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Chapter 15: Consumer Law

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CHAPTER 15

Consumer Law

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§ 15.1. **Introduction.** Important changes occurred in two areas of consumer law during the 1981 *Survey* year. Several decisions handed down by the Massachusetts Supreme Judicial and Appeals Courts significantly contributed to the expanding body of case law on chapter 93A, commonly referred to as the Massachusetts Consumer Protection Act. The decisions addressed such issues as the retroactivity of the 1979 amendments to chapter 93A, the scope of permissible claims under chapter 93A, and the definition of unfair or deceptive acts or practices. In addition, the Massachusetts legislature substantially revised the Massachusetts truth-in-lending act, now codified at chapter 140D. The amendments to the truth-in-lending act impact most heavily on those creditors extending credit to consumers on an other-than-open-end credit plan, usually termed closed-end credit.

§ 15.2. **Chapter 93A — Applicability of Pre-1979 Law.** In 1979, the legislature substantially modified the Consumer Protection Act, chapter 93A. Those modifications broadened the scope of claims a consumer can bring under the Act.[1] During the 1981 *Survey* year, however, the Massachusetts Court of Appeals clearly established that the modified version of chapter 93A would apply only to those actions which accrued after the 1979 amendments took effect.[2]

Significant among the changes to the Act was chapter 406 of the Acts of 1979.[3] That amendment eliminated the precondition that a consumer must incur a loss of money or property in order to sue under chapter 93A, section 9.[4] The requirement of actual loss of money or property had barred a number of potential claims and had diminished the impact of section 9 as a remedial tool in discouraging unfair practices.[5] Chapter 406 alleviated this

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§ 15.2. [1] *See* Gitlin, *Consumer Law*, 1979 ANN. SURV. MASS. LAW § 12.8, at 351-54.

[2] Smith v. Caggiano, 1981 Mass. App. Ct. Adv. Sh. 1101, 421 N.E.2d 473; Mongeau v. Borlen, 1981 Mass. App. Ct. Adv. Sh. 934, 419 N.E.2d 1386.

[3] Chapter 406 was approved on July 20, 1979 and took effect on October 18, 1979.

[4] St. 1979, c. 406, § 1.

[5] *See* Gitlin, *supra* note 1, at 353.

problem by requiring only that the consumer make a showing that he has been "injured."[6] Additionally, section 9, which previously had limited rights of action only to persons who were either purchasers or lessees, was broadened to give standing to *any person* injured by the use of an unfair or deceptive act or practice.[7]

The statute of limitations arising out of any chapter 93A action runs 4 years following the time from which the cause of action accrues.[8] Therefore, the practicing attorney should be aware that for any action which accrued on or before October 17, 1979, the last day on which the former version of section 9 was in effect in Massachusetts, his client must be a purchaser or lessee and must have suffered a loss of money or property in order to maintain successfully a chapter 93A action.

In *Smith* v. *Caggiano*,[9] the Appeals Court stated that it had no difficulty in concluding that the 1979 amendment which deleted the loss of money or property requirement was only to receive prospective treatment. Furthermore, in *Mongeau* v. *Borlen*,[10] the court, without addressing the 1979 amendment, decided whether the plaintiff qualified as a purchaser or lessee and thus had standing to sue under chapter 93A. Had the court applied chapter 93A, as amended in 1979, the court's discussion of whether the plaintiff had standing as a purchaser or lessee would have been unnecessary.

In addition to clarifying which actions are governed by the amended version of chapter 93A, both *Smith* and *Mongeau* also clarified the scope of two important limitations of the pre-1979 statute: the "loss of money and property" and the meaning of "purchaser or lessee."

In *Smith*, the court found that a lower court judgment against the plaintiffs for ambulance fees constituted "a loss of money or property" for purposes of the pre-1979 versions of chapter 93A, which required proof of such loss to maintain an action for an unfair or deceptive practice.[11]

The plaintiffs all had received ambulance service from the defendant, a Medicaid provider. The defendant, in spite of being informed by the plaintiffs of their Medicaid eligibility, nevertheless billed the plaintiffs directly for its services, rather than billing the Department of Public Welfare.[12] By so doing, the defendant was able to charge the plaintiffs at a rate that exceeded the Medicaid fee schedule for such services.[13] When each plaintiff failed to pay, the defendant sought and obtained judgment against several of the plaintiffs in small claims court for the amount of the bills.[14]

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[6] G.L. c. 93A, § 9, as amended by Acts of 1979, c. 406.

[7] G.L. c. 93A, § 9(1).

[8] G.L. c. 260, § 5.

[9] 1981 Mass. App. Ct. Adv. Sh. 1101, 421 N.E.2d 473.

[10] 1981 Mass. App. Ct. Adv. Sh. 934, 419 N.E.2d 1386 (rescript opinion).

[11] 1981 Mass. App. Ct. Adv. Sh. at 1103, 421 N.E.2d at 475.

[12] *Id.* at 1102, 421 N.E.2d at 475.

[13] *Id.*

[14] *Id.*

Following the small claims court judgment in favor of the defendant, the plaintiffs brought a class action[15] against the defendant. They claimed that the defendant had engaged in an unfair practice by ignoring their Medicaid eligibility in order that the defendant could charge higher fees to plaintiffs.[16] The defendant argued that the plaintiffs had failed to allege a loss of money or property and thus lacked standing to bring the action.[17]

The court found that the plaintiffs had suffered a loss of money.[18] According to the court, the judgments against the plaintiffs established a debt analogous to medical bills incurred, but not yet paid.[19] The court reasoned that "anyone inquiring into the financial status of the plaintiffs would realistically consider each of them poorer by the amount of the judgment rendered."[20] Thus, the court concluded that "the plaintiffs against whom [the defendant] obtained judgment have suffered loss of money as surely as if they had given promissory notes in payment of [the defendant's] fees."[21]

The court emphasized that loss does not turn on the flow of dollars from the plaintiffs to defendant,[22] and pointed out that chapter 93A "was designed to meet a pressing need for effective remedy, and . . . traditional technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice."[23] The court did note, however, that the loss of an opportunity to have the ambulance services paid by the Medicaid system was not in and of itself a loss of money or property.[24]

In the second case, *Mongeau* v. *Borlen*, the court considered whether the pre-1979 version of section 9 applied to a consumer who incurred legal expenses as a result of using a loaned car from an auto dealer while the dealer repaired the car which the consumer originally purchased.[25]

The plaintiff had purchased a used car from the defendant. Before the sale, the plaintiff told defendant's salesman that the car must be fit to pass

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[15] *See* Mass. R. Civ. P. 23, 365 Mass. 767-68 (1974).

