
**Planned Parenthood, Nonprofit Marketization, and
Law School Employment-Placement Statistics:
How Three Seemingly Unrelated Topics
Could Potentially Expand the Scope of
Chapter 93A of the Massachusetts General Laws**

*Labor, the professions, charitable organizations, etc., are merely auxiliary forces [in the marketplace] and may, therefore, be initially subject to their own ethical or other rules of the games. To the extent, however, that their activities may impinge upon or otherwise affect a competitive contest between businessmen, they may be subject to the rules of the game applicable to those competitors.*¹

I. INTRODUCTION

Consumers in Massachusetts have been protected from acts of unfair and deceptive trade by chapter 93A of the Massachusetts General Laws (93A) since 1967.² Liability occurs under 93A only when the defendant is engaged in trade or commerce.³ To date, courts have held that public charities and nonprofits, while engaged in their charitable missions, are not engaged in trade or commerce, and therefore those entities have traditionally been found to be outside the reach of 93A claims.⁴ In the near future, however, the courts may have another chance to determine if, and under what circumstances, public charities may be engaged in trade or commerce.⁵

Two, if not more, potential lawsuits could be filed against Massachusetts law

1. 1 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 1:1 (4th ed. 2013), available at Westlaw 1 Callman on Unfair Comp., Tr. & Mono § 1:1.

2. MASS. GEN. LAWS ANN. ch. 93A, §§ 1-11 (West 2013) (declaring unfair methods of competition and unfair or deceptive acts in trade or commerce unlawful).

3. See *id.* §§ 9, 11 (requiring defendant engaged in trade or commerce); see also *id.* § 2 (declaring unfair acts in trade or commerce unlawful).

4. See *infra* Part II.A.3 (discussing 93A and public charities); see also ch. 93A, §§ 2, 9, 11 (providing consumers protection from those engaged in trade or commerce).

5. *Filed Complaints*, L. OFFS. OF DAVID ANZISKA, http://www.anziskalaw.com/Filed_Complaints.html (last visited Feb. 9, 2014) (listing filed complaints). This list includes two Massachusetts schools: New England School of Law and Western New England University School of Law. See *Law School Litigation*, L. OFFS. OF DAVID ANZISKA, http://www.anziskalaw.com/Law_School_Litigation.html (last visited Feb. 9, 2014) (listing potential defendants). Attorney David Anziska is currently concentrating on filing lawsuits against law schools. See *About*, L. OFFS. OF DAVID ANZISKA, http://www.anziskalaw.com/Home_Page.html (last visited Feb. 9, 2014) (stating Attorney Anziska's current focus).

schools.⁶ These suits would join those that have already been filed against various law schools for publishing allegedly misleading and false employment-placement statistics.⁷ If a suit is filed in Massachusetts, it will likely include a 93A claim.⁸ Because defendants in 93A suits must be engaged in trade or commerce, the court would have to determine whether the law school, when it published its employment-placement statistics, was engaged in trade or commerce.⁹ That legal determination could have major implications for all public charities in the Commonwealth.¹⁰

This Note will first discuss a brief history of 93A.¹¹ It will then review major cases interpreting when a defendant is a person engaged in trade or commerce, including public charities.¹² Part II.B will then examine the marketization of the nonprofit sector.¹³ Next, this Note will turn to a review of the statutory framework for the publication of law school employment-placement statistics, and the two court decisions to date.¹⁴ Part III.A will then analyze whether law schools could be engaged in trade or commerce by publishing employment-placement statistics.¹⁵ This Note will conclude by contemplating how a possible finding that law schools are engaged in trade or

6. See *supra* note 5 and accompanying text (highlighting potential lawsuits).

7. See, e.g., *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785, 789 (W.D. Mich. 2012) (alleging law school misrepresented and manipulated employment-placement statistics); *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 837-38 (N.Y. Sup. Ct. 2012) (alleging law school disseminated misleading information about graduates' employment profiles); Fourth Amended Class Action Complaint ¶¶ 3-4, 6-8, 12, *Alaburda v. Thomas Jefferson Sch. of Law*, No. 37-2011-00091898-CU-FR-CTL (Cal. Super. Ct. filed Aug 8, 2012), available at http://www.lawschooltransparency.com/lawsuits/Alaburda_v_TJSL-Fourth-Amended-Complaint.PDF (claiming damages because law school published misleading and inaccurate employment-placement statistics); Karen Sloan, *Fresh Round of Litigation Targets 12 Law Schools over Jobs Data*, NAT'L L.J., Feb. 1, 2012, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202540950653&srreturn=20131103145652> (reporting twelve lawsuits filed against law schools claiming inaccurate employment-placement statistics).

8. See *MacDonald*, 880 F. Supp. 2d at 791-92 (discussing alleged violation of Michigan Consumer Protection Act); *Gomez-Jimenez*, 943 N.Y.S.2d at 840-51 (discussing alleged violation of New York's consumer-protection law); Fourth Amended Class Action Complaint, *supra* note 7, at paras. 87-102, 130-38 (claiming violation of California's Unfair Competition Law and Consumer Legal Remedies Act).

9. See MASS. GEN. LAWS ANN. ch. 93A, §§ 2, 9, 11 (West 2013) (providing consumers protection from those engaged in trade or commerce).

10. See *infra* Part III.B (discussing implications for public charities). This Note will use the term "public charity," defined in the Internal Revenue Code, as:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual

I.R.C. § 501(c)(3) (2012).

11. See *infra* Part II.A.1.

12. See *infra* Part II.A.2-3.

13. See *infra* Part II.B.

14. See *infra* Part II.C.

15. See *infra* Part III.A.

commerce may have 93A implications for all public charities in Massachusetts.¹⁶

II. HISTORY

A. 93A: History and Interpretation of “Person Engaged in Trade or Commerce”

1. History of 93A

a. Consumer Protection Pre-93A

At early common law, consumers were required to prove a defendant’s fraudulent misrepresentation, the defendant’s knowledge that such misrepresentation was fraudulent, the defendant’s intention to induce reliance, the consumer’s reasonable reliance, and damages proximately caused by the defendant’s misrepresentations.¹⁷ Additionally, a court did not award punitive damages on top of any actual damages.¹⁸ Further, even if the defendant was found liable, a consumer would not be made whole as the plaintiff bore the burden of attorneys’ fees.¹⁹

In the early to mid-twentieth century, however, the laissez-faire economics driving commercial law began to dissipate.²⁰ The Sherman Antitrust Act, passed in 1890, incorporated favorable consumer elements because it allowed (and still allows) persons injured by monopolies and other trade restraints to recover multiple damages and attorneys’ fees.²¹ The Federal Trade Commission Act (FTC Act), enacted in 1914, allows liability against the defendant for unfair and deceptive trade practices regardless of the defendant’s intent.²² Also, the “demise of . . . legal formalism” and “the rise of the

16. *See infra* Part III.B.

