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## Mastering Massachusetts General Laws Chapter 93A—The Massachusetts “Consumer” Protection Act (Part II)

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*A courtroom and boardroom reference guide dedicated to deciphering the Massachusetts Consumer Protection Act (Chapter 93A) for attorneys and businesses.*

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<sup>±</sup> Please note that the information provided in these articles does not, and is not intended to, constitute legal advice; instead, all information and content, are for general informational purposes. Readers should contact their own attorneys to obtain advice with respect to any legal matter. The views expressed through these articles are those of the individual authors writing in their individual capacities only, not of their respective employer.

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## I. Introduction

Massachusetts General Laws Chapter 93A—the Massachusetts “Consumer”<sup>1</sup> Protection Act—“is a statute of broad impact” that prohibits “unfair methods of competition” and “unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>2</sup> The Massachusetts Legislature has enacted many statutes, and the Massachusetts Attorney General has promulgated many regulations, declaring what is an “unfair” or “deceptive” act or practice in Massachusetts. Chapter 93A may be enforced *publicly* by the Massachusetts Attorney General or *privately* through civil lawsuits filed by consumers and businesses—including through class-action lawsuits. The standards for prosecuting and defending Chapter 93A claims differ depending on who has been injured and who brings the claims. There are thousands of reported case decisions concerning Chapter 93A. The result is a regulatory and judicial quagmire for the legal and business communities to navigate.

This is the second article in a series of articles—four in total—that are organized to help the legal and business communities better understand Chapter 93A. Despite the amount of regulatory and judicial activity under Chapter 93A, the statute has only eleven sections. The first article<sup>3</sup> covered Sections 1-3, which deal with what conduct falls within the scope of Chapter 93A—and what conduct does not. This second article covers Sections 4-8, which deal with *public* enforcement of Chapter 93A by the Massachusetts Attorney General. The third article will cover only one section—Section 9—which deals with *private* enforcement of Chapter 93A by *consumers*. Section 9 is where much of the legislative, regulatory, and judicial activity occurs. The final article will cover Section 11, which deals with *private* enforcement of Chapter

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<sup>1</sup> As Chapter 93A also covers business-to-business disputes (Section 11), the use of the word “consumer” in the common name of the statute is somewhat of a misnomer.

<sup>2</sup> *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 693–694 (1975).

<sup>3</sup> David G. Thomas & Angela C. Bunnell, *Mastering Massachusetts General Laws Chapter 93A—The Massachusetts “Consumer” Protection Act (Part I)*, *PLI CURRENT: THE JOURNAL OF PLI PRESS*, Vol. 7 (2023), [https://plus.pli.edu/Details/Details?fq=id%3A\(373726-ATL10\)](https://plus.pli.edu/Details/Details?fq=id%3A(373726-ATL10)).

93A by businesses.<sup>4</sup> In each article, we provide the verbatim statutory text of each section followed by a discussion concerning the applicable section.

## II. Public Enforcement (Sections 4-8)

### A. Chapter 93A, § 4—Actions by attorney general; notice; venue; injunctions

#### 1. Proceedings in the Public Interest

##### (i). The Text.

Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he [or she] may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice.

##### (ii). Discussion.

Section 4 gives the Massachusetts Attorney General (MA AGO) the specific power to enforce Chapter 93A when enforcement is in the “public interest.”<sup>5</sup> The MA AGO need not show immediate irreparable harm to obtain injunctive relief under Section 4, unlike private litigants under Sections 9 and 11.<sup>6</sup> All a court need do is determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.<sup>7</sup> In doing so, a court should consider specifically whether there is a likelihood of statutory violations and how such statutory violations affect or would affect the public interest.<sup>8</sup> The MA AGO may proceed under Section 4 even absent a compensable injury.<sup>9</sup>

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<sup>4</sup> The second, third, and fourth articles will each cover Section 10, which connects the *public* and *private* enforcement mechanisms of Chapter 93A.

<sup>5</sup> *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 88–90 (1984).

<sup>6</sup> *Id.* at 89–90.

<sup>7</sup> *Id.*; *Commonwealth v. ELM Med. Labs, Inc.*, 33 Mass. App. Ct. 71, 83–84 (1992).

<sup>8</sup> *Mass. CRINC*, 392 Mass. at 89–90.

<sup>9</sup> *Shaulis v. Nordstrom Inc.*, 120 F. Supp. 3d 40, 53 (D. Mass. 2015).