[16] 1981 Mass. App. Ct. Adv. Sh. at 1103, 421 N.E.2d at 475.

[17] *Id.* at 1104, 421 N.E.2d at 476.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 1105, 421 N.E.2d at 476. The court cited Homsi v. C. H. Bobb Co., 1980 Mass. App. Ct. Adv. Sh. 1679, 409 N.E.2d 219, as having previously held that an intangible loss, such as loss of potential interest on a deposit not timely returned, was a loss within the meaning of chapter 93A. 1981 Mass. App. Ct. Adv. Sh. at 1105, 421 N.E.2d at 476. Moreover, the court noted that a tort plaintiff could recover, as compensatory losses, medical bills not yet paid. *Id.* Thus, collecting the debt on an accrual basis would be the equivalent of having paid the debt. *Id.*

[22] 1981 Mass. App. Ct. Adv. Sh. at 1101-05, 421 N.E.2d at 474-76.

[23] *Id.* at 1105, 421 N.E.2d at 476 (*citing* Baldassari v. Public Fin. Co., 369 Mass. 33, 40-41, 337 N.E.2d 701, 706 (1975)).

[24] *Id.* at 1106, 421 N.E.2d at 477.

[25] The 1979 Act deleted the limitation that only a consumer who had purchased or leased goods, services or property could employ the remedial provisions of § 9.

inspection because he needed the car for transportation to and from school.[26] The salesman then represented to the plaintiff that the car was in "good shape."[27] A few weeks later, when the car failed to pass inspection, the plaintiff brought the car back to the defendant who estimated that the repairs would take "at least one week."[28] In place of the car, the defendant loaned the plaintiff a used ambulance also owned by the defendant.[29] The defendant put the plaintiff's license plates on the ambulance and advised the plaintiff that he could operate the ambulance lawfully so long as the plaintiff had the bill of sale for the ambulance, which defendant provided the plaintiff.[30] A few days later, the plaintiff was arrested for operating an unregistered and uninsured motor vehicle, for operating a motor vehicle without an inspection sticker, and for unlawfully transferring registration plates from one car to another.[31] The plaintiff incurred $400 in legal fees in successfully defending himself against the motor vehicle charges, and brought a chapter 93A action against the dealer to recover the cost of those fees.[32]

The plaintiff argued that the loaned car constituted an implied term of the original purchase contract because the plaintiff had informed the defendant before buying the car that he needed it for transportation to school and that it must be fit to pass inspection.[33] Thus, the plaintiff claimed to have standing as a purchaser under the pre-1979 version of chapter 93A, section 9, which applied only to a person who "purchases or leases goods, services or property . . . primarily for personal, family or household purposes."[34] The Appeals Court disagreed.

The court found that the loan did not constitute an implied term of the original sale.[35] While it agreed that the contract may have obligated the defendant to perform repairs, it saw no obligation on the seller to provide alternative transportation. The court viewed the loaning of the car as a transaction separate from the original contract. Furthermore, since no consideration changed hands in loaning the car, the court concluded that the loan amounted to neither a purchase nor a lease.[36] Therefore, the court held that the plaintiff did not have standing under section 9(1).[37]

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[26] 1981 Mass. App. Ct. Adv. Sh. at 934, 419 N.E.2d at 1387.
[27] *Id.* at 934-35, 419 N.E.2d at 1387.
[28] *Id.* at 935, 419 N.E.2d at 1387.
[29] *Id.*
[30] *Id.* at 935, 419 N.E.2d at 1387-88.
[31] *Id.* at 935, 419 N.E.2d at 1388.
[32] *Id.*
[33] *Id.* at 936, 419 N.E.2d at 1388.
[34] *Id.*
[35] *Id.* at 936, 419 N.E.2d at 1389.
[36] *Id.*
[37] *Id.*

§ 15.3. Chapter 93A — Application of "In a Business Context." Chapter 93A provides section 11 consumers with a private remedy only for acts or practices which occur "in the conduct of any trade or commerce."[1] The commercial transaction, however, need not take place in the ordinary course of a person's business or occupation.[2] Rather, the Supreme Judicial Court has ruled that chapter 93A requires the transaction, even if an isolated transaction, to simply take place "in a business context."[3]

During the *Survey* year, the Appeals Court further defined the concept of "in the business context." In *Lynn* v. *Nashwaty*[4] the plaintiff buyer sought damages under chapter 93A, section 11 against the sellers of a retail stationary store. In the purchase and sale agreement for the store, the defendants (sellers) represented that the inventory on the premises, which constituted part of the assets being transferred, was worth $13,000 at wholesale cost.[5] Shortly after the buyer assumed ownership of the business, he found that the inventory on the premises had a retail value of $13,000 but a wholesale value of only approximately half that amount.[6] Obtaining no satisfaction from the defendants after notifying them of the discrepancy, the plaintiff brought an action under chapter 93A, section 11 alleging that the misrepresentation by the defendant was an unfair or deceptive act or practice.[7]

The defendants argued that chapter 93A should not apply to an isolated transaction such as was involved in this case.[8] The Appeals Court rejected this argument by applying the rule of *Begelfer* v. *Najarian*[9] that an isolated transaction is subject to section 11 if it takes place "in a business context."[10] The court then focused its opinion on determining whether the sale of the retail store was in fact in a business context. In so doing, the court cited the six indicia that the Supreme Judicial Court had set forth in *Begelfer* for determining whether "a business context" existed:[11]

(1) the nature of the transaction,

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§ 15.3. [1] G.L. c. 93A, §§ 2(a), 11.

[2] Begelfer v. Najarian, 1980 Mass. Adv. Sh. 1721, 1735, 409 N.E.2d 163, 176.

[3] *Id.* at 1734, 409 N.E.2d at 176.

[4] 1981 Mass. Adv. Sh. 1453, 423 N.E.2d 1052.

[5] *Id.* at 1454, 423 N.E.2d at 1053. During negotiations one of the defendants had also told the plaintiff that the value of the inventory was worth $13,000 at wholesale. This was represented before the parties agreed on a sale price. *Id.*

[6] *Id.*

[7] *Id.* The plaintiff would have been able to recover his damages in a simple contract action but he sought relief under c. 93A in order to recover attorneys' fees, as well.