17. *See* 52 MICHAEL C. GILLERAN, MASSACHUSETTS PRACTICE SERIES, LAW OF CHAPTER 93A § 1.1 (2d ed. 2007), available at Westlaw 52 Mass. Prac., Law of Chapter 93A § 1.1 (explaining elements of common-law business tort).

18. *See id.*

19. *See id.* Massachusetts follows the American Rule on attorney’s fees, thus the plaintiff bears the burden of filing suit. *See id.*

20. *See id.* (discussing declining influence of laissez-faire economics).

21. 15 U.S.C. § 15(a) (2012); *see* GILLERAN, *supra* note 17, § 1.1 (explaining implications of Sherman Antitrust Act).

22. *See* L. & C. Mayers Co. v. FTC, 97 F.2d 365, 367 (2d Cir. 1938) (acknowledging section 5 of FTC Act applies to misleading statements made innocently); GILLERAN, *supra* note 17, § 1.1 (explaining pre-93A forces such as FTC Act supplanting laissez-faire economic consumer law). In one account, the FTC ACT is described as having been created to make “unfair competition” unlawful, a phrase that was altogether left undefined in earlier statutory language. *See* George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, PROC. ACAD. POL. SCI. CITY N.Y. (TRADE ASS’NS & BUS. COMBINATIONS), Jan. 1926, at 114, 116 (recounting early intent behind drafting of FTC Act). Rublee, who helped draft the FTC Act, believed that giving the Federal Trade Commission the ability to enforce a general prohibition on unfair competition would help prevent monopolistic practices. *See id.* at 117 (providing reasoning for FTC Act).

consumer classes and the decline of wealthy classes” helped supplant laissez-faire economic consumer law.²³

b. 93A and Its Current Structure

In 1967, the Massachusetts legislature passed 93A.²⁴ Massachusetts was the first state to enact a state law counterpart to the FTC Act.²⁵ Section 1 of 93A contains definitions.²⁶ Section 2 states the purpose of the act, namely declaring unfair or deceptive acts or practices in trade or commerce unlawful.²⁷ Section 3 exempts transactions otherwise permitted under Massachusetts law.²⁸ Sections 4 through 8 specifically refer to actions brought by the Attorney General and are outside the scope of this Note.²⁹ Section 9 grants individuals a private right of action.³⁰ Section 10 provides notice instructions to the clerk of the court

23. See GILLERAN, *supra* note 17, § 1.1 (footnote omitted) (articulating additional pre-93A forces supplanting laissez-faire economic consumer law).

24. MASS. GEN. LAWS. ANN. ch. 93A, §§ 1-11 (West 2013). The law has evolved considerably from its original form. See Dwight E. Golann, *Evolution of Chapter 93A: National and Local Authority*, in CHAPTER 93A RIGHTS AND REMEDIES § 1.3 (Hon. Margot Botsford ed., Mass. Continuing Legal Educ. 2010) (outlining history of 93A). Initially, there was no private right of action; only the Attorney General could bring suit. See *id.* In 1969, the legislature amended the statute to allow for individual private actions. See *id.* In 1972, the legislature further amended the statute to allow businesses to bring suit under 93A. See *id.* (discussing expansion of consumer protection). The final amendment to 93A was in 1983 when the legislature eliminated the provisions of the law that required the underlying transaction of the lawsuit to involve the use of channels of interstate commerce. See *id.* (discussing rejection of interstate commerce element).

25. See Golann, *supra* note 24, § 1.3 (noting Massachusetts first state to implement “little FTC Act”).

26. See ch. 93A, § 1. Two definitions are of specific interest for this Note: “[p]erson” is defined as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity”; and “[t]rade” and “commerce” includes:

[T]he advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security . . . and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

Id. § 1(a)-(b); see *infra* Part II.A.2 (discussing interpretation of “person engaged in trade or commerce”). The courts have yet to make a clear-cut decision as to whether government actors are “persons” within the context of 93A. Compare *City of Bos. v. Aetna Life Ins. Co.*, 506 N.E.2d 106, 110 (Mass. 1987) (allowing city as plaintiff in suit under section 11 of 93A), with *M. O’Connor Contracting, Inc. v. City of Brockton*, 809 N.E.2d 1062, 1067 (Mass. App. Ct. 2004) (indicating governmental entities acting by legislative mandate not within 93A).

27. See ch. 93A, § 2. Section 2 of 93A states that the legislature intended the FTC and federal court interpretations of the FTC Act to guide 93A. See *id.* § 2(b). Further, section 2 explicitly allows the Massachusetts Attorney General to promulgate rules and regulations interpreting 93A. See *id.* § 2(c); 940 MASS. CODE REGS. 3.00-3.19 (2013) (codifying regulations pursuant to 93A).

28. See ch. 93A, § 3.

29. See *id.* §§ 4-8. The *Massachusetts Practice Series* explains suits filed by the Attorney General. See GILLERAN, *supra* note 17, § 5.9 (discussing Attorney General as plaintiff in 93A suits); see also Golann, *supra* note 24, § 1.5; Barbara B. Anthony *Public Enforcement*, in CHAPTER 93A RIGHTS AND REMEDIES §§ 3.1-3.6.3 (Hon. Margot Botsford ed., Mass. Continuing Legal Educ. 2010) (discussing public enforcement of 93A).

