or not the party or parties bringing the action have adequately and fairly represented the interests of the other persons similarly situated. Once the representatives of the class are certified by the court sitting at the preliminary hearing, the court will order that notice of the pending action be given to the unnamed petitioners in the most effective manner practicable. It is important to note that the court may require that the petitioner send written

³¹ G.L., c. 93A, §36(1)(b)(ii).

³² G.L., c. 93A, §3(c)(2).

§8.3. ¹ As defined by G.L., c. 93A, §2, or by any rule or regulation issued, and §2(c), as noted in §8.2 *supra*.

² See §8.5 *infra*.

notice to each unnamed petitioner. If this is not practicable, another method may be devised upon court approval. Also, the adequate representation requirement may be restrictively interpreted to include substantially similar or identical interests in the initial transaction or in the relief sought. For example, a restrictive interpretation may not allow petitioners to seek both money damages and injunctive relief in the same suit. Thus, care must be taken before commencing a class action under Chapter 93A. If such an action will restrict one's relief, it should be avoided, or at least commenced with a realization of the dangers involved. However, due to the broad and inclusive wording of Section 9(1), this caveat will most likely prove to be unnecessary.

§8.4. Procedural considerations. The basis or grounds for action under the Act is an injury to a consumer caused by the use of unfair or deceptive acts or practices¹ in a purchase or lease transaction for goods or services primarily for personal, family or household purposes. Once a determination has been made that grounds exist under Sections 2 and 3,² the practitioner must then turn to Section 9(3) for the procedural steps. The first is the written demand for relief.³ At least 30 days before the petitioner claimant intends to file suit for damages or injunctive relief,⁴ it is required that he mail or deliver to the prospective respondent a written demand letter for the relief he is seeking.⁵ Such a demand letter must be mailed or delivered to any and every prospective respondent. If mailed, the letter should be sent registered mail, return receipt requested. It should be carefully addressed to the appropriate corporate officer, if respondent is a corporation, or to the legally responsible individual if respondent is not a corporation. The demand letter must identify the claimant and must reasonably describe the unfair or deceptive act or practice relied upon as a basis for the claim, as well as the injury suffered. The petitioner claimant should state in the demand letter that the transaction involved was a purchase or lease of goods or services (as applicable) and that the transaction was primarily for either personal, family, or household purposes. If petitioner claimant is contemplating a class action, he should include in the demand letter information that, to his knowledge, the act or practice of which he is complaining has been used to the detriment of others.

Any prospective respondent, upon receiving a demand for relief may, within 30 days of receipt of that demand, make a written tender of settlement.⁶ If this tender is refused, the prospective respondent may file the written tender and an affidavit concerning the transaction for which relief was demanded. If the court finds that the settlement tender

¹ §8.4. 1 As defined by G.L., c. 93A, §§2 and 3.

² See §8.2 *supra*.

³ See Appendix I at the end of this chapter for sample letter.

⁴ G.L., c. 93A, §9(1).

⁵ See Appendix I for a sample demand letter drafted by the staff attorneys for the National Consumer Law Center.

⁶ G.L., c. 93A, §9(3).

was reasonable in relation to the injury actually suffered by the petitioner, the relief in the action will be limited to the settlement previously tendered by the respondent and refused by the petitioner. In the event that a settlement is not tendered or is refused, court action becomes necessary.

In the event that court action is necessary, a complaint must of course be filed. A sample complaint can be found in Appendix II of this chapter. There are a few portions of this complaint which are worthy of special consideration.

The sample complaint lists Suffolk County as the place of filing. However, Section 9 of Chapter 93A does not provide any venue requirements. Venue, under Section 4 is established as where the defendant lives or has his usual place of business. Section 4, however, deals with actions to be instituted by the attorney general and not with private actions. It would thus seem that, by omission of mention the proceedings may well be properly termed "transitory" and thus would be commenceable in either petitioner's or respondent's county.⁷ The safest procedure would seem to be to institute action in respondent's county and thus avoid any additional controversy.

The case name in the sample complaint, as may be noted, reads: "Mary Consumer [for herself and all others similarly situated]." This is a dual purpose heading. If the action is a class action, the bracketed portion is added after the name or names of the primary, representative petitioner and no brackets are used. If the action is not a class action, only the name or names of the petitioner (or petitioners) are used. The bracketed portion is then omitted entirely. It should be noted that only one respondent is listed in the sample. Whether or not several respondents can be joined as a class in a Section 9 action is uncertain. Section 9 itself is silent as to class respondents and until a test case is brought, there can be no certainty.