[8] *Id.* at 1456, 423 N.E.2d at 1054. The defendants cited Lantner v. Carson, 374 Mass. 606, 373 N.E.2d 913 (1978), which held that c. 93A did not apply to the sale of a house from one individual to another, as support for this argument. 1981 Mass. App. Ct. Adv. Sh. at 1455, 423 N.E.2d at 1054.

[9] 1980 Mass. Adv. Sh. 1721, 409 N.E.2d 167.

[10] 1981 Mass. Adv. Sh. at 1457, 423 N.E.2d at 1054.

[11] *Id.* at 1456, 423 N.E.2d at 1054.

(2) the character of the parties,
(3) the activities engaged in by the parties,
(4) whether similar transactions had been undertaken in the past by the parties,
(5) whether the transaction is motivated by business or personal reasons, and
(6) whether the participants played an active part in the transaction.

The court seemed to find two factors persuasive in determining that the transaction occurred "in a business context": (1) the defendants were businessmen who sold assets used in their former business and (2) defendants were fully involved in every aspect of the transaction.[12] The court pointed out that "the sale of a business or business assets by a businessman is not the same as the sale of a home by an individual homeowner . . . and the defendants in [this case] were fully involved in every aspect of the transaction . . . including the false representation which is the core of the alleged chapter 93A violation."[13]

Perhaps as significant as the indicia the court in *Lynn* did consider in reaching its holding are the factors which the court did not evaluate. For example, while the court analyzed the character of the defendant, it evaluated neither the character nor the motivation of the plaintiff. The trial court had noted that the plaintiff had never engaged in a retail business, although he did enter into the transaction with the intention of running the store as a business.[14] Thus, the plaintiff was at arm's length in the transaction and an inherent cautiousness was more likely to exist than in a typical consumer context. Furthermore, unlike the trial court, the Appeals Court gave only minimal consideration to whether the parties had undertaken similar transactions in the past. In a brief footnote, the court noted that it was "arguable" that the defendants fit within this criteria for determining whether a business context existed because they had "participated, as a family, in two prior sales of stationery stores, although not as sellers, but as buyers."[15]

That the court focused on the defendants and gave such weight to the fact that they were businessmen, without analyzing the nature of the transaction with respect to the capacities of both parties, has implications for future litigation. The applicability of section 11 has shifted from those transactions which occur "in the ordinary course" of a seller's trade or business to those which take place "in a business context." If the court in future cases continues to stress the business experience of the seller to the exclusion of other factors, the test of "in a business context" may begin to become synonymous with this one single factor.

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[12] *Id.* at 1457, 423 N.E.2d at 1054.
[13] *Id.*
[14] *Id.* at 1454, 423 N.E.2d at 1053.
[15] *Id.* at 1457 n.3, 423 N.E.2d at 1054 n.3.

§ 15.4. Chapter 93A — Attorneys' Fees. Chapter 93A, section 9 entitles a consumer to an award of attorneys' fees even if the consumer has suffered no actual damage as a result of the use of an unfair or deceptive act or practice.[1] During the 1981 *Survey* year, the Supreme Judicial Court held that section 11[2] provides the same right to businesspersons as well.

In *Raymer* v. *Bay State National Bank*,[3] the Supreme Judicial Court upheld a lower court finding that a bank had "committed an unfair act or practice" in wrongfully dishonoring several of the plaintiff's[4] checks drawn on the bank.[5] Yet, although the plaintiff had sought damages in the face amount of the checks which were dishonored, the court found that plaintiff had suffered no actual damages.[6]

Addressing itself to the issue of attorneys' fees, the Court noted that to award such fees in most cases where no other relief is awarded would be anomalous.[7] Yet, in spite of the lack of actual damages, the Court held that Section 11 entitled the plaintiff to "an award of modest attorneys' fees."[8]

The Court explained that section 11 requires an award of attorneys' fees if a violation of section 2 has occurred. The Court noted that the trial judge had made this requisite finding.[9] Furthermore, the Court stated that the suit was not "frivolous, unreasonable or groundless."[10] Thus, lacking any reason to deny the award of attorneys' fees and faced with a situation where chapter 93A had been violated, the Court upheld the award of the fees.[11]

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§ 15.4. [1] G.L. c. 93A, §§ 9(3), 9(4); Hanner v. Classic Auto Body, Inc., 1980 Mass. Adv. Sh. 1219, 406 N.E.2d 686.

[2] Section 11, paragraph 6, provides: "If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action." G.L. c. 93A, § 11, para. 6.

[3] 1981 Mass. Adv. Sh. 1870, 424 N.E.2d 515.

[4] The plaintiff in this case was Robert S. Raymer, as assignee of Raymer Products Corporation. Raymer was president and principal shareholder of the corporation. *Id.* at 1871, 424 N.E.2d at 517.

[5] *Id.* at 1879, 424 N.E.2d at 521. The Court's opinion primarily focused on applicable sections of article 4 of the Uniform Commercial Code (UCC), incorporated in G.L. 106, § 4-101 *et seq.*

[6] 1981 Mass. Adv. Sh. at 1879, 424 N.E.2d at 521. Although the Court agreed that the bank had acted wrongfully, *id.*, it found no actual damages because the company had filed for a chapter 11 bankruptcy. *Id.* at 1877-78, 424 N.E.2d at 520. The Court noted that the net result of the bank's wrongful dishonor in this case was that the company's bank account was used to pay debts different from those which the company sought to pay, although the company itself did not suffer a loss of money to which it otherwise would have been entitled. *Id.* at 1877, 424 N.E.2d at 520.

[7] *Id.* at 1880, 424 N.E.2d at 521.

[8] *Id.* Under section 11, to award attorneys' fees, a judge must find a violation of section 2 which prohibits unfair or deceptive acts or practices. *See* G.L. c. 93A, § 11.

[9] 1981 Mass. Adv. Sh. at 1880, 424 N.E.2d at 521.