30. See MASS. GEN. LAWS. ANN. ch. 93A, § 9 (West 2013) (providing consumers protection from those

where a 93A suit is filed.³¹ Lastly, section 11 allows a person engaged in trade or commerce—as opposed to an individual consumer—to bring suit against another person engaged in trade or commerce.³²

2. Interpretation of “‘Person’ Engaged in ‘Trade’ or ‘Commerce’”

The defendant must be a person engaged in trade or commerce to be held liable under 93A.³³ The purpose of the statute is to regulate business activity by enhancing disclosure of information in business transactions and establishing an equitable balance between the parties.³⁴ Furthermore, 93A creates rights for consumers that did not previously exist under common law.³⁵ Although the definitions in section 1 of 93A are broadly written, not every transaction occurs in a business context, thus not every defendant is considered a person engaged in trade or commerce.³⁶

a. The Lantner Decision and “Business Context”

In *Lantner v. Carson*,³⁷ the Massachusetts Supreme Judicial Court (SJC) reviewed and allowed a motion to dismiss a 93A claim involving the sale of a

engaged in trade or commerce). Section 9 of 93A also allows for the filing of a class action suit. *See id.* § 9(2). Section 9 further requires that before filing suit, a consumer make a written demand to the potential defendant describing the unfair or deceptive act or practice. *See id.* § 9(3). The statute specifically allows for the awarding of double or treble damages and reasonable attorney’s fees and costs. *See id.* § 9(3A)-(4); *cf.* MASS. GEN. LAWS ANN. ch. 231, § 85K (West 2013) (limiting tort damages of public charity to \$100,000).

31. *See* ch. 93A, § 10. Section 10 of 93A also informs plaintiffs that any permanent injunctions ordered under section 4 (Attorney General as plaintiff) shall be evidence in a 93A private action. *See id.*

32. *See id.* § 11. “Person” and “‘trade’ or ‘commerce’” are defined in section 1 of 93A. *See supra* note 26 (quoting statutory definitions). Like section 9, section 11 of 93A allows for class actions to be filed against defendants. *See* ch. 93A, § 11. The section also allows double and treble damages for “willful or knowing violations” of 93A, and for reasonable costs and attorney’s fees. *See id.*

33. *See* ch. 93A, §§ 1-2, 9, 11; GILLERAN, *supra* note 17, § 2.1 (discussing 93A’s subject-matter requirement: trade or commerce). As discussed above, “person” and “‘trade’ or ‘commerce’” are defined in section 1 of 93A. *See supra* note 26 (articulating statutory definitions of “person” and “‘trade’ or ‘commerce’”). Section 9 allows for individuals to file suit and section 11 allows for a person engaged in trade or commerce—namely a business—to file suit against another person engaged in trade or commerce. *See* ch. 93A, §§ 9, 11 (summarizing private causes of action).

34. *See* *Commonwealth v. DeCotis*, 316 N.E.2d 748, 752 (Mass. 1974) (explaining legislative intent behind 93A).

35. *See* *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 772 (Mass. 1975) (acknowledging 93A creates new substantive rights).

36. *See, e.g.,* *Billings v. Wilson*, 493 N.E.2d 187, 188 (Mass. 1986) (holding renting unit in owner-occupied dwelling to individual not within 93A); *Riseman v. Orion Research, Inc.*, 475 N.E.2d 398, 400 (Mass. 1985) (affirming 93A not applicable to disputes regarding internal governance of corporations); *M. O’Connor Contracting, Inc. v. City of Brockton*, 809 N.E.2d 1062, 1067 (Mass. App. Ct. 2004) (indicating governmental entities acting by legislative mandate not within 93A); *see also* GILLERAN, *supra* note 17, § 2.1 (providing examples of “Not In Trade or Commerce”); Bruce A. Singal, *Defenses and Exemption*, in CHAPTER 93A RIGHTS AND REMEDIES, *supra* note 29, § 6.2 (outlining “trade and commerce” and defenses to 93A claims); *infra* Part II.A.3 (discussing public charities as “persons engaged in trade or commerce.”).

37. 373 N.E.2d 973 (Mass. 1978).

house.³⁸ The plaintiffs argued that sections 1 and 2 of 93A were broadly defined and therefore should include any type of commercial exchange.³⁹ The SJC disagreed and drew a sharp distinction between those who sell as part of a business and those who sell in private transactions.⁴⁰ This distinction is based on an analysis of the language of sections 9 and 11 of 93A: section 9 requires only that the defendant be a person engaged in trade or commerce, while section 11 requires that both the plaintiff and defendant be persons engaged in commerce.⁴¹ The SJC then reasoned that without distinguishing a “person” from a “person engaged in trade or commerce,” sections 9 and 11 would be effectively identical.⁴² In affirming the dismissal, the SJC concluded that for a person to be engaged in trade or commerce in the context of 93A, that person must act in a “business context.”⁴³

b. The Begelfer Decision and the Begelfer Factors

In *Begelfer v. Najarian*,⁴⁴ the plaintiffs made nine promissory notes to borrow a total of \$300,000 to renovate rental property.⁴⁵ The defendants, at the behest of other investors, participated and accepted one of the notes from the plaintiffs for \$30,000.⁴⁶ The plaintiffs eventually brought a suit claiming violations of chapter 271, section 49 of the Massachusetts General Laws, as well as 93A.⁴⁷

Through the SJC’s discussion about whether the defendants were persons engaged in commerce, the court expanded the business-context idea developed

38. *See id.* at 974-75. The plaintiffs were the buyers and the defendants were the sellers. *See id.* at 975.

39. *See id.* at 976. The plaintiffs specifically pointed out that the statute does not differentiate who the seller must be and what level of professional experience the seller must have. *See id.* (arguing no distinction between professional and amateur); *see also supra* notes 26-27 and accompanying text (discussing sections 1 and 2 of 93A).

40. *See Lantner*, 373 N.E.2d at 976 (distinguishing private sales of homes from business sales).

41. *See MASS. GEN. LAWS ANN.* ch. 93A, §§ 9, 11 (West 2013). The intent underlying the addition of section 11 of 93A was to provide the “businessman” a private remedy through 93A. *See Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 774-75 & n.12 (Mass. 1975).

42. *See Lantner*, 373 N.E.2d at 976.

43. *See Lantner v. Carson*, 373 N.E.2d 973, 976-77 (Mass. 1978) (concluding “business context” needed for 93A suits). The SJC further reasoned that in a private sale of that nature, both buyer and seller are on equal bargaining ground. *See id.* at 977. If the buyer was given additional rights through 93A, then the buyer would effectively be given the upper hand in the sale. *See id.* (applying court’s reasoning). As it stood, both parties had equal rights through common-law principles. *See id.* (finding 93A inapplicable). This reasoning furthers the legislature’s policy behind 93A, namely creating an equal relationship between consumers and sellers. *See Commonwealth v. DeCotis*, 316 N.E.2d 748, 752 (Mass. 1974) (recognizing legislature’s intent for equality in marketplace).

44. 409 N.E.2d 167 (Mass. 1980).