Another point is the statement of the relief for which petitioner prays. The bracketed section here includes injunctive relief. This stresses that, in addition to damages for past acts, the petitioner may request affirmative action by the court of equity under Section 9 to prevent the continuance of the unfair practices.

Number three of the representations is to be used only if the action is a class action. If it is not, number three is omitted in its entirety.

Representation number five should give a detailed account of the act which has precipitated the action. This act may well be one of those noted previously as being unlawful either under Section 2 itself or under a rule or regulation issued by the attorney general pursuant to Section 2(c).⁸ Certainly any act listed as already having been ruled unlawful is preferable, although an act analogous to those listed or a totally new unfair practice may certainly be pleaded.

Also under number five, after quoting the text, the complaint should

⁷ 6 Mass. Practice Series §§111-119.

⁸ See §8.2 *supra*.

state that the use of the practice was knowing and willful. This will establish liability for double or treble damages.

Representation number six, is, as was number three, applicable only if the action is a class action. Number seven deals with the demand for relief. This is not required if the respondent is not a resident of Massachusetts.⁹ It is probably best not to include the fact that respondent had made a written tender of settlement within 30 days which was refused as unreasonable. However, if this was a bad faith offer, respondent's liability for double or treble damages can be established by including the bracketed portion of number seven. Section 9 seems to require a refusal by respondent and not simply a failure to respond.

Representation eight includes the prayers for relief. Number one thereunder requests a temporary restraining order. While Section 9 does not provide for this remedy, it is inherent in the powers of equity courts and thus should be obtainable. Number five under representation eight requests actual damages. Section 9(3) seems to indicate that if respondent does not reply to a demand, even if the petitioner suffers no damages, provided there is a technical violation of Sections 2 or 2(c), petitioner may recover \$25, or double or treble this amount under the specified circumstances.¹⁰ This, of course, is valuable in private enforcement, especially in a class action. Relief prayer number six is for attorney's fees and costs. This should always be included since the probability of recovery for these expenses is not foreclosed for a violation of Section 2(c). Finally, it is necessary to swear and subscribe the complaint if restraining orders are being requested.

§8.5. Damages and other relief. If the court finds for the petitioner where no written tender of settlement has been made by respondent or where that tender was unreasonable, recovery will be the amount of damages actually suffered or \$25, whichever amount is greater. This is only for unintentional violations of the Act.¹ For willful or knowing violations of the Act or a bad faith refusal to tender settlement upon demand, with knowledge or reason to know that the act or practice complained of violated Section 2, the court may award up to three but not less than two times the amount which would be awarded for an unintentional violation.² Any act or practice specifically covered by the provisions of Section 2 or Section 5 of the Federal Trade Commission Act or the rules and regulations promulgated by the attorney general should provide "reason to know" that the act or practice was a violation of the Act. It would therefore follow that a refusal to tender settlement upon demand for an act or practice covered would provide the basis for petitioner to recover double to treble damages, if successful in proving his allegations. Although it is desirable from the consumer's viewpoint, it is up to the courts to determine whether or not a patently unreasonable tender of settlement will be

⁹ G.L., c. 93A, §9(3).

¹⁰ See §8.5 *infra*.

§8.5. ¹ G.L., c. 93A, §9(3).

² *Ibid*.

treated as if no tender were made. The Act does not give any indication as to this point.

The demand requirements of Section 3 do not apply to prospective respondents who do not maintain a place of business within the Commonwealth or who do not keep assets within the Commonwealth.³ However, the nonresident respondent may voluntarily employ the tender provisions of Section 9, by making a written offer of relief as soon as practicable *after receiving notice of an action commenced under Section 9.*⁴ The nonresident respondent may limit damages to the amount of the tender, if refused by petitioner, by paying that tender into court. This limitation, as with resident respondents, inures only if the tender is reasonable in relation to the damages as determined.