[10] *Id.*

[11] *Id.*

Prior to *Raymer*, a businessperson who felt victimized by an unfair or deceptive practice may have hesitated to bring a chapter 93A action when his proof of damages was weak. Such consumers may have been concerned that a failure to establish actual damages would result not only in loss of the case, but also in a loss of the cost of legal fees. By awarding legal fees in the absence of proof of actual damages, this case may serve to encourage businesspersons to bring chapter 93A actions, even when they anticipate difficulty in proving actual damages.[12]

§ 15.5. Chapter 93A — Application of "Unfair or Deceptive." During the *Survey* year, in *Essigmann* v. *Western New England College*[1] an aggrieved law student brought a chapter 93A action against his law school, for its failure to award him a juris doctor degree. The plaintiff had received a failing grade in three courses, whereupon he later repeated and passed two of those courses.[2] However, he was unable to repeat the third course, a summer elective, after the school dropped the course from its curriculum.[3]

The school, consistent with its policy, computed the failing grades into the plaintiff's cumulative grade point average even though the plaintiff had subsequently repeated and passed the courses.[4] Accordingly, the plaintiff failed to reach the minimum grade point average required for earning a juris doctor degree.[5] The plaintiff argued that the school's policy was an arbitrary, unfair and deceptive practice and thus a violation of chapter 93A, but the court disagreed.[6]

The court acknowledged that the school's catalogue did not articulate the grading policy. However, the court noted that the semester grade reports recited the plaintiff's cumulative grade average and indicated his probationary status.[7] Thus, the plaintiff could not have been unaware of the school's policy. As for the school taking the summer course out of its course offering, the court noted that the school catalogue did specifically reserve the right of the school to change such offerings.[8] The court stated that the plaintiff, at all pertinent times, could have ascertained from the semester reports that he would need to excel in other courses to compensate for his

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[12] *Cf.* Slaney v. Westwood Auto, Inc., 366 Mass. 688, 322 N.E.2d 768 (1975) (where the Court recognized that the legislative intent for awarding attorneys' fees includes making small claims sufficiently attractive to attorneys to bring these claims).

§ 15.5. [1] 1981 Mass. App. Ct. Adv. Sh. 846, 419 N.E.2d 1047 (rescript opinion).

[2] *Id.* at 846, 419 N.E.2d at 1048.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 847, 419 N.E.2d at 1048-49.

[8] *Id.* at 847, 419 N.E.2d at 1049.

failure.[9] Thus, the court found nothing in the school's policy to be unfair.[10]

The court, in discussing its concept of fairness, demonstrated a lack of sympathy for the plaintiff's cause, stating that "[a]s a matter of common sense, a student who passes a course only after failing and repeating it is not academically equal to the student who takes the course but once and passes. Thus it is neither arbitrary nor unfair to adopt a grading system which reflects this difference."[11] Thus, the court's opinion indicates that, in determining whether an unfair or deceptive practice has occurred, the court will not necessarily focus on any one particular fact, but will look at the circumstances as a whole. According to the court, the fact that the school's grading policy was not explicitly stated in its catalogue was not sufficient to demonstrate lack of notice, especially when both subsequent grade reports and common sense indicated otherwise. The tone of the court's opinion seems to reflect a lack of patience for and a desire to discourage the use of chapter 93A in circumstances which it feels are undeserving of the statute's protection.

§ 15.6. Chapter 93A — Business Practice Defense. In 1979, the Appeals Court imposed a strict standard for determining whether an act or practice is unfair or deceptive among businesspersons in *Levings* v. *Forbes & Wallace, Inc.*.[1] The court there ruled that in order for a businessperson to recover under chapter 93A, "[t]he objectionable conduct [of the defendant] must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce."[2] During the *Survey* year, in *Professional Economics, Inc.* v. *Professional Economic Services, Inc.*,[3] the Appeals Court added content to this standard by providing an example of inappropriate rascal-like conduct.

In this case, Professional Economics, Inc. (PEI), the plaintiff, was a small company organized for the purpose of providing financial counseling

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[9] *Id.*

[10] *Id.* While chapter 93A prohibits unfair or deceptive acts or practices, it provides no definition of either "unfair" or "deceptive." Rather, the statute directs the courts to follow interpretations by the Federal Trade Commission and the federal courts in construing section 5(a)(1) of the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1); G.L. c. 93A, § 2(b). The Supreme Judicial Court has determined that the existence of unfair acts or practices must be determined by the circumstances of each case. *See* Commonwealth v. DeCotis, 366 Mass. 234, 241, 316 N.E.2d 748, 754 (1974).

[11] 1981 Mass. Adv. Sh. at 847, 419 N.E.2d at 847.

§ 15.6. [1] *See* Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 396 N.E.2d 149 (1979). For a discussion of the development of the stricter standard *see* Gitlin, *Consumer Law*, 1979 ANN. SURV. MASS LAW § 12.8, at 341-43.

[2] *Id.* at 502, 396 N.E.2d at 153.

[3] 1981 Mass. App. Ct. Adv. Sh. 1145, 421 N.E.2d 1221.

services to professional people.[4] Less than two years after PEI was organized, the defendant, Professional Economic Services, Inc. (PES) began operating a franchise in Massachusetts, offering a service similar to that of the plaintiff.[5] PES, a subsidiary of the John Hancock Life Insurance Company had its base of operation in New York City.[6] PEI sued PES for use of an unfair business practice under chapter 93A, section 11.[7]

The court reversed the trial court's finding that PEI had engaged in an unfair business practice.[8] The court explained that the trial judge had reached his conclusion as a result of erroneously finding that buyer confusion had existed and that PEI had acquired a right to a "secondary meaning in the making."[9] The Appeals Court held that buyer confusion itself was not sufficient to sustain an action of unfair competition absent a finding of secondary meaning.[10]

In its analysis, the court applied the criteria established in *PMP Associates, Inc.* v. *Globe Newspaper Co.*[11] for determining the existence of a violation of ch. 93A: "(1) whether the practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)."[12] The first factor was not satisfied because the

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[4] *Id.* at 1146, 421 N.E.2d at 1223.

[5] *Id.* at 1147, 421 N.E.2d at 1223.

[6] *Id.*

[7] *Id.* at 1146, 421 N.E.2d at 1222. PEI also sued for unfair competition under common law, a claim which the court rejected. *Id.*

[8] *Id.* at 1146, 421 N.E.2d at 1223.