45. *See id.* at 170 (describing plaintiffs’ actions). The plaintiffs were in the business of buying, selling, renting, constructing, and renovating residential properties. *See id.*

46. *See id.*

47. *See id.* at 169. The plaintiffs claimed that a violation of chapter 271, section 49 of the Massachusetts General Laws is an unfair and deceptive act and therefore a violation of 93A. *See id.* The court did not follow this reasoning. *See id.* at 170 (stating court’s holding).

in *Lantner*.⁴⁸ The court used a case-by-case analysis to consider whether a transaction occurred in a business context.⁴⁹ A series of factors were outlined to make the determination, such as the nature of the transaction, the character of the parties involved, the activities engaged in by the parties, whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons, and whether the participant played an active part in the transaction.⁵⁰ Additionally, the SJC noted that the transaction need not be in the person's ordinary course of business.⁵¹ Still, the SJC determined that the defendants' passive participation in the transaction underlying the loan did not reach the threshold needed to classify the defendants as persons engaged in trade or commerce.⁵²

3. Determining Whether Public Charities Are Engaged in Trade or Commerce

a. Planned Parenthood and the Public Charity's Motivation

In *Planned Parenthood Federation of America, Inc. v. Problem Pregnancy of Worcester, Inc.*,⁵³ the SJC, for the first time, tackled the issue of whether organizations incorporated as charitable corporations could be held liable under 93A.⁵⁴ The plaintiffs, Planned Parenthood, sued Problem Pregnancy, a pro-life organization, claiming that Problem Pregnancy's door signage confused prospective clients of Planned Parenthood.⁵⁵ As a result of this confusion and

48. See *id.* at 175-76 (expanding business-context principle); see also *Lantner*, 373 N.E.2d at 976 (developing business-context standard).

49. See *Begelfer*, 409 N.E.2d at 176.

50. See *Begelfer v. Najarian*, 409 N.E.2d 167, 176 (Mass. 1980) (listing factors in determining business context). Application of these factors has been one of the primary methods for conducting a 93A analysis in Massachusetts courts. See, e.g., *Barrett v. Mass. Insurers Insolvency Fund*, 592 N.E.2d 1317, 1318-19 (Mass. 1992) (determining whether statutorily mandated company engaged in trade or commerce); *Stop & Shop Supermarket Co. v. Loomer*, 837 N.E.2d 712, 718 (Mass. App. Ct. 2005) (determining whether personal check-cashing scheme violated 93A); *Grand Pac. Fin. Corp. v. Brauer*, 783 N.E.2d 849, 860-61 (Mass. App. Ct. 2003) (determining whether law firm holding loaned funds violated 93A).

51. See *Begelfer*, 409 N.E.2d at 176 (declaring defendant's transactions not in ordinary business still subject to 93A).

52. See *id.*

53. 498 N.E.2d 1044 (Mass. 1986).

54. See *id.* at 1050-51. The SJC explicitly states that it has not previously considered whether a corporation such as Problem Pregnancy could be held liable under 93A. See *id.* The SJC was specifically referring to those organizations incorporated under chapter 180 of the Massachusetts General Laws. See *id.* at 1051 & n.13 (discussing charitable corporations). This statute refers to corporations set up for various charitable reasons such as civic, educational, charitable, benevolent, or religious purposes before October 1, 1971. See MASS. GEN. LAWS ANN. ch. 180, § 1 (West 2013) (applying charitable status for corporations organized prior to 1971); *id.* § 4 (listing incorporating purposes). See generally ch. 180, §§ 1-29 (codifying corporations set up for certain charitable purposes).

55. See *Planned Parenthood*, 498 N.E.2d at 1045. The two plaintiffs were Planned Parenthood Federation of America, Inc. and Planned Parenthood League of Massachusetts, Inc. See *id.* The sign at issue read "PP" followed by smaller letters "Inc. of Worc." See *id.* About a foot from the bottom of the door the full title of Problem Pregnancy was printed in lettering measuring approximately one-half inch. See *id.* On three

in anticipation of future confusion, Planned Parenthood claimed Problem Pregnancy committed common-law service mark infringement and violated 93A.⁵⁶

The SJC affirmed that Problem Pregnancy infringed on Planned Parenthood's trademark because it used a sign that emphasized "PP."⁵⁷ In its 93A discussion, the SJC reasoned that Problem Pregnancy's services, namely giving pregnancy tests, counseling advice, and other pregnancy-related services, did not fall under activities the legislature considered trade or commerce when it enacted 93A.⁵⁸ The employees' motivations—to provide social services rather than profit—further persuaded the SJC that Problem Pregnancy was not engaged in trade or commerce.⁵⁹ Finally, the SJC noted that Problem Pregnancy did not charge for its pregnancy tests.⁶⁰ The culmination of these factors effectively persuaded the SJC to determine that Problem Pregnancy was not a person engaged in trade or commerce and therefore not subject to 93A.⁶¹

separate occasions women who had intended to go to Planned Parenthood mistakenly went to Problem Pregnancy. *See id.* In all three cases the women spoke with staff and filled out forms before they realized they were at the wrong office. *See id.* The women's complaints triggered the lawsuit. *See id.* at 1046.

56. *See id.* at 1045. Other state claims included violations of chapter 155, section 9 of the Massachusetts General Laws (prohibiting taking the name of another corporation) and chapter 110B, section 12 of the Massachusetts General Laws (a statute regarding registration and trademarks, which has since been repealed). *See id.* at 1046. Planned Parenthood also claimed violations of 15 U.S.C. §§ 1114(a) and 1125(a) regarding trademark infringement. *See id.*

57. *See id.* at 1047 (recognizing common-law service mark infringement). The lower court judge enjoined Problem Pregnancy from using the "PP" sign. *See id.* at 1046.

58. *See id.* at 1052 (discussing court's interpretation of legislative intent behind 93A). In fact, the SJC concluded that "the Legislature intended to exclude the activities engaged in by a corporation such as PP, Inc. from the reaches of . . . 93A." *Id.* (emphasis added). In its discussion, the SJC also looked to several meanings of trade and commerce. *See id.* at 1052 & nn.15-16. As mentioned earlier in this Note, 93A provides a specific meaning to "trade and commerce." *See* MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 2013); *supra* note 26 (providing statutory definition of trade and commerce requirement). In addition to the statutory definition, the SJC also opted to use definitions from *Black's Law Dictionary*. *See Planned Parenthood*, 498 N.E.2d at 1052 nn.15-16. Trade is defined by the dictionary as "[t]he act or the business of buying and selling for money; traffic; barter The business which a person has learned and which he carries on for procuring subsistence, or for profit; occupation or employment" BLACK'S LAW DICTIONARY 1338 (5th ed. 1979). Commerce is defined as "[t]he exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles." *Id.* at 244.