The purpose of this grant of authority “is to provide an efficient, inexpensive, prompt and broad solution to the alleged wrong,” and, as such, the MA AGO may seek class-wide relief under Section 4.<sup>10</sup> Typically, MA AGO investigations (under Section 6) and enforcement actions (under Section 4) are complaint driven, i.e., they are initiated based on a complaint made to the MA AGO or based on notice of Chapter 93A litigation provided under Section 10. The MA AGO, however, is not limited to representing the interest of a particular injured person on whose behalf legal action is taken, but rather is empowered to act in the public interest and to protect all of the residents of the Commonwealth from the alleged unlawful practices.<sup>11</sup> The MA AGO may proceed on its own behalf and without the consent and even over the objection of the alleged injured persons if the MA AGO believes that the public interest requires the case to proceed.<sup>12</sup> The MA AGO’s powers and rights under Section 4 are not limited when a party ceases the underlying unfair or deceptive practice so long as the conduct occurred within the statute of limitations.<sup>13</sup>

## **2. Venue**

### **(i). The Text.**

**The action may be brought in the superior court of the county in which such person resides or has his principal place of business, or the action may be brought in the superior court of Suffolk county with the consent of the parties or if the person has no place of business within the commonwealth. If more than one person is joined as a defendant, such action may be brought in the superior court of the county where any one defendant resides or has his principal place of business, or in Suffolk county.**

### **(ii). Discussion.**

The general Massachusetts Venue Statute lays venue for actions brought by the Commonwealth in the county where the defendant lives or has a usual place of

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<sup>10</sup> Commonwealth v. DeCotis, 366 Mass. 234, 245 (1974).

<sup>11</sup> Commonwealth v. H&R Block, Inc., No. 08-2474, 2008 WL 5975053 (Mass. Super. Ct. Nov. 10, 2008).

<sup>12</sup> *Id.*

<sup>13</sup> Commonwealth v. Purdue Pharma, L.P., No. 1884CV01808, 2019 WL 5617817, at \*3–5 (Mass. Super. Ct., Oct. 8, 2019).

business, or in Suffolk County.<sup>14</sup> Section 4 is similar but to bring the action in Suffolk County, either the parties must consent or the defendant must not have a place of business in Massachusetts. There is scant reported case law construing venue for MA AGO enforcement actions under Section 4. Proceedings brought by the MA AGO are *in personam*, as opposed to *in rem*, and therefore the action is not a local action (but rather a transitory one).<sup>15</sup> Actions brought by the MA AGO are brought on behalf of the Commonwealth and are not removable to federal court on Class Action Fairness Act grounds.<sup>16</sup>

### ***3. Relief Available – Restoration to Any Person Who Suffered Any Ascertainable Loss***

#### **(i). The Text.**

**Said court may issue temporary restraining orders or preliminary or permanent injunctions and make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such method, act, or practice.**

#### **(ii). Discussion.**

The Commonwealth has a quasi-sovereign interest in the well-being of its citizens, including their economic well-being, as well as ensuring that businesses comport with a basic level of fairness in all their dealings.<sup>17</sup> Upon receipt of a complaint by a consumer, Section 4 gives the MA AGO the right to bring an action for injunctive relief and restitution, even if the business has ceased its unfair practices.<sup>18</sup> Courts enjoy their full panoply of equity powers under Section 4 to fashion orders “to remedy the wrong complained of and to make” orders effective, including the right to require that funds be placed in escrow and escheat to the State when the rightful owner or owners

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<sup>14</sup> MASS. GEN. LAWS ch. 223, § 5.

<sup>15</sup> Att’y Gen. v. Indus. Nat’l Bank of R.I., 380 Mass. 533, 535 (1980); First Fed. Sav. & Loan Ass’n v. Merrimack Valley Nat’l Bank, 5 Mass. App. Ct. 320, 322–23 (1977).

<sup>16</sup> Commonwealth v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 49–51 (D. Mass. 2020).

<sup>17</sup> *In re Bartel*, 403 B.R. 173, 176 (Bankr. D. Mass. 2009).