[9] *Id.* at 1155, 421 N.E.2d at 1227. The court found no secondary meaning of the name "Professional Economics," because the name had not become distinctive. *Id.* at 1149-53, 421 N.E.2d at 1224-27. PEI had not succeeded in "creating a congruence in the minds of an appreciable number" of professionals, *id.* at 1151, 421 N.E.2d at 1225, nor had the name been in use for a sufficient time, *id.* at 1151-52, 421 N.E.2d at 1225-26, nor had the name been so extensively advertised to create such a congruence. *Id.* Furthermore, PEI had not acquired a "secondary meaning in the making" with respect to the name, *id.* at 1152, 421 N.E.2d at 1226, because the evidence showed that "PEI's efforts and goodwill were far too minimal to invoke protection." *Id.* at 1154, 421 N.E.2d at 1227 ("Secondary meaning in the making" is recognized for purposes of preventing intentional capitalization on the efforts and goodwill of another. *Id.* (*citing* Orion Pictures Co. v. Dell Pub. Co., 471 F. Supp. 393, 396 (S.D.N.Y. 1979)).

[10] *Id.* at 1153, 421 N.E.2d at 1226. In Massachusetts, a plaintiff may show unfair competition by either secondary meaning or palming off. Mann v. Parkway Motor Sales, Inc., 324 Mass. 151, 156, 85 N.E.2d 210, 213 (1949). The term "palming off" indicates an attempt to induce customers to believe that one product is actually the product of another producer. *See* Remco Industries, Inc. v. Toyomenka, Inc., 286 F. Supp. 948, 954 (S.D.N.Y.) *aff'd* 397 F.2d 977 (2d Cir. 1968). In *Professional Economics* the plaintiff introduced no evidence to show palming off. 1981 Mass. Adv. Sh. at 1155, 421 N.E.2d at 1227.

[11] 366 Mass. 593, 321 N.E.2d 915 (1975).

[12] 1981 Mass. Adv. Sh. at 1155, 421 N.E.2d at 1227 (quoting PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596, 321 N.E.2d 915, 917).

court found no unfair competition by either a secondary meaning or palming off theory.[13] The other factors failed to be satisfied because no evidence existed that any actual or prospective consumer of PEI was misled into going to PES.[14] The only other incidents of confusion between the two companies involved mail or phone calls intended for PES reaching PEI.[15] No evidence existed, however, that mail meant for PEI reached PES.[16]

The court's analysis emphasizes the difference in standards which exist between section 11 and section 9 plaintiffs before the court will apply the protections of chapter 93A. Chapter 93A was enacted to protect the consumer who is in a weak position with respect to the person or business with whom he is dealing. A businessperson under chapter 93A, however, would, according to the Appeals Court, need to show that any so-called immoral, unethical, oppressive, or unscrupulous conduct reached a level so as to "raise an eyebrow [of someone] inured to the rough and tumble world of commerce."[17] Thus, rather than establishing a parity between parties in their dealings with one another, chapter 93A requires a section 11 plaintiff to be tougher in, and more calloused from, the world of business than the section 9 plaintiff. The manner in which the court dismissed the plaintiff's arguments concerning the existence of unfair or deceptive practices indicates that PEI did not constitute a threshold case as to the degree of roughness the court would require of a businessperson to endure before granting relief under chapter 93A. From the court's analysis, it appears that the tougher the business context, the tougher the businessperson would presumably have to be. It remains to be resolved by future cases precisely what threshold of roughness the court will require a businessperson to suffer before allowing it to benefit from the protections of the Consumer Protection Act.

§ 15.7. Chapter 93A — Application to Banks. During the *Survey* year, the Supreme Judicial Court resolved the question, left open in prior cases,[1] of whether chapter 93A applies to banks. In *Raymer* v. *Bay State National Bank*,[2] the Court held that an argument that chapter 93A did not apply to banks was "contrary to the plain language of the statute."[3] The Court found that banks engage in "trade or commerce," as required by § 2 of

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[13] *Id.*

[14] *Id.* at 1155-56, 421 N.E.2d at 1228.

[15] *Id.* at 1155, 421 N.E.2d at 1238.

[16] *Id.*

[17] *Id.* at 1156, 421 N.E.2d at 1228.

§ 15.7. [1] *See* Murphy v. Charlestown Savings Bank, 1980 Mass. Adv. Sh. 1323, 1327, 405 N.E.2d 954, 956-57; Mechanics National Bank v. Killeen, 377 Mass. 100, 110 n.8, 384 N.E.2d 1231, 1237-38 n.8 (1979).

[2] 1981 Mass. Adv. Sh. 1870, 424 N.E.2d 515.

[3] *Id.* at 1879, 424 N.E.2d at 521. Section 2(a) states: "Unfair method of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared

chapter 93A, and thus, rejected the argument that banks should be exempt from chapter 93A.

The defendant bank had argued that since chapter 93A directs the Massachusetts courts to look to Federal Trade Commission and federal court interpretations of the FTCA for guidance in interpreting section 2(a),[4] and since the FTCA specifically excludes banks from its jurisdiction,[5] the Massachusetts legislature similarly intended to exclude bank conduct from chapter 93A.[6]

While acknowledging that the FTCA does not govern bank conduct, the Court refused to find a similar exemption in chapter 93A.[7] The Court pointed out that federal law authorized the Federal Reserve Board, rather than the FTC, to promulgate regulations prohibiting unfair or deceptive acts or practices by banks, including those acts or practices unfair or deceptive to consumers.[8] The Court reasoned therefore that "the fact that they [banks] are regulated by a different Federal agency does not require a similar exception from c. 93A."[9] The Court also pointed out that it has "had no hesitation in applying c. 93A to other regulated financial institutions" such as insurance companies and consumer loans.[10]

§ 15.8. Consumer Cost Credit Disclosure. Effective December 24, 1981, the Massachusetts legislature repealed chapter 140C of the General Laws and enacted chapter 140D.[1] Chapter 140D, commonly known as the Massachusetts truth-in-lending act, and regulations promulgated by the

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unlawful." G.L. c. 93A, § 2(a). Section 11, in pertinent part, states: "Any person . . . who suffers any loss . . . as a result of the use or employment by another person *who engages in any trade or commerce*. . . ." G.L. c. 93A, § 11 (emphasis added).

[4] "It is the intent of the legislature that . . . the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. ¶ 45(a)(1), as from time to time amended." G.L. c. 93A, § 2(b).

[5] Federal Trade Commission Act, 15 U.S.C. Section 45(a)(2) (1976).