59. *See Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 498 N.E.2d 1044, 1052 (Mass. 1986). The SJC specifically reasoned that the employees of Problem Pregnancy were motivated by their advocacy of pro-life positions. *See id.*

60. *See id.* at 1052; *see also About*, Subheading to *Contact Us*, PROBLEM PREGNANCY, <http://www.problempregnancy.org/Contact.aspx> (last visited Feb. 9, 2014) [hereinafter *Problem Pregnancy*] (stating free pregnancy services available). Planned Parenthood describes itself as the nation's leader in sexual and reproductive healthcare. *See About Us*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/about-us> (last visited Feb. 9, 2014).

61. *See Planned Parenthood*, 498 N.E.2d at 1052.

b. All Seasons Services and the Primary Function Determinant

In *All Seasons Services, Inc. v. Commissioner of Health and Hospitals*,⁶² the SJC once again dealt with a public charity as a defendant in a 93A suit.⁶³ Boston City Hospital, a charitable organization operated by the defendant, solicited bids for its vending machines and canteen facilities.⁶⁴ All Seasons Services submitted the highest bid to operate the vending machines, yet the contract was given to another bidder.⁶⁵ All Seasons claimed that the hospital, by not awarding it the contract, had committed an unfair and deceptive act under 93A.⁶⁶

The hospital must be a person engaged in trade or commerce to be liable under 93A.⁶⁷ The SJC noted that the hospital did not seek to profit from its transaction with All Seasons.⁶⁸ It reasoned that the contracting for food services was “merely incidental to the hospital’s primary function of providing medical services.”⁶⁹

c. Linkage Corp. and Insertion into the Marketplace

In *Linkage Corp. v. Trustees of Boston University*,⁷⁰ Linkage Corporation sued Boston University under 93A.⁷¹ Boston University contracted with Linkage to provide corporate training services at their Wang Institute.⁷² The contract also included a noncompetition clause.⁷³ Boston University’s intent behind contracting with Linkage was to increase its revenue stream.⁷⁴

62. 620 N.E.2d 778 (Mass. 1993).

63. *See id.* at 779 (noting Boston City Hospital as charitable organization).

64. *See id.*

65. *See id.* The winning bid was for \$4800, yet All Seasons claimed to have bid \$5200. *See id.* The SJC pointed out that All Seasons submitted multiple bids. *See id.* (describing All Seasons’s bid submissions). The submission by All Seasons also included additional services that it proposed the hospital accept. *See id.* (noting lack of conformity of bid).

66. *See All Seasons Services*, 620 N.E.2d at 779.

67. *See id.* (reciting 93A requirements); *see also* MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 2013). The SJC considered whether the hospital was in trade or commerce when soliciting bids for its food and vending services. *See id.* The SJC used the business-context factors to determine if the hospital’s conduct was business oriented. *See id.*; *see also* *Begelfer v. Najarian*, 409 N.E.2d 167, 176 (Mass. 1980) (listing factors for business context); *Lantner v. Carson*, 373 N.E.2d 973, 976 (Mass. 1978) (explaining business-context requirement).

68. *See All Seasons Servs., Inc. v. Comm’r of Health and Hosps.*, 620 N.E.2d 778, 780 (Mass. 1993).

69. *Id.*

70. 679 N.E.2d 191 (Mass. 1997).

71. *See id.* at 195. The SJC characterized the university as a charitable corporation. *See id.* at 207. As the SJC pointed out, however, the statute broadly applies to any “person” engaged in trade or commerce. *See id.* (examining meaning of person); *see also* MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 2013) (defining “person”).

72. *See Linkage*, 679 N.E.2d at 196 (explaining services provided).

73. *See id.* (explaining restrictions within contract).

74. *See id.* Boston University specifically looked to offset increased overhead on a newly acquired building. *See id.* The contract itself included revenue goals and Linkage was set to receive bonuses for hitting these goals. *See id.* (reciting performance incentives).

Prior to the end of the initial term of the contract, the parties began negotiating an extension and eventually agreed to one.⁷⁵ After the parties reached an agreement, however, Boston University unilaterally terminated the original contract.⁷⁶ In addition to the premature termination of the contract, Boston University also attempted to hire Linkage's employees.⁷⁷

Linkage sued Boston University under several theories, including 93A.⁷⁸ The SJC set out to determine whether the university was a person engaged in trade or commerce.⁷⁹ It reasoned that Boston University was primarily motivated by business, and not by its core mission.⁸⁰ Further, Boston University's business motivations exposed it to 93A, despite being a nonprofit, because it had "inserted itself into the marketplace."⁸¹

75. *See id.* at 197-98 (discussing contract extension). Leading up to the negotiations, Linkage hit each revenue goal. *See id.* at 197 (reviewing Linkage's performance record). On top of the original contract, Linkage also took over another division of Boston University's training program, the Metropolitan College. *See id.* (highlighting Linkage's responsibilities). Boston University and Linkage eventually negotiated the original contract and Metropolitan College programs into a single agreement. *See id.* at 197-98 (reviewing later contract construction). Even though the agreement was executed, John Silber, the President of Boston University, refused to ratify it and claimed it was ineffective. *See id.* at 196, 200. Prior to this decision, Mr. Silber ordered an unannounced audit of Linkage and claimed the university was not subject to the noncompetition clause. *See id.* at 199-200.

76. *See Linkage Corp. v. Trs. of Bos. Univ.*, 679 N.E.2d 191, 200 (Mass. 1997). The parties negotiated early to allow Linkage to find a replacement client if the parties did not come to terms. *See id.* at 197.

77. *See id.* at 200. Mr. Silber claimed the termination was due to an unfavorable audit, but the audit only showed minor errors in reporting of financial matters. *See id.* at 200-01. Mr. Silber also ordered his team to offer Linkage employees positions, with increased salaries if necessary, to keep the programs running. *See id.* at 200.

78. *See id.* at 195. In addition to the 93A claim, Linkage sued on contract and tort causes of action. *See id.*

79. *See id.* at 206-07 (acknowledging parties must be engaged in trade or commerce to recover under 93A). Additionally, the court reiterated that an organization's status as charitable is not dispositive as to whether it is under the purview of 93A. *See id.* at 207 (holding Boston University engaged in trade or commerce); *see also* *Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 498 N.E.2d 1044, 1051 (Mass. 1986) (declaring charitable status not dispositive in 93A suit).