<sup>18</sup> Lowell Gas Co. v. Att’y Gen., 377 Mass. 37, 47 (1979).

cannot be found.<sup>19</sup> Relief is not limited to those who complained to the MA AGO, but extends to all persons allegedly wronged, which means that Section 4 actions are in the nature of a class action.<sup>20</sup> A court may require a defendant to find persons entitled to restitution at the defendant's expense.<sup>21</sup> Although Section 4 does not permit a blameless person to provide restitution, such a person still may be added as a party if necessary to effectuate an adequate equitable remedy, such as a "reach-and-apply" or "trustee-process" defendant named for the limited purpose of holding funds subject to restitution.<sup>22</sup>

#### **4. Civil Penalties and Attorneys' Fees**

##### **(i). The Text.**

**If the court finds that a person has employed any method, act or practice which he knew or should have known to be in violation of said section two, the court may require such person to pay to the commonwealth a civil penalty of not more than five thousand dollars for each such violation and also may require the said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorneys' fees.**

##### **(ii). Discussion.**

Section 4 provides for civil penalties in an amount of up to \$5,000 per violation of Section 2. It also allows the Commonwealth to recover the costs of its investigation and the resulting litigation, including attorney's fees. This penalty portion of Section 4 can be onerous as, for example, each act of deception (or unfairness) may be viewed by a court as a separate statutory violation for which to award a separate civil penalty.<sup>23</sup> No such similar language appears in Sections 9 and 11.<sup>24</sup> The mental state required for

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<sup>19</sup> *DeCotis*, 366 Mass. at 245.

<sup>20</sup> *DeCotis*, 366 Mass. at 245–46; *Commonwealth v. Chatham Dev. Co., Inc.*, 49 Mass. App. Ct. 525, 528 (2000).

<sup>21</sup> *DeCotis*, 366 Mass. at 245.

<sup>22</sup> *H&R Block*, 2008 WL 5975053, at \*15.

<sup>23</sup> *Commonwealth v. AmCan Enters, Inc.*, 47 Mass. App. Ct. 330, 338 (1999); *Commonwealth v. Crowther*, 93 Mass. App. Ct. 1120, at \*5 (2018) (Rule 1:28 decision).

<sup>24</sup> *AmCan Enters.*, 47 Mass. App. Ct. at 338; *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 313–314 (1991).

penalties (knowingly or willfully) does not require a defendant to have actual knowledge of the law or that the subject conduct violated the law.<sup>25</sup> Rather, a defendant's knowledge or reckless disregard of the underlying conduct is the focus of Section 4's penalty provision.<sup>26</sup> The amount of penalties are left to the discretion of the court and are permissive, not mandatory.<sup>27</sup> When exercising its discretion, a court considers "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the Commonwealth."<sup>28</sup>

## ***5. Unlawful acts or practices – Securities or Commodities***

### **(i). The Text.**

**If the court finds any method, act, or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery as defined in section two, the court may issue such orders or judgments as may be necessary to restore any person who has suffered any ascertainable loss of any moneys or property, real or personal, or up to three but not less than two times that amount if the court finds that the use of the act or practice was a willful violation of said section two, a civil penalty to be paid to the commonwealth of not more than five thousand dollars for each such violation, and also may require said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorney fees.**

### **(ii). Discussion.**

There is no known reported case discussing the MA AGO's authority to bring actions concerning unfair acts or practices in connection with securities and commodity futures. Unlike the more general powers under Section 4, the MA AGO may seek double or treble damages under this subparagraph for willful violations. The standard for civil penalties here is "willful."

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<sup>25</sup> *Montanez v. Bagg*, 24 Mass. App. Ct. 954, 956 (1987).

<sup>26</sup> *Commonwealth v. Miller*, No. 11-0573, 2012 WL 5398914, at \*4 (Mass. Super. Ct., Nov. 1, 2012).

<sup>27</sup> *Id.* at \*5.

<sup>28</sup> *AmCan Enters.*, 47 Mass. App. Ct. at 338.



## **6. 5-Day Letters**

### **(i). The Text.**

At least five days prior to the commencement of any action brought under this section, except when a temporary restraining order is sought, the attorney general shall notify the person of his intended action, and give the person an opportunity to confer with the attorney general in person or by counsel or other representative as to the proposed action. Such notice shall be given the person by mail, postage prepaid, to his usual place of business, or if he has no usual place of business, to his last known address.