The court, upon proper application, may award such other equitable relief, including an injunction, as it deems necessary and proper under the circumstances of the case.⁵ If the court finds that there has been a violation of Section 2, the petitioner will be awarded reasonable attorney's fees and costs incurred in connection with the suit, irrespective of the amount in controversy.⁶ However, in order to encourage reasonable settlements, the court will not award attorney's fees or costs in a case where the petitioner has rejected a reasonable tender of settlement made in due time as required by Section 9(3).⁷

C. PUBLIC REMEDIES

§8.6. Initiation of legal action by the attorney general: Investigations. Where the attorney general has reason to believe¹ that a person is using or is about to use any method, act or practice declared unlawful under Section 2 of the Act and not exempted by Section 3 and that proceedings would be in the public interest, he may conduct an investigation² as to the method, act or practice in question, and if the situation merits, he may bring an action in the name of the Commonwealth.³

The attorney general is authorized by Section 6(1) to conduct such an investigation to ascertain whether the person complained of is in fact engaging in a method, act or practice which violates the Act. The

³ *Ibid.*

⁴ *Ibid.*

⁵ G.L., c. 93A, §9(1).

⁶ G.L., c. 93A, §9(4).

⁷ See §8.4 *supra*.

§8.6. 1 G.L., c. 93A, §4. Information as to a possible violation of the Act may come from any source. Section 4 creates a duty in any district attorney or law enforcement officer who receives notice of a violation to immediately notify the attorney general in writing of that violation. Section 10 requires the clerk of court to inform the attorney general of any private proceedings under the Act.

² G.L., c. 93A, §6(1).

³ G.L., c. 93A, §4.

investigation must comply with the standards set out in the Act as to notice⁴ and service of notice.⁵ The Act provides for safeguards as to material received⁶ and for extensions of time for compliance.⁷ It also has a provision limiting the material which must be provided for inspection.⁸ A civil penalty of up to \$5000 is assessable for failure to comply with the investigation proceeding.⁹

If the situation warrants legal proceedings to restrain the use of the method, act or practice complained of, the Attorney General is authorized to bring an action in the name of the Commonwealth.¹⁰ The attorney general must notify the prospective respondent of his intended action at least ten days prior to its commencement. The respective respondent must be given an opportunity to confer with the attorney general concerning the proposed action, either in person or through counsel.¹¹

Upon deciding to initiate legal proceedings, the attorney general may bring the action in the county where the respondent resides or has his principal place of business. By consent of the parties or if the respondent has no place of business within the Commonwealth, the action may be brought in the superior court of Suffolk County.¹²

The court, in a suit brought by the attorney general under the Act, may issue temporary or permanent injunctions and other orders or judgments as may be necessary to do justice for the aggrieved consumers.¹³

§8.7. Assurance of discontinuance of violation. In lieu of filing a legal action under Section 4 of the Act, the attorney general may accept an assurance of discontinuance from the person thought to *be* engaged in, or to *have been* engaged in a violative method, act or practice.¹ This assurance must be in writing and must be filed with the Superior Court of Suffolk County. The assurance may be required to include a stipulation of an amount voluntarily placed in escrow pending any action by aggrieved consumers under Section 9, or an amount paid as restitution to the aggrieved consumers, or both.

Evidence of a violation of an assurance of discontinuance is *prima facie* evidence of a violation of Section 2 in any subsequent proceeding brought by the attorney general.²

§8.8. Penalties for violating an injunction. Section 4 of the Act

⁴ G.L., c. 93A, §§6(2), 6(4).

⁵ G.L., c. 93A, §6(3).

⁶ G.L., c. 93A, §§6(5), 6(6).

⁷ G.L., c. 93A, §6(7).

⁸ G.L., c. 93A, §6(5).

⁹ G.L., c. 93A, §7.

¹⁰ G.L., c. 93A, §10.

¹¹ See §8.7 *infra*.

¹² G.L., c. 93A, §4.

¹³ *Ibid*.

§8.7. ¹ G.L., c. 93A, §5.

² *Ibid*.

provides that any person who violates the terms of an injunction or other order issued under that section shall forfeit and pay to the Commonwealth a civil penalty of not more than \$10,000 for each violation. The attorney general, under Section 8, may petition the court to order the dissolution, suspension, or forfeiture of the franchise of any domestic corporation, or the right of any foreign corporation to do business in the Commonwealth, whenever he finds that the corporation has habitually violated the terms of a Section 4 injunction.