80. *See Linkage*, 679 N.E.2d at 208 (determining Boston University's motivation as primarily profit-based). The SJC's use of the word "profits" refers to revenue exceeding expenses. *See id.* at 208 n.35 (noting use of colloquial definition). Boston University attempted to profit by eliminating Linkage's role in the training programs. *See id.* at 208 (stating SJC's reasoning for classifying Boston University as engaged in trade or commerce). In addition to profit seeking, the SJC also pointed out that the contract was not incidental to its core mission. *See id.* at 209 (distinguishing Boston University's intentions from All Seasons'); *see also supra* Part II.A.3.b (discussing All Seasons and primary mission).

81. *Linkage*, 679 N.E.2d at 209; *see supra* text accompanying note 1 (describing consequences of nonprofits inserting into marketplace).

*B. Marketization of the Nonprofit Sector*⁸²

In the late 1970s and early 1980s, the federal government started to restrain the growth of social welfare spending.⁸³ Because of this retrenchment, nonprofits turned to service fees to promote growth.⁸⁴ Because services fees have become the main source of growth, nonprofits have been forced to become more businesslike in their organization and practices to cultivate growth.⁸⁵ Nonprofits' focus has shifted to creating more revenue at the expense of their primary missions.⁸⁶

In 2010, 2.3 million nonprofit organizations operated in the United States.⁸⁷ Two-thirds of nonprofits were public charities.⁸⁸ Public charities reported \$1.51 trillion in revenue in 2010.⁸⁹ Fees from private sources accounted for

82. A lengthy discussion of marketization is beyond the scope of this Note; however, for more information on the subject, see generally Judith L. Bosscher, *Commercialization in Nonprofits: Tainted Value?*, 5 SPNA REV. 1 (2009) (exploring growing utilization of commercial activity in nonprofit sector and its effects), available at <http://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1025&context=spnareview>; Angela M. Eikenberry & Jodie Drapal Kluver, *The Marketization of the Nonprofit Sector: Civil Society at Risk?*, 64 PUB. ADMIN. REV. 132 (2004) (reviewing major marketization trends within nonprofit sector and potential impact); Lester M. Salamon, *The Marketization of Welfare: Changing Nonprofit and For-Profit Roles in the American Welfare State*, 67 SOC. SERV. REV. 16 (1993) (reviewing shift from government-nonprofit partnership to dominance of market-type relationship).

83. See Salamon, *supra* note 82, at 20-21 (describing 1980s retrenchment).

84. See *id.* at 24. Service fees and other commercial income grew by ninety-three percent between 1977 and 1989. See *id.*

85. See Bosscher, *supra* note 82, at 2.

86. See Eikenberry & Kluver, *supra* note 82, at 138 (concluding nonprofits increased focus on revenue lessens focus on social capital); Salamon, *supra* note 82, at 35-36 (concluding nonprofits increasingly involved in market-type relations). Monica Auteri, a professor of political science at the University of La Tuscia in Viterbo, Italy, observed the following pattern in the United States' nonprofit sector:

Over the past two decades, private, nonprofit organizations in the United States and elsewhere have become increasingly embedded in the market economy. That this is so becomes clear in a number of ways, including nonprofits' increasing dependence on revenues from sales, more intense competition with for-profit business in both service and labor markets, more aggressive pursuit of commercial venture opportunities, and growing involvement in sponsorships and partnerships with business corporations.

Monica Auteri, *The Entrepreneurial Establishment of a Nonprofit Organization*, 3 PUB. ORG. REV. 171, 171 (2003).

87. See AMY S. BLACKWOOD ET AL., URBAN INST., *THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING*, 2012, at 1 (2012), <http://www.urban.org/UploadedPDF/412674-The-Nonprofit-Sector-in-Brief.pdf>. In 2010, there were 1.6 million nonprofits registered with the Internal Revenue Service. See *id.* at 1-2. Additionally, in 2009, Molly F. Sherlock and Jane G. Gravelle drafted a report for Congress surveying the entire nonprofit and charitable sector. See generally MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RESEARCH SERV., R 40919, *AN OVERVIEW OF THE NONPROFIT AND CHARITABLE SECTOR* (2009), available at <http://www.fas.org/sgp/crs/misc/R40919.pdf>.

88. See BLACKWOOD ET AL., *supra* note 87, at 2; *supra* note 10 (defining "public charity"). In 2000, there were 688,600 public charities and by 2010 that number had grown to 979,901, representing a 42.3% increase in ten years. See BLACKWOOD ET AL., *supra* note 87, at 2 (listing nonprofit statistics).

89. See BLACKWOOD ET AL., *supra* note 87, at 2. In 2010, hospitals and higher education, brought in \$773.4 billion and \$159.3 billion, respectively. See *id.* at 4.

approximately fifty percent of the revenue produced by public charities.⁹⁰

C. Recent Law School Employment-Statistics Litigation⁹¹

1. Higher Education and Guidelines⁹²

Within the Higher Education Act, Congress created a framework for higher-education institutions to report statistics related to graduating students' employment placement.⁹³ An institution that advertises job placement rates "as a means of attracting students to enroll in the institution" must make all employment-placement statistics available "at or before the time of

90. See *id.* at 3 (reporting 49.6% of revenue raised through fees). Fees include tuition, hospital-patient revenues (excluding Medicare and Medicaid), and ticket sales. See *id.* According to the Urban Institute report, these fees are driven largely by higher-education tuition and hospitals. See *id.* For instance, law schools can cost up to \$53,226 per year. See Staci Zaretsky, *How Much Will Law School Cost in the Future? It's Pretty Scary...*, ABOVE THE LAW (Oct. 10, 2012, 5:51 PM), <http://abovethelaw.com/2012/10/how-much-will-law-school-cost-in-the-future-its-pretty-scary> (listing current prices of selected schools and predicting future tuition rates).