[6] 1981 Mass. Adv. Sh. at 1879, 424 N.E.2d at 521.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* (citing Dodd v. Commercial Union Insurance Company, 373 Mass. 72, 79 n.6, 365 N.E.2d 802, 806 n.6 (1977); Schubach v. Household Finance Corp., 375 Mass. 133, 135, 376 N.E.2d 140, 141 (1978)). (In *Dodd*, the defendant also argued that chapter 93A excluded insurance companies because FTCA, which exempts insurance companies, is a guide to interpreting Massachusetts law. The Supreme Judicial Court refused to read section 2 as containing the legislative intent to except insurance companies from chapter 93A. In rejecting the defendant's argument, the Court noted that the FTCA does not cover Massachusetts insurance practices because those practices are subject to Massachusetts regulation. *See* 15 U.S.C. Section 1012(b). The Court also noted that Massachusetts had adopted its own form of insurance regulation. G.L. c. 176, § 1.)

§ 15.8. [1] 1981 Mass. Acts c. 733.

Division of Banks and Loan Agencies[2] now govern disclosure by creditors of the cost of credit to consumers. Significant changes were made, and many creditors, especially those extending closed-end credit to consumers, must revise their disclosure documents to comply with the new requirements of chapter 140D and the regulations under chapter 140D. Most of the changes mirror the changes made to the federal truth-in-lending statute[3] by the Truth in Lending Simplification and Reform Act of 1980,[4] but important differences between the state and federal statutes and regulations remain.[5] Although many of the changes to chapter 140C contained in chapter 140D and the regulations thereunder affect closed-end credit disclosures, a number of important changes were made to the scope of the truth-in-lending act, to the requirements that apply to open-end credit transactions and to the civil liability provisions of the act. This section will discuss some of the more important changes to the provisions governing consumer credit cost disclosure reflected in chapter 140D and the regulations. Because this section will only highlight some of these changes, those not familiar with truth-in-lending requirements or desiring more information on the changes embodied in chapter 140D should refer to chapter 140D and the applicable regulations directly.

The Coverage of Chapter 140D. Section 2(a) exempts from chapter 140D credit transactions when the primary purpose of the transaction is agricultural. Section 1 defines agricultural purpose and agricultural products to include all phases of the production and sale of agricultural goods. Under the old law, extensions of up to $25,000 of credit for agricultural purposes were covered.[6]

Chapter 140D expands the definition of "dwelling" to include mobile homes and individual cooperative units as well as residential structures and condominiums. If a security interest is or will be acquired in real property or in personal property used or to be used as the consumer's principal dwelling in connection with a credit transaction, the statute applies irrespective of the total amount financed. The old law only included credit transactions involv-

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[2] 209 C.M.R. 32 (effective June 4, 1982).

[3] 15 U.S.C.A. §§ 1601-1666j.

[4] Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, tit. VI, 94 Stat. 132 (1980).

[5] The mandatory compliance date for the federal truth-in-lending statute was October 1, 1982. In Massachusetts, creditors were required to comply with the state truth-in-lending statute by April 1, 1982. The compliance date was effectively delayed, however, when the mandatory compliance date for the regulations was scheduled for October 1, 1982. 209 C.M.R. 32.29. Massachusetts obtained an exemption from the federal requirements prior to the compliance date. 47 Fed. Reg. 42, 171-172 (1982). All creditors, except certain banking institutions, are exempt from most of the requirements of the federal truth-in-lending statute.

[6] G.L. c. 140C, § 2(c) (repealed effective Dec. 24, 1981).

ing personal property when the total amount financed did not exceed $25,000.[7]

Finally, chapter 140D and the regulations under chapter 140D now provide greater certainty in determining whether a creditor is a creditor for truth-in-lending purposes. The old law merely defined a "creditor" as "a person who in the ordinary course of business regularly extends ... consumer credit. . . ."[8] Chapter 140D similarly defines "creditor" as a person who regularly extends consumer credit.[9] The regulations further provide, however, that a person regularly extends credit if in the preceding year the person extended credit more than twenty-five times, or more than five times if a security interest was taken in a consumer's principal dwelling in connection with the credit transaction.[10]

The definition of "creditor" has also been clarified in another important respect for creditors and their subsequent assignees. "Creditor" is defined in part as "the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement."[11] The new definition should provide certainty as to which party is considered the creditor for purposes of truth-in-lending when a consumer's obligation arising from a credit sale is immediately assigned to a banking institution or finance company.

Open-End Credit. The initial disclosure requirements for open-end credit transactions in chapter 140D have been simplified. Section 11 of chapter 140D no longer requires that any required minimum periodic payment be stated in the initial disclosures. The security interest disclosure has been simplified: A creditor need only disclose that a security interest is or will be taken in either the property purchased as part of the credit transaction or in other property identified by item or type.[12] The creditor is no longer required to use a specified type size, although the terms "finance charge" and "annual percentage rate" must be more conspicuous than any other required disclosure, except the identity of the creditor, when required to be used with a corresponding numerical figure.[13] The creditor may, except for

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[7] *Id.* § 2(c).
[8] *Id.* § 1(1).
[9] G.L. c. 140D, § 1. Section 1 also sets forth other limitations on the definition of creditor.
[10] 209 C.M.R. 32.01(17) & n.3.
[11] G.L. c. 140D, § 1.
[12] The repealed section governing initial disclosures required creditors to provide either a description or identification of the type of interest taken or to be taken as well as the conditions under which such an interest may be retained or acquired. G.L. c. 140C, § 6(a)(6) (repealed effective Dec. 24, 1981).
[13] *Id.* § 8(a); 209 C.M.R. 34.05(a)(2).

the terms "finance charge" and "annual percentage rate," use whatever terms convey substantially the same meaning as those used in chapter 140D; the creditor is no longer required to use the terminology set forth in the statute.[14]

The only additional initial disclosure requirement for open-end credit transactions is that creditors must now state whether or not the consumer has a time period within which the credit extended may be repaid without the imposition of a finance charge.[15] Previously, the creditor had to disclose the existence of a "free-ride" period but not that no such "free-ride" period was available.