§8.9. Summation. In all, the Massachusetts General Court has provided the consumer with one of the most powerful weapons ever created for him. Exactly how powerful it is will be determined by the interpretation and applications of the courts of the Commonwealth. Exactly how effective it is will be determined by the awareness of its existence by the general public and by the willingness of that public and its attorneys to enforce the rights granted thereunder. Often the actual loss in these actions is minimal, thus the tendency is to forgive the trespass. However, when all of the consumers who have been trespassed against are considered, the result is many trespasses resulting in cumulatively large monetary damages. Perhaps the class action, included herein by the General Court, is the answer. Such an action might be financially reasonable to the consumer and his attorney and thus foster a better enforcement of the rights granted. In any event, the attorney who would advise his client to forget a small claim under this Act might do well to remember that he too is a consumer. If this Act is successfully enforced by the courts, by the public and by the attorney general, the result could be a great overall saving for the populace in general. The seller is unlikely to be unfair if the odds of punishment are high.

Massachusetts, along with North Carolina, is the testing ground of this new concept, this tool for the consumer. If Chapter 93A succeeds in eliminating unfair practices, it may well be followed across the United States, thus making the lot of the consumer more equitable. If Chapter 93A fails, it will be written off as just another noble experiment which has failed.

APPENDIX I

THIRTY-DAY WRITTEN DEMAND FOR RELIEF

Dear _____:

Under the provisions of Massachusetts General Laws, Chapter 93A, Section 9(1), I (name and address of claimant), hereby make written demand for relief as outlined in that statute.

On or about (date and reasonable description of the unfair or deceptive act relied upon). This unfair or deceptive act or practice is, in

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my opinion, an unfair or deceptive act or practice declared unlawful by Section 2 of Chapter 93A (or legal rule or regulation issued under Section 2(c) of chapter 93A) which reads as follows:

[Quote text of section.]

As a result of information available to me and in my belief, this unfair or deceptive act or practice has been used or employed in regard to others.

Therefore, I hereby demand the following relief:

[Indicate relief sought.]

Sincerely,

(signature)

Name of Claimant

By his attorney:

APPENDIX II

SAMPLE PLEADINGS UNDER CHAPTER 93A, SECTION 9

Commonwealth of Massachusetts

Suffolk, SS¹

Superior Court
Number _____

MARY CONSUMER [for herself and all
others similarly situated]²

v.

DEFRAUDING MERCHANTS COMPANY³

BILL IN EQUITY FOR DAMAGES [AND INJUNCTIVE RELIEF]⁴

Respectfully represents your petitioner(s):

1. This is an action under Mass. Gen. Laws ch. 93A, as amended.

¹ Section 9 does not establish venue requirements. Section 4 establishes venue as where the defendant lives or has his usual place of business, but the attorney general is responsible for instituting actions under this section. While proceedings under §9 could properly be classified as transitory and thus suit could be commenced in either petitioner's or respondent's county, it would be the best procedure to file in respondent's county. See §8.4 *supra*.

² If brought as a class action.

³ Section 9 is silent as to whether several respondents can be joined as a class.

⁴ Both monetary damages and injunctive relief can be sought under §9.

2. Petitioner, Mary Consumer, is a natural person and a resident of Boston, County of Suffolk, Commonwealth of Massachusetts, and purchased (or leased) goods (or services) primarily for personal, family or household purposes and thereby has suffered monetary (or property, real or personal) loss as a result of the employment (or use) by the defendant(s) of an unfair or deceptive act or practice declared unlawful by Mass. Gen. Laws ch. 93A, Section 2 (or by rule [or regulation] issued under Mass. Gen. Laws ch. 93A Section 2(c)) as will appear in greater detail below.

3. Petitioner brings this action on behalf of herself and all other persons similarly injured by the employment (or use) of the unfair or deceptive act or practice since petitioner adequately and fairly represents such other persons as will appear in greater detail below.⁵

4. The respondent, Defrauding Merchants Company, is a corporation established and existing under the laws of this Commonwealth and having its usual place of business in said Boston.