91. At this time, there are two court decisions regarding law school employment-placement statistics. See *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785, 792 (W.D. Mich. 2012) (dismissing Michigan Consumer Protection Act claim); *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 856-57 (N.Y. Sup. Ct. 2012) (dismissing claims). For purposes of this Note, these two suits will be relied on primarily. See *infra* Parts II.C.2-3 (discussing litigation involving New York Law School and Thomas M. Cooley Law School). In addition to those two suits, in 2012, a lawsuit was filed against Thomas Jefferson Law School. See generally Fourth Amended Class Action Complaint, *supra* note 7 (claiming Thomas Jefferson Law School published misleading employment-placement statistics). In that suit, the plaintiffs claim that the school defrauded them, and have statements by a former employee of the school to corroborate their claims. See Declaration of Karen Grant paras. 5-6, 8, 10-11, *Alaburda v. Thomas Jefferson Sch. of Law*, No. 37-2011-00091898-CU-FR-CTL (Cal. Super. Ct. filed Aug 2, 2012), available at http://www.lawschooltransparency.com/lawsuits/Alaburda_v_TJSL-Declaration-of-Karen-Grant.PDF (claiming Thomas Jefferson School of Law deliberately tampered with employment-placement statistics). For further information, a nonprofit organization has created a website dedicated to increasing law schools' transparency, which includes reporting on suits related to employment-placement statistics. See L. SCH. TRANSPARENCY, <http://www.lawschooltransparency.com> (last visited Feb. 9, 2014) (advocating greater transparency, accountability, and reform in legal education).

92. For articles that focus specifically on the American Bar Association's Section of Legal Education and Admissions to the Bar and its standards for reporting employment-placement statistics, see Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at American Law Schools*, 32 PACE L. REV. 1 (2012) (recommending clearer reporting practices); Daniel S. Harawa, Note, *A Numbers Game: The Ethicality of Law School Reporting Practices*, 24 GEO. J. LEGAL ETHICS 607 (2011) (reviewing current law school reporting practices); Christopher Polchin, Comment, *Raising the "Bar" on Law School Data Reporting: Solutions to the Transparency Problem*, 117 PENN ST. L. REV. 201 (2012) (reviewing law school employment-statistics reporting and recommending alternatives).

93. See 20 U.S.C. § 1092(a)(1)(R) (2012) (requiring dissemination of employment-placement information). Law schools are considered institutions of higher education and are therefore required to comply with the requirements of the Act. See 20 U.S.C. § 1001(a) (2012) (defining "institution of higher education"). The Act allows the Secretary of Education to promulgate rules and regulations governing the manner of the programs administered by the Department of Education. See 20 U.S.C. § 1221e-3 (2012). Using this power, the Secretary promulgated a regulation requiring disclosure of information, including, "[t]he placement of, and types of employment obtained by, graduates." See 34 C.F.R. § 668.41(d)(5) (2013). Additionally, the institutions must identify all of their sources of information and all methodologies used to form the statistics. See *id.* § 668.41(d)(5)(ii).

application.”⁹⁴ The United States Secretary of Education can delegate regulation of these laws to an accrediting agency or association.⁹⁵ The American Bar Association’s Section of Legal Education and Admissions to the Bar (The Section) is the accrediting agency for law schools.⁹⁶

In its role as an accrediting agency, The Section publishes the *ABA Standards and Rules of Procedure for Approval of Law Schools*.⁹⁷ Within these standards and rules, Standard 509 provides law schools with certain requirements regarding consumer information that they must satisfy.⁹⁸ These requirements provide that information published must be “complete, accurate, and not misleading to a reasonable law student or applicant.”⁹⁹ The requirements also regulate the disclosure of consumer information, transfer-credit requirements, employment-placement statistics, scholarships, and accreditation information.¹⁰⁰ Standard 509 was recently updated before the 2012-2013 standards were published.¹⁰¹ These new requirements increased the amount of information disclosed and decreased the time period for disclosure.¹⁰² Standard 509 also now requires certain information be disclosed on the school’s website.¹⁰³

94. 20 U.S.C. § 1094(a)(8) (2012). Not only does the institution need to make its statistics available, but it must also provide “information necessary to substantiate the truthfulness of the advertisements.” *Id.*

95. See 20 U.S.C. §§ 1099a-1099b (2012) (outlining responsibilities and requirements for accrediting agency).

96. See *Recognized Accrediting Associations*, INFOUSA, http://usinfo.org/enus/education/overview/edlite-org_accred1.html (last visited Feb. 9, 2014) (providing list of accredited agencies); see also *About Us, Section of Legal Education and Admissions to the Bar*, AM. B. ASS’N, http://www.americanbar.org/groups/legal_education/about_us.html (last visited Feb. 9, 2014) (explaining relationship between American Bar Association and The Section). The Section is independent of the American Bar Association in its function as a Department of Education accrediting agency. See *id.*

97. See generally SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2012) [hereinafter ABA STANDARDS], available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf (providing standards and rules for law schools).

98. See *id.* at 39 (providing consumer-information standards).

99. *Id.*

100. See *id.* at 39-40 (outlining standards for information).

101. See ABA Section of Legal Educ. & Admissions to the Bar, *Standard 509* (2012) [hereinafter *Standard 509 Redlined*], available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/s509_post_january_2012_draft_redlined_to_standards.authcheckdam.pdf (redlining previous version); *Amendments Made to Standard 509, Rule 16 and Foreign Program Criteria*, AM. BAR ASS’N, http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/fall_2012/2012-2013_changestoabastandardsandrules.html (last visited Feb. 9, 2014) (explaining amendments to Section 509); Debra Cassens Weiss, *No Fudging: Revised Standard Bars Law Schools from Publishing Misleading Consumer Info*, ABA J. (Aug. 6, 2012, 10:46 AM), http://www.abajournal.com/news/article/no_fudging_revised_standard_bars_law_schools_from_publishing_misleadin (reviewing amendments to Standard 509).

102. See *Standard 509 Redlined*, supra note 101 (focusing standard on greater disclosure).

103. See *id.* (increasing required disclosures on school’s website).

2. New York Law School

In *Gomez-Jimenez v. New York Law School*,¹⁰⁴ a class of students and recent graduates sued New York Law School for violation of chapter 20, article 22-A, section 349 of the New York General Business Law.¹⁰⁵ The class consisted of nine graduates who alleged that the school misled them with false and deceptive employment-placement statistics.¹⁰⁶ The statistics in question were those from the period 2005 to 2010.¹⁰⁷

The court first found that compliance with The Section's standards did not create a defense against the state consumer-protection claim.¹⁰⁸ Then it considered whether New York's consumer-protection law, which requires that the transaction be misleading to a consumer acting reasonably under the circumstances, was applicable.¹⁰⁹ According to the court, the plaintiffs, as prospective students, could not have reasonably relied on the information published by New York Law School because as reasonable consumers, they should have been sophisticated enough to sift through the statistics.¹¹⁰ Further, the court reasoned that prospective students should have known that those graduating from highly ranked law schools were more likely to obtain higher

104. 943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012).

