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Retail Industry 2021 Year in Review: Treble Damages Without Setting Foot in Massachusetts!?!?

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RETAIL INDUSTRY 2021 YEAR IN REVIEW

In today's world, business is conducted in all manner of ways, over vast distances and across invisible borders. Retailers working to expand their reach to consumers nationwide or partnering with vendors and other businesses across state lines have long known that doing so likely means that their conduct becomes subject to the laws of the jurisdiction where their counterparty is located. This, of course, makes intuitive sense in the context of traditional business dealings that are in person, or at least consist of regular contact and conduct within the counterparty's jurisdiction.

But, times have changed and— particularly in the context of the COVID-19 pandemic—business is increasingly conducted through remote and virtual means. In those cases where the business relationship is based entirely on these electronic contacts, does a retailer need to worry anymore about the laws in its counterparty's jurisdiction? What happens, for example, when a retailer from Mississippi intentionally breaches a contract with its web designer in Massachusetts, or posts a defamatory review about its Massachusetts web designer on its website, hosted on servers in and owned by an Oregon company—all without ever selling a product or setting foot in Massachusetts, and even contractually choosing Mississippi law to govern? Can the Massachusetts web designer still avail itself of Massachusetts' unfair and deceptive trade practices statute, Mass. Gen. Laws ch. 93A (Chapter 93A), because the alleged conduct occurred "primarily and substantially" within Massachusetts? See Mass. Gen. Laws ch. 93A, § 11. The answer may not be so obvious.

It is not uncommon for business litigation matters in Massachusetts to include claims under Chapter 93A (whether affirmative or counter claims). The regular inclusion of Chapter 93A claims is understandable as a potentially significant leverage point in any litigation. The penalties available for a successful Chapter 93A claim can be two or three times actual damages, plus attorney fees—see Mass. Gen. Laws ch. 93, § 11—making viable claims very credible settlement tools, while deterring future improper conduct. The statute, of course, defines the type of conduct subject to its governance. However, Massachusetts courts have a long history of interpreting the statute rather broadly to encompass a more wide-ranging scope of conduct than may be obvious on the face of the statute—including simply breaching a contract with the intention to create leverage for renegotiation.

See, e.g., Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 55 (1st Cir. 1998) (Chapter 93A violation found where defendants' "wrongful purpose was to extract a favorable settlement from [plaintiff] for less than the amount [defendant] knew it owed by repeatedly promising to pay, not doing so, stringing out the process, and forcing [plaintiff] to sue"); Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 17–19 (1st Cir.1985) (Chapter 93A violation found where payment withheld as a "wedge" to enhance bargaining power); Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 474 (1991) ("conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes").

Further worry for an out-of-state retailer subject to a Chapter 93A claim is that Massachusetts courts have uniformly held that challenges to "primarily and substantially" involve fact-based inquiries. As such, Chapter 93A claims routinely survive a motion to dismiss simply if the verified 2021 Retail Industry Year in Review 13 complaint simply alleges harm to a plaintiff located in Massachusetts and that the injury—such as financial harm or reliance on a misleading statement— occurred in Massachusetts. Achieving this relatively low bar for pleadings, the litigation regularly moves into the expensive and invasive discovery phase, putting greater pressure on retailer defendants to settle regardless of the merits. See, e.g., Pegasystems, Inc. v. Appian Corp., 424 F. Supp. 3d 214, 224 (D. Mass. 2019); Jofran Sales, Inc. v. Watkins & Shepard Trucking, Inc., 216 F. Supp. 3d 206, 216 (D. Mass. 2016). Retailers, and many other companies today, enter into all manner of business arrangements without ever setting foot themselves or with their products in the jurisdiction of their counterparty. Meetings are handled through telephone, Zoom and emails. Contracts, invoices, orders and instructions are passed back and forth electronically. Even a retailer's "Massachusetts" vendor, such as the web designer, may not do anything more in Massachusetts than call its workforce in India to design the website, which is delivered to the retailer's contracted server platform in Oregon. Surprisingly to many businesses outside Massachusetts, simply housing the alleged subject matter of the dispute in Massachusetts can defeat a motion to dismiss. See, e.g., KPM Analytics N. Am. Corp. v. Blue Sun Sci., LLC, No. 4:21-CV-10572-TSH, 2021 WL 2982866, at *16–17 (D. Mass. July 15, 2021) (plaintiff adequately alleged that injury occurred primarily and substantially in Massachusetts where complaint asserted that plaintiff was based in Massachusetts, "where the disputed trade secrets are electronically stored").

Given the ease and proliferation of web-based business, the age of Zoom and virtual meetings, and cross-border business dealings, retailers and other businesses alike need to look carefully at the potential consequences of statutes like Massachusetts' Chapter 93A, which they may not normally think they would be subject to, when no traditional business has been conducted in Massachusetts. Of course, on the flip side, for retailers and businesses located in Massachusetts, Chapter 93A may be just the leverage needed to bring a dispute to a favorable resolution.

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