The requirements with respect to periodic statements have not been extensively changed. The new statute has simplified the form of the periodic statement. Creditors are no longer required to place most of the periodic disclosures on the face of the periodic statement, and need not give them in a form which the consumer may keep.[16] As with initial disclosure documents, only the terms "finance charge" and "annual percentage rate," when required to be used with corresponding numerical figures, must be more conspicuous than other disclosures.[17]

One important change in the right of rescission now permits creditors extending open-end credit to more easily acquire and retain a security interest in a consumer's principal dwelling. Under the old law, the right of rescission had to be given to a consumer each time credit was extended under an open-end credit plan if the creditor had a security interest in the consumer's principal dwelling, effectively precluding open-end creditors from acquiring such security interests. Under section 10(e)(1)(D), however, a creditor under a preexisting open-end credit plan need not give the right of rescission for each advance under the plan if the creditor already has a security interest in the consumer's principal dwelling and the advances are made in accordance with a previously established credit plan.[18]

Finally, it should be noted that the definition of "open-end credit plan" has been clarified. An "open-end credit plan" under the new statute is a plan under which the creditor "reasonably contemplates repeated transactions."[19] The old standard was whether the creditor under the plan "may

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[14] G.L. c. 140D, § 8(a).

[15] *Id.* § 11(a)(1).

[16] *Compare id.*, § 11(b) *with* G.L. c. 140C, § 6(b)-(c) (repealed effective Dec. 24, 1981).

[17] G.L. c. 140D, §8(a).

[18] *Id.* § 10(e)(1)(D). Subsection D is scheduled to be deleted on April 1, 1985. 1981 Mass. Acts c. 733, § 25. The trial period for this exemption on the federal level is scheduled to end on September 30, 1985. 15 U.S.C.A. § 1635(e)(2).

[19] G.L. c. 140D, § 1. Under the regulations, a consumer under an open-end credit plan must be able to obtain credit up to the credit limit set by the creditor to the extent that any outstanding balance is repaid. 209 C.M.R. 32.02(a)(20)(iii).

permit the customer to make purchases or obtain loans, from time to time. . . ."[20]

Closed-End Credit. The most significant changes to consumer credit cost disclosures affect the form and content of the disclosures required to be made in connection with other than open-end credit plans. Under section 12(b)(1) of chapter 140D, the following disclosures must be "conspicuously segregated" from all other information provided in connection with a closed-end credit transaction, including a residential mortgage transaction:

(1) the "amount financed," which may not be itemized, using that term and a descriptive explanation of the term;
(2) the amount of the "finance charge," using that term and a descriptive explanation of the term;
(3) the finance charge expressed as an "annual percentage rate," using that term and a descriptive explanation of the term (the terms "finance charge" and "annual percentage rate" must be more conspicuous than all other disclosures, except the creditor's identity, when required to be used with a corresponding numerical figure);[21]
(4) the "total of payments," usually equal to the sum of the amount financed and the finance charge, using the term "total of payments" and a descriptive explanation of the term;
(5) the schedule of payments;
(6) in a credit sale, the "total sale price," equal to the sum of the cash price, additional charges and the finance charge, using the term "total sale price"and an explanation of the term which includes the amount of any downpayment;[22]
(7) in a secured transaction, a statement that a security interest has been or will be acquired in the property purchased as part of the transaction or other property identified by item or type;
(8) any late payment charge;
(9) a statement whether or not the consumer will receive a rebate of a portion of the finance charge if the finance charge is precomputed and the obligation is paid in full before the end of the term or, if the finance charge is not precomputed, whether a penalty will be imposed for prepayment;
(10) a statement that the consumer should refer to the appropriate contract document for additional information about specified contract provisions;

[20] G.L. c. 140C, § 1(r)(1) (repealed effective Dec. 24, 1981).

[21] If the annual percentage rate may increase after the credit is extended, the regulations impose additional disclosure requirements. The creditor must disclose the circumstances under which the rate may increase, the effect of any increase, any limitation on the amount of the increase and an example of how an increase would change the payment terms. 209 C.M.R. 32.18(f)(1)-(4). The regulation also states that if a creditor requires the consumer to maintain a deposit, the creditor must disclose that the annual percentage rate does not reflect the deposit. The regulation exempts from this requirement such deposits as escrow accounts for items such as taxes and deposits that earn interest at a rate less than five per cent per year. *Id.* 32.18(r) & n.45.

[22] The regulations under chapter 140D set forth sample explanations which are required to accompany the disclosures set forth in section 12(a)(2)(A)-(5), (7) of chapter 140D. 209 C.M.R. 32.18(b), (d)-(e), (h), (j).

(11) in a residential mortgage transaction, a statement whether or not a subsequent purchaser may assume the consumer's obligation on its original terms;
(12) the disclosures required to be made to exclude from the finance charge premiums for credit life, accident, health, property and liability insurance; and
(13) the disclosures required to be made to exclude from the finance charge fees paid to public officials or premiums for insurance obtained in lieu of a security interest.

The form of the disclosures set forth above represents simplification of a number of requirements imposed by prior law. For example, many of the prior disclosures required for credit sale transactions have been eliminated. The security interest disclosure, as with the open-end security interest disclosure, has been significantly simplified. The creditor may not disclose the method for calculating the finance charge rebate in the section of the truth-in-lending disclosure statement containing the required disclosures. If the creditor chooses to disclose the method for calculating the rebate, it must be separate from the required disclosures. Also, the creditor may not provide an itemization of the amount financed in the section of the disclosure statement containing the required disclosures, although the creditor must provide the itemization separately or provide the consumer with a statement of the right to obtain a written itemization and spaces for indicating whether or not the consumer desires an itemization by placing his or her initials in the appropriate space.[23]

Two other changes to prior law reflected in chapter 140D and the regulations under chapter 140D significantly affect closed-end credit transactions. First, if a closed-end obligation is payable on demand, the disclosures must be based on an assumed maturity of one year rather than six months.[24] Second, in a residential mortgage transaction subject to the federal Real Estate Settlement Procedures Act,[25] the creditor must deliver or mail to the consumer good faith estimates of the truth-in-lending disclosures required to be made within three business days after the creditor receives the consumer's written credit application or before the credit is extended, whichever is earlier.[26] If the disclosures are delivered within three business days after the receipt of the application and the annual percentage rate at the time of consummation differs from the disclosed annual percentage rate by more than one-eighth of one percentage point for a regular transaction or one-fourth of one percentage point for an irregular transaction, the creditor must disclose the new annual percentage rate either by the time of consummation or settlement.[27]