105. *See id.* at 840 (outlining plaintiffs' claims); *see also* N.Y. GEN. BUS. LAW § 349 (McKinney 2013) (providing consumers protection from unfair acts by those in business). Subsection (a) of the statute declares that deceptive acts or practices in the conduct of any business, trade, or commerce are unlawful. *See* GEN. BUS. LAW § 349(a). This statute is New York's equivalent to section 2 of 93A. *See* MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 2013).

106. *See Gomez-Jimenez*, 943 N.Y.S.2d at 837. The class consisted of students who had a large variance in post-law-school employment results. *See id.* at 838. For instance, at the time of the suit, Ms. Gomez-Jimenez operated her own firm. *See id.* On the other end of the spectrum, Ms. Giligan voluntarily assumed inactive status in the New York Bar because she could not find a job. *See id.*

107. *See id.* (claiming fraudulent statistics for years 2005 to 2010). New York Law School reported a ninety to ninety-two percent employment rate within nine months of graduation. *See id.* at 839. According to the plaintiffs, these statistics omitted significant information such as whether the employment was full- or part-time, required a law degree, and was permanent or temporary. *See id.* Further, the plaintiffs claimed that the school inflated graduate mean salaries by using deliberate filtering. *See id.*

108. *See id.* at 842 (finding no defense to state consumer-protection claim). The court pointed out that The Section's standards were not those of the New York Legislature and while the legislature could have chosen to make The Section the interpreting body, it did not. *See id.* (acknowledging state can use The Section's standards); *see also supra* Part II.C.1 (discussing The Section and Higher Education Act).

109. *See Gomez-Jimenez*, 943 N.Y.S.2d at 842-43 (using objective-reasonableness standard); *see also* *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 647 N.E.2d 741, 745 (N.Y. 1995) (declaring objective standard of reasonable consumer). This standard was created due to an anticipated increase of consumer-protection suits. *See Oswego*, 647 N.E.2d at 745 (reviewing legislative intent).

110. *See Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834, 843, 847 (N.Y. Sup. Ct. 2012). *But see* *McEntee & Lynch*, *supra* note 92, at 8-9 (arguing statistics provided by schools too vague to make informed decisions). The court would expect prospective students to research websites such as the Law School Admission Council's guide on how to evaluate law schools. *See Gomez-Jimenez*, 934 N.Y.S.2d at 846 (stating plaintiffs selectively relied only on relatively incomplete statistics); *How To Evaluate Law Schools*, LSAC, <http://www.lsac.org/jd/choosing-a-law-school/evaluating-law-schools> (last visited Feb. 9, 2014) (providing guide for prospective law students); *see also Law Schools and Reputation*, LSAC, <http://www.lsac.org/jd/choosing-a-law-school/lr-reputation> (last visited Feb. 9, 2014).

paying jobs than those graduating from lesser-ranked schools.¹¹¹ As a result, the court dismissed the claim.¹¹²

3. Thomas M. Cooley Law School

In *MacDonald v. Thomas M. Cooley Law School*,¹¹³ a Michigan-based law school was sued for violating a state consumer-protection statute.¹¹⁴ The plaintiffs were a class consisting of twelve graduates of the law school.¹¹⁵ They alleged that the school's statistics misled them and caused them to pay more to attend the school than they would have without the statistics.¹¹⁶ The plaintiffs claimed that the school intentionally manipulated its employment statistics.¹¹⁷

The court began its analysis by noting that the consumer-protection statute only applies to "conduct of trade or commerce" and purchases for personal reasons.¹¹⁸ According to the court, the plaintiffs purchased their education for

111. See *Gomez-Jimenez*, 943 N.Y.S.2d at 845 (claiming students wearing "blindness" and ignore common sense).

112. See *id.* at 846-47. In addition to the problems related to the consumer-protection claim itself, the court refused to speculate about the plaintiffs' damages. See *id.* at 851 (acknowledging issues with calculating damages). The plaintiffs sought damages, claiming that their law degrees were worth less than what New York Law School represented them to be worth. See *id.* at 847 (explaining plaintiffs' request for damages). In 2013, full-time tuition at New York Law School cost \$47,600 per year. *Tuition and Financial Aid*, N.Y. L. SCH., http://www.nyls.edu/admissions/tuition_and_financial_aid (last visited Feb. 9, 2014).

113. 880 F. Supp. 2d 785 (W.D. Mich. 2012).

114. See *id.* at 787 (describing claims against law school). The plaintiffs sued under Michigan's Consumer Protection Act. See *id.*; see also MICH. COMP. LAWS ANN. § 445.903 (West 2013) (declaring unfair, unconscionable, or deceptive acts in conducting trade or commerce unlawful); *supra* note 105 (discussing consumer-protection statutes in New York and Massachusetts).

115. See *MacDonald*, 880 F. Supp. 2d at 787. This class also consisted of students who had a large variance in post-law-school-employment results. See *id.* at 790-91. For instance, Mr. MacDonald opened his own law firm in Michigan, while on the other hand, Mr. Baron was unemployed. See *id.*

116. See *id.* The law school "ranked in the bottom tier of every major law school ranking." *Id.* at 788. One of the most widely known ranking compilations is the *U.S. News & World Report*. See *About U.S. News & World Report*, U.S. NEWS & WORLD REP., <http://www.usnews.com/info/features/about-usnews> (last visited Feb. 9, 2014); *Best Law Schools*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Feb. 9, 2014). The law school rankings are calculated using a compilation of statistics, including employment-placement statistics. See Sam Flanigan & Robert Morse, *Methodology: Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 11, 2013), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings> (explaining methodology of compiling law-school ranks). A proposal to improve the *U.S. News & World Report* rankings calls for greater transparency, especially concerning post-graduate employment placement. See Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 IND. L.J. 791, 791 (2008) (critiquing and suggesting improvements for rankings).

117. See *MacDonald*, 880 F. Supp. 2d at 789. The plaintiffs allege that the numbers must be false because the placement and salary information remained static over a five-year period while the number of graduates more than doubled. See *id.* (noting increase in students "saturat[ed] legal market"). The plaintiffs claimed that the numbers should have dropped because there were fewer jobs available. See *id.* Lastly, the plaintiffs claimed that the numbers must have been inflated because of the school's bottom-tier ranking. See *id.*

118. See *id.* at 791-92 (explaining application of Michigan Consumer Protection