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CLIENT ADVISORY

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TRUSTEES AND EXECUTORS

Professional fiduciaries need to be aware of their exposure to claims under M.G.L. c. 93A for multiple damages and attorneys' fees, particularly since their insurance may not provide any coverage for multiple damages.

Massachusetts, like other states, has an unfair trade practice statute, M.G.L. c. 93A. Lawsuits now frequently include a 93A claim. If the 93A claim is successful, there is (1) an automatic award of attorneys' fees to the plaintiff (but no fee award to the defendant if plaintiff loses); and (2) an award of multiple damages (two or three times the actual damages) if the court finds a willful or knowing violation. A 93A claim can significantly increase the defendant's exposure to damages.

Because a 93A claim has a "trade or commerce" requirement and does not apply to private relationships, fiduciaries such as trustees and executors did not initially face any 93A liability. Earlier cases held on specific facts that actions of a trustee or administrator did not take place in the conduct of trade or commerce.²

But the courts have expanded the reach of 93A. The actions of a professional trustee or other professional fiduciary can now be the basis of a 93A claim. (The courts still do not apply the statute to non-professional fiduciaries). In Quinton v. Gavin the Court held a financial advisor who served as an independent trustee of numerous trusts liable under 93A. The plaintiff was awarded treble damages and attorneys' fees. The Court ruled that Gavin should

not be treated differently from similarly situated business professionals who are subject to 93A, such as attorneys, accountants, banks, medical care providers, stock brokers and others. Although Gavin's actions were especially reprehensible and the Court criticized his conduct, the case apparently has opened the door wide for 93A claims against professional trustees and fiduciaries generally.

The conduct that can create 93A liability is broad. Although a 93A claim can be based on a violation of common law or any statute, it also includes otherwise lawful actions which are determined to be "unfair or deceptive". Even if there has been no breach of contract, a 93A violation can still be found. Often 93A is based on a failure to disclose or a misrepresentation. A breach of a fiduciary duty can also create 93A exposure. Because the fiduciary duties imposed on a trustee are so extensive, the potential for 93A claims is great.

Fiduciaries in other situations have been found to violate 93A for a variety of reasons. United States v. U.S. Trust Co. (SBA, a depository of funds for a joint venture in the defendant bank, sued the bank for unfair conduct. The Court held that pressuring the joint venture to sign an indemnity, failing to answer requests for information and refusal to provide an accounting were a disregard of the bank's fiduciary duties, violated 93A and justified treble damages and attorneys' fees.)

In addition to the many obligations placed on a trustee as a fiduciary, Massachusetts trustees also face compliance with various uniform acts, including the Uniform Principal and Income Act, Uniform Prudent Investors Act, and Uniform Prudent Management of Institutional Funds Act. A violation of any of these acts or any other fiduciary duties could be the basis of a 93A claim. Other fiduciary duties of a trustee include the duty of disclosure, of

loyalty, and of prudence, and the duty to follow the trust terms, to provide personal attention and not to delegate, and to preserve and protect trust assets.

Finally, many liability insurance policies do not provide coverage for punitive damages. Because 93A provides for multiple damages, which are punitive damages, a fiduciary may not have coverage for a double or treble 93A damage award. Even if a policy covers punitive damages, there is a Massachusetts statute which bars insurance companies from providing insurance against liability for deliberate or intentional injury or wrongdoing. This statute has not yet been interpreted in a case involving a 93A award of multiple damages. But, it could prevent insurance coverage for any award of punitive damages, even if the policy specifically provided for coverage.

93A claims can often be prevented by a proper response before a lawsuit is filed. It is now more important than ever for a fiduciary to consult experienced probate counsel for advice when disputes develop. A timely reasonable settlement offer can also legally defeat a 93A claim, or at least prevent an award of multiple damages. (The offer must meet certain legal requirements.) But, the failure to make a reasonable settlement offer can itself be the basis for an award of multiple damages.

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² Garnett v. Lowell (defendant administrator's actions were not undertaken in the ordinary course of business where administrator was son of the defendant); Kveraga - Olson v. Steinberg (defendant trustees of nominee and family trusts owning recreational property for personal use of defendants were not engaged in real estate business); Steele v. Kelly (defendant trustee sued by beneficiary concerning trust administration did not involve trade or commerce); Lattuca v. Rousham (defendant agent of trustee of nominee trust sued by beneficiary was private grievance outside scope of 93A where defendant was friend and relative).

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