5. That on or about November 20, 1969, the respondent, Defrauding Merchants Company, through its agent, servant, or employee, John Smith, [describe in detail the factual occurrence complained of].⁶ The employment (or use) of this act or practice has been declared unlawful by Mass. Gen. Laws ch. 93A, Section 2 (or by rule or regulation issued under Mass. Gen. Laws ch. 93A, Section 2(c)), which provides:

[Quote the text.]

That respondent's employment (or use) of the said act or practice was willfully or knowingly done in violation of Mass. Gen. Laws ch. 93A, Section 2.

6. That, on information to and belief by the petitioner, for an unknown period of time prior to and subsequent to November 20, 1969, the said respondent, through its agents, servants, or employees employed (or used) similar acts or practices in regard to numerous other persons unnamed and unknown to petitioner who are too numerous to permit joinder but who are adequately and fairly represented by the petitioner.⁷

7. That on or about November 25, 1969, the petitioner sent to the respondent by registered mail, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered. A true copy of this written demand attached hereto, marked Exhibit "A," and by this reference incorporated herein.⁸ ["Respondent did not reply to petitioner's

⁵ If brought as a class action.

⁶ See §8.2 *supra* for a sampling of those activities declared unlawful by §2 itself and by rule or regulation issued under §2(c).

⁷ If brought as a class action.

⁸ A demand is not required if respondent is out of state. See Section 9(3). It is probably better practice not to include the fact that respondent made a written tender of settlement within 90 days. However, one can establish respondent's liability for treble or double damages by including the quote cited in the text. While Section

demand (or "refused to grant petitioner's demand for relief") and this failure and refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated Mass. Gen. Laws ch. 93A, Section 2."]

8. That as a result of the unfair or deceptive practices employed (or used) by the said respondent the petitioner and those persons similarly situated which petitioner represents have suffered monetary (or property, real or personal) losses in that (*describe the losses fully*).

WHEREFORE, the petitioner prays:

1. That the respondent, its agents, servants, and employees be temporarily restrained and enjoined from (*describe respondent's unlawful conduct*).⁹

2. That the Honorable Court conduct a preliminary hearing and determine:

(a) Petitioner adequately and fairly represents the numerous other persons damaged in a similar way monetarily (or to their property, real or personal) by the employment of the unfair or deceptive act or practice.

(b) That the most effective practical manner to give notice of this action to the said numerous other unnamed petitioners is to require the said respondent to furnish forthwith to this Court lists of names of those persons who have been subjected by the respondent to the said unfair or deceptive act or practice.

3. That this Honorable Court require the said respondent to furnish forthwith to this Court lists of names of those persons who have been subjected by the respondent to the said unfair or deceptive act or practice and that this Court arrange to notify said persons of this action.

4. That the respondent, its agents, servants, and employees lie perpetually enjoined from (*describe respondent's unlawful conduct*).

5. That the damages actually caused to the petitioner be established¹⁰ and that an execution issue for triple the established amount thereon since "the respondent's employment (or use) of the said act or practice was willfully or knowingly done in violation of Mass. Gen. Laws ch. 93A, Section 2" (or "respondent did not reply to petitioner's

⁹ appears to require refusal rather than failure to respond by the respondent, it is open to this latter interpretation. Where respondent makes a written tender of settlement rejected by a petitioner, and the tender is later determined by a court to be "reasonable in relation to the injury suffered, recovery is limited to that amount."

⁹ Although §9 does not mention temporary restraining orders, an equity court's jurisdiction inherently includes the power.

¹⁰ Section 9(3) seems to indicate that if respondent does not reply to a demand, even if petitioner suffers no damages, but there is a technical violation of §§2 and 2(c), petitioner may recover \$25 (or treble or double this sum under certain circumstances). This, of course, is a valuable private enforcement too, especially if brought as a class action.

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demand (or refused to grant petitioner's demand for relief) and this failure and refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated Mass. Gen. Laws ch. 93A, Section 2.")

6. That the petitioner be awarded reasonable attorneys fees for and costs of this action.¹¹

7. And for such other and equitable relief that this Honorable Court may deem equitable and just.

Sworn and subscribed to under the pains and penalties of perjury this second day of January, 1970.¹²

Mary Consumer

ATTORNEYS FOR PETITIONER

By the Clerk of this Honorable Court.

¹¹ Include in all cases since Section 9 does not foreclose this possibility for a violation of Section 2(c).

¹² Required when requesting restraining orders.