### **(ii). Discussion.**

The required notice only needs to put a defendant on notice of the claims and the theory of a proposed action.<sup>29</sup> The Legislature intended a minimal degree of rigor for fulfillment of the statutory written demand.<sup>30</sup> Among other things, the letter need not identify all persons for whom the MA AGO seeks relief as long as the defendant had adequate notice that violations as to similarly situated tenants could figure into the Commonwealth's theory of the case.<sup>31</sup> The standard is akin to the notice required under Mass. R. Civ. P. 8 when filing a complaint.<sup>32</sup> This notice is referred to colloquially as a "5-Day Letter." Receipt of a 5-Day Letter is an indication that the MA AGO has concluded, based on its investigation, that the recipient has or is about to violate Section 2. In other words, a 5-Day Letter indicates that the MA AGO intends to bring an enforcement action under Section 4. Importantly, however, Section 4 requires the MA AGO to confer with the putative defendant in most instances before doing so.

## **7. District Attorney/Law Enforcement Reporting**

### **(i). The Text.**

Any district attorney or law enforcement officer receiving notice of any alleged violation of this chapter or of any violation of an injunction or order issued in an action

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<sup>29</sup> *Miller*, 2012 WL 5398914, at \*2 n.4.

<sup>30</sup> *Id.*; see also *Cassano v. Gogos*, 20 Mass. App. Ct. 348, 352 (1985) (in the context of MASS. GEN. LAWS ch. 93A, § 9).

<sup>31</sup> *Miller*, 2012 WL 5398914, at \*2 n.4.

<sup>32</sup> *Id.*

brought under this section shall immediately forward written notice of the same together with any information that he may have to the office of the attorney general.

**(ii). Discussion.**

There is no known reported case discussing the obligation of the district attorney or a law enforcement officer to forward written notice to the attorney general.

**8. Penalties for Violating Injunctions/Orders**

**(i). The Text.**

Any person who violates the terms of an injunction or other order issued under this section shall forfeit and pay to the commonwealth a civil penalty of not more than ten thousand dollars for each violation. For the purposes of this section, the court issuing such an injunction or order shall retain jurisdiction, and the cause shall be continued, and in such case the attorney general acting in the name of the commonwealth may petition for recovery of such civil penalty.

**(ii). Discussion.**

Where a company has willfully violated a consent judgment, a judge has “every reason to impose a penalty at or near the maximum” allowed under this section.<sup>33</sup> Within that maximum, a court possesses discretion.<sup>34</sup> The purpose of the “not more than ten thousand dollars” per violation amount provided under this section is to deter companies from violating judgments and court orders as opposed to simply imposing a nominal amount that would merely act as a penalty to the business for violations under this Chapter.<sup>35</sup>

***B. Chapter 93A, § 5—Assurance of discontinuance of unlawful method or practice***

**(i). The Text.**

In any case where the attorney general has authority to institute an action or proceeding under section four, in lieu thereof he may accept an assurance of discontinuance of any method, act or practice in violation of this chapter from any person alleged to be engaged or to have been engaged in such method, act or

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<sup>33</sup> *Fall River Motor Sales*, 409 Mass. at 312.

<sup>34</sup> *See id.* at 310.

<sup>35</sup> *Id.* at 313.

practice. Such assurance may, among other terms, include a stipulation for the voluntary payment by such person of the costs of investigation, or of an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved buyers, or both. Any such assurance of discontinuance shall be in writing and be filed with the superior court of Suffolk county. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest. Evidence of a violation of such assurance shall be prima facie evidence of a violation of section two in any subsequent proceeding brought by the attorney general.

**(ii). Discussion.**

There is scant case law interpreting Section 5. Generally, Section 5 allows the attorney general to accept an assurance of discontinuance in lieu of instituting an action or proceeding in court.<sup>36</sup>

***C. Chapter 93A, § 6—Examination of books and record; attendance of persons; notice***

***1. Scope (Section 6(1))***

**(i). The Text.**

The attorney general, whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter, may conduct an investigation to ascertain whether in fact such person has engaged in or is engaging in such method, act or practice. In conducting such investigation he may (a) take testimony under oath concerning such alleged unlawful method, act or practice; (b) examine or cause to be examined any documentary material of whatever nature relevant to such alleged unlawful method, act or practice; and (c) require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material. Such testimony and examination shall take place in the county where such person resides or has a place of business or, if the parties consent or such person is a nonresident or has no place of business within the commonwealth, in Suffolk county.

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<sup>36</sup> *In re* Norwood Hosp., Civ. A. No. 90-2284, 1990 WL 322753, \*1 (Mass. Super. Ct. Apr. 23, 1990).

**(ii). Discussion.**

Section 6 grants the MA AGO broad investigatory powers.<sup>37</sup> The MA AGO has the statutory authority to issue a civil investigative demand (CID) based on only his “belief that a person has engaged in or is engaging in conduct declared to be unlawful under G.L. c. 93A.”<sup>38</sup> The MA AGO need not be confident of the probable result of his investigation and need not have probable cause to investigate.<sup>39</sup> The MA AGO is not required to disclose the name of the person being investigated, and a CID may be issued to a person who is not a “target” of the investigation, i.e., to “witnesses” as opposed to “targets.”<sup>40</sup> Also, the MA AGO’s power to issue a CID extends beyond the person being investigated.<sup>41</sup> Courts construe this grant of investigatory authority liberally in favor of the MA AGO.<sup>42</sup>

**2. Notice – Service (Section 6(2)-(3))**

**(i). The Text.**

**Notice of the time, place and cause of such taking of testimony, examination or attendance shall be given by the attorney general at least ten days prior to the date of such taking of testimony or examination. Service of any such notice may be made by (a) delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (b) delivering a duly executed copy thereof to the principal place of business in the commonwealth of the person to be served; or (c) mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in the commonwealth or, if said**

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<sup>37</sup> *Att’y Gen v. Bodimetric Profiles*, 404 Mass. 152, 157 (1989).

<sup>38</sup> *CUNA Mut. Ins. Soc’y v. Att’y Gen.*, 380 Mass. 539, 542 n.5 (1980); *In re Civil Investigative Demand No. 2016-CPD-50*, No. 20162098, 2016 WL 7742940, at \*2 (Mass. Super. Ct., Oct. 28, 2016).

<sup>39</sup> *Bodimetric Profiles*, 404 Mass. at 157, (quoting *CUNA Mut. Ins. Soc’y*, 380 Mass. at 542 n.5).

<sup>40</sup> *In re Civil Investigative Demand No. 2016-CPD-50* (citing *CUNA Mut. Ins. Soc’y*, 380 Mass. at 542–543).

<sup>41</sup> *Bodimetric Profiles*, 404 Mass. at 156–157.

<sup>42</sup> *In re a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 364 (1977).

person has no place of business in the commonwealth, to his principal office or place of business.

**(ii). Discussion.**

Sections 6(2)–6(3) set forth the proper procedures for notifying investigated parties of the attorney general's demands. There is no known case law interpreting these provisions.

**3. Notice – Contents (Section 6(4)–(5))**

**(i). The Text.**

Each such notice shall (a) state the time and place for the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; (b) state the statute and section thereof, the alleged violation of which is under investigation and the general subject matter of the investigation; (c) describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded; (d) prescribe a return date within which the documentary material is to be produced; and (e) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

**(ii). Discussion.**

Section 6(4) of Massachusetts General Laws Chapter 93A states that the notice of taking testimony or examination must clearly state certain information, including the person's name or, if the name is not known, a description which would allow identification of the individual or the group to which the individual belongs. It does not require that the name of the person being investigated be disclosed. Further, it does not limit, nor intend to limit, the testimony being taken to be only of the person being investigated or documents that the person possesses.<sup>43</sup> Further, Section 6(4)(c) requires

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<sup>43</sup> *CUNA Mut. Ins. Soc'y*, 380 Mass. at 542–43.

that every CID provide “reasonable specificity” in the description of the documents to be produced “so as fairly to indicate the material demanded” and so that compliance with the CID should not constitute an unreasonable hindrance.<sup>44</sup>

#### ***4. Confidentiality (Section 6(6))***

##### **(i). The Text.**

**Any documentary material or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same; provided, however, that such material or information may be disclosed by the attorney general in court pleadings or other papers filed in court.**

##### **(ii). Discussion.**

There is no known case law interpreting the scope of Section 6(6)'s confidentiality provision.

#### ***5. Limitations through Court Intervention (Section 6(7))***

##### **(i). The Text.**

**At any time prior to the date specified in the notice, or within twenty-one days after the notice has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county. This section shall not be applicable to any criminal proceeding nor shall information obtained under the authority of this section be admissible in evidence in any criminal prosecution for substantially identical transactions.**

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<sup>44</sup> *Yankee Milk*, 372 Mass. at 361.