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[23] G.L. c. 140D, § 12(a)(2)(B).
[24] 209 C.M.R. 32.17(c)(5).
[25] 12 U.S.C. §§ 2601-2617.
[26] G.L. c. 140D, § 12(b)(2).
[27] *Id.*; 209 C.M.R. 32.19(b). The new timing requirement and subsequent disclosure require-

Enforcement Provisions. Chapter 140D embodies two important changes to the provisions governing enforcement of the truth-in-lending disclosure requirements. One change is the addition of restitution provisions empowering the Commissioner of Banks to require creditors to make refunds to consumers when the finance charge or annual percentage rate was inaccurately disclosed.[28] The refund provisions were added to protect a consumer from paying more than the lower of the finance charge that is actually disclosed or the dollar amount corresponding to the annual percentage rate actually disclosed. In determining whether an error has occurred in the disclosure of the finance charge or the annual percentage rate and the amount of any refund to be made to a consumer, the statute sets forth various tolerances to be used. The tolerances do not apply, however, if the creditor willfully failed to accurately disclose in order to mislead the consumer.

The Commissioner is required to order the creditor to make a refund to the consumer when the disclosure error is the result of "a willful violation which was intended to mislead the person to whom the credit was extended."[29] If the error occurred as a result of "(A) a clear and consistent pattern or practice of violations [or] (B) gross negligence," the Commissioner is required to order the creditor to make a refund unless:

(1) the error involves the disclosure of a fee or charge which may be excluded from the finance charge if it is itemized separately, although the Commissioner must require a refund if the error involves credit life, accident or health insurance premiums and the transaction was consummated after April 1, 1982;
(2) the amount disclosed is ten percent or less of the amount that should have been disclosed and the other disclosures are correct;
(3) the creditor totally fails to disclose either the finance charge or the annual percentage rate; or
(4) the error involves clearly technical and nonsubstantive violations and does not mislead the consumer.[30]

In the case of other disclosure errors involving the finance charge or annual percentage rate, the Commissioner may order the creditor to make a refund.

The Commissioner may permit a creditor to make required refunds in installments, but may not order a refund to be made if it is less than one dollar. In the case of creditors subject to periodic examination by the Commissioner, refunds may only be ordered in connection with transactions

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ment apply to all residential mortgage transactions irrespective of the status of the lien. The statute defines residential mortgage transactions as transactions in which a security interest is taken in a consumer's dwelling to finance the acquisition or initial construction of the dwelling, G.L. c. 140D, § 1, and excludes any requirement that the security interest have first lien status.

[28] G.L. c. 140D, § 6.

[29] *Id.* § 6(2).

[30] *Id.* § 6(2)(A)-(D).

consummated after the last examination unless the creditor has willfully violated the disclosure requirements with the intent to mislead or the refund resulted from errors previously cited in examination reports and not corrected by the creditor. No refund may be ordered more than four years after the cause of action accrues unless the creditor has willfully violated the disclosure requirements with an intent to deceive. Finally, unless subject to a refund order, upon discovery of a disclosure error, the creditor has a grace period of sixty days within which to notify the consumer of the error and adjust the account to remedy the error.[31]

Prior law on civil liability for violations of the truth-in-lending statute has been changed to limit the liability of creditors and subsequent assignees for such violations.[32] Previously, creditors were liable for any violation of the truth-in-lending act, irrespective of the absence of harm to the consumer or the technical nature of the violation. Section 32(a) of chapter 140D now limits statutory damage liability to specified closed-end and open-end disclosure violations. As with the new restitution provisions, the civil liability section empowers the Commissioner of Banks to set tolerance for errors in finance charge and annual percentage rate disclosures.[33] Multiple obligors may now only receive one recovery of statutory damages,[34] and a limit is placed on the maximum liability of the creditor for the same violation regardless of the number of class actions.[35]

Massachusetts and Federal Truth-in-Lending Statutes. As noted above, most of the changes to prior law embodied in chapter 140D reflect changes made to the federal truth-in-lending statute and regulations. Important differences remain, however, between the Massachusetts and federal requirements. The principal differences under Massachusetts law are:

(1) The statute of limitations for causes of action arising under chapter 140D is four years. The federal statute of limitations is one year.[36]
(2) If the notice of the right to rescind or other disclosures are not delivered to the consumer, the right to rescind expires four years after the date of the consummation of the transaction or upon the sale of the property. The right to rescind under the federal truth-in-lending statute expires three years after consummation or upon the sale of the property.[37]
(3) Additional disclosures must be made to a consumer upon the creation of a credit balance in an open-end account. No such disclosures are required by the federal statute.[38]

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[31] *Id.* § 6(3)-(4).
[32] *Compare* G.L. c. 140C, § 10 (repealed effective Dec. 24, 1981) *with* G.L. c. 140D, § 32.
[33] G.L. c. 140D, §5(c).
[34] *Id.* § 32(d).
[35] *Id.* § 32(a)(2)(a).
[36] *Compare id.* c. 260, § 5A *with* 15 U.S.C.A. § 1640(e).
[37] *Compare* G.L. c. 140D, § 10(f) *with* 15 U.S.C.A. § 1635(f).
[38] *Compare* G.L. c. 140D, § 22 *with* 12 C.F.R. §§ 226.11, 226.21 (1982).

(4) If the consumer has been issued a credit card, the issuer cannot automatically deduct from a deposit account of the consumer all or a portion of the amount owed unless the consumer authorizes the deduction in a separately signed agreement which must contain a specified disclosure. Federal regulations only state that automatic debiting must be authorized in writing by the consumer.[39]
(5) There is a mandatory free-ride period for retail goods or services purchased with a credit card.[40]
(6) If a creditor fails to mail or deliver a periodic statement to a consumer fifteen days before the earlier of the end of the next succeeding billing cycle or the payment due date, the creditor may not collect any finance charge in the next billing cycle based on the balance at the end of the preceding cycle. Federal regulations require that the periodic statement be sent fourteen days in advance, and prohibit a creditor which fails to deliver the statement when required from collecting the portion of the finance charge or any other charge resulting from the failure.[41]

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[39] *Compare* G.L. c. 140D, § 21 *with* 12 C.F.R. § 226.12(d)(3) (1982).
[40] G.L. c. 140D, § 20. There is no comparable provision in the federal statute or regulations.
[41] *Compare* G.L. c. 140D, § 19 *with* 12 C.F.R. § 226.5(b)(2)(ii) (1982).