**(ii). Discussion.**

A party moving to set aside a CID bears a substantial burden in demonstrating good cause as to why it should not be required to respond.<sup>45</sup> To do so, the moving party must show that the MA AGO “acted arbitrarily or capriciously in issuing the demand.”<sup>46</sup>

Section 6(1)(b) establishes a relevance standard to determine what documents the MA AGO may examine in the context of a valid investigation, which is confined by the scope of a court’s subpoena powers and privilege.<sup>47</sup> The court has broad discretion to determine what is relevant.<sup>48</sup> To “balance the opposing interests of the investigator and the investigated,” a court must consider (1) whether the CID “describe[s] with reasonable particularity the material required”; (2) whether “the material required is not plainly irrelevant to the authorized investigation”; and (3) whether “the quantum of material required does not exceed reasonable limits.”<sup>49</sup> Violating one of these standards constitutes “good cause” to set aside a CID pursuant to Section 6(7).<sup>50</sup> Document requests only “exceed reasonable limits” when the requests “seriously interfere with the functioning of the investigated party by placing excessive burdens on

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<sup>45</sup> *In re Civil Investigative Demand No. 2016–CPD–50*, at \*2-3 (moving party could not show good cause for setting aside CID because the attorney general had good and sufficient grounds to issue CID since there were safety concerns regarding moving party’s products being owned and sold throughout Massachusetts).

<sup>46</sup> *CUNA Mut. Ins. Soc’y*, 380 Mass. at 544; *Bodimetric Profiles*, 404 Mass. at 157; *see also Bodimetric Profiles*, 404 Mass. at 157–58 (a moving party’s assertion that attorney general has not “affirmatively demonstrated” legitimacy of his belief of wrongdoing is inadequate to show that MA AGO has acted arbitrarily or capriciously.).

<sup>47</sup> MASS. GEN. LAWS ch. 93A, § 6(1)(b) (the MA AGO may “examine ... any documentary material ... relevant to such alleged unlawful method, act or practice[.]”); MASS. GEN. LAWS ch. 93A, § 6(5) (no CID may contain any “requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth[.]or require the disclosure of any documentary material which would be privileged[.]”); *Yankee Milk*, 372 Mass. at 357–58.

<sup>48</sup> *Yankee Milk*, 372 Mass. at 357-58.

<sup>49</sup> *Id.* at 360–61, 361 n.8.

<sup>50</sup> *Id.* at 359 n.7.

manpower or requiring removal of critical records.”<sup>51</sup> However, when the documents requested are “peculiarly within the province of the person” to whom the CID is addressed, “broad discovery demands may be permitted even when such a demand ‘imposes considerable expense and burden on the investigated party.’”<sup>52</sup>

Documents covered by a confidentiality agreement do not bind the MA AGO’s discovery of such information.<sup>53</sup> Also, the last sentence of Section 6(7) exempts applicability of Section 6 to criminal proceedings and provides that information obtained under this section shall not be admissible in any “criminal prosecution for substantially identical transactions.” The Massachusetts Supreme Judicial Court (MA SJC), however, has concluded that Section 6(7) “still leaves the witness open to potential criminal prosecution as a consequence of a disclosure he might be called upon to make.”<sup>54</sup> Therefore, a party being deposed by the MA AGO may still assert a privilege against self-incrimination.

Section 6(7) provides the method for a CID recipient to challenge a CID by extending the response time or otherwise modifying or setting aside the CID. A recipient must file a motion with the court seeking this relief within twenty-one (21) days after the CID was served or the date specified for compliance in the CID, *whichever is shorter*. This method provides an opportunity for prompt review of a CID and protects recipients from improper CIDs.<sup>55</sup> Failure to seek relief using this method may waive a recipient’s objections to the CID.<sup>56</sup> A CID recipient should not remain passive and then react with objections in response to a MA AGO’s motion to compel compliance with a CID.<sup>57</sup> Merely informing the MA AGO of objections in writing is insufficient and does not shift the burden to the MA GAO to file a motion to compel.<sup>58</sup>

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<sup>51</sup> *Id.* at 361 n.8.

<sup>52</sup> *Exxon Mobil Corp. v. Att’y Gen.*, 479 Mass. 312, 327 (2018) (citing *Bodimetric Profiles*, 404 Mass. at 159).

<sup>53</sup> *Bodimetric Profiles*, 404 Mass. at 158.

<sup>54</sup> *Att’y Gen. v. Colleton*, 387 Mass. 790, 799 (1982).

<sup>55</sup> *In re a Civil Investigative Demand Addressed to Bob Brest Buick, Inc.*, 5 Mass. App. Ct. 717, 719 (1977).

<sup>56</sup> *Bodimetric Profiles*, 404 Mass. at 155–56.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



***D. Chapter 93A, § 7—Failure to appear or to comply with notice***

**(i). The Text.**

A person upon whom a notice is served pursuant to the provisions of section six shall comply with the terms thereof unless otherwise provided by the order of a court of the commonwealth. Any person who fails to appear, or with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this chapter, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody or control of any person subject to any such notice, or knowingly conceals any relevant information, shall be assessed a civil penalty of not more than five thousand dollars.

The attorney general may file in the superior court of the county in which such person resides or has his principal place of business, or of Suffolk county if such person is a nonresident or has no principal place of business in the commonwealth, and serve upon such person, in the same manner as provided in section six, a petition for an order of such court for the enforcement of this section and section six. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

**(ii). Discussion.**

To enforce its powers under Section 6, the attorney general must bring a petition under Section 7.<sup>59</sup> Generally, a court must issue a final order of compliance under Section 7 for any civil penalty to be appealable.<sup>60</sup> However, a Single Justice of the Appeals Court may grant an interlocutory appeal under G.L. c. 231, § 118.<sup>61</sup>

***E. Chapter 93A, § 8—Habitual violation of injunctions***

**(i). The Text.**

Upon petition by the attorney general, the court may for habitual violation of injunctions issued pursuant to section four order the dissolution, or suspension or

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<sup>59</sup> *Indus. Nat'l Bank of R.I.*, 380 Mass. at 533.

<sup>60</sup> *Harmon Law Offices, P.C. v. Att'y Gen.*, 83 Mass. App. Ct. 830, 832 (2013); *see also, In re Bob Brest Buick*, 5 Mass. App. Ct. at 718 (declining to consider an interlocutory appeal).

<sup>61</sup> *CUNA Mut. Ins. Soc'y*, 380 Mass. at 540.

**forfeiture of franchise of any corporation or the right of any individual or foreign corporation to do business in the commonwealth.**

**(ii). Discussion.**

There is no known reported case law interpreting Section 8. In *Red Wolf Energy Trading, LLC v. BIA Cap. Mgmt., LLC*, the District Court cited to Section 8 for the proposition that the defendant engaged in unfair or deceptive trade practice in connection with claims concerning trade secret theft and the defendant's alleged failure to comply with the court's orders to produce documents.<sup>62</sup> It is unclear, however, how Section 8 applies to an action brought by a private party in that case. In addition, in *Forcucci v. U.S. Fidelity and Guaranty Co.*, the District Court cited to Section 8 for the proposition that a party was not estopped to bring a claim.<sup>63</sup> It would appear that the District Court meant to cite to Section 9(8) for that proposition, rather than Section 8. Finally, Section 8 received a mention by the MA SJC in *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*;<sup>64</sup> however, Section 8 was not at issue in that case.

***F. Chapter 93A, § 10—Notice to attorney general; injunction, prima facie evidence***

**(i). The Text.**

**Upon commencement of any action brought under section nine or section eleven, the clerk of the court shall mail a copy of the bill in equity to the attorney general and, upon entry of any judgment or decree in the action, the clerk of the court shall mail a copy of such judgment or decree to the attorney general. Any permanent injunction or order of the court made under section four shall be prima facie evidence in an action brought under section nine or section eleven that the respondent used or employed an unfair or deceptive act or practice declared unlawful by section two.**

**(ii). Discussion.**

There is no known reported case law interpreting Section 10.

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<sup>62</sup> *Red Wolf Energy Trading, LLC v. BIA Cap. Mgmt., LLC*, 626 F. Supp. 3d 478, 482 (D. Mass. 2022).

<sup>63</sup> *Forcucci v. U.S. Fid. and Guar. Co.*, 817 F. Supp. 195, 202 n.2 (1993).

<sup>64</sup> *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, 376 Mass. 313, 317 n.4 (1978).

**David G. Thomas** advises on individual and corporate disputes during the entire dispute-resolution life cycle, including through strategic negotiation, mediation, other forms of alternative dispute resolution, and adjudication through trial when needed or required. David has experience with many subject matters, including unfair or deceptive business practices disputes in individual and putative class action settings, including under Massachusetts General Laws Chapter 93A—the Massachusetts Consumer Protection Act. David also works with clients on avoiding disputes proactively by identifying and ameliorating existing or potential dispute risks in business policies and practices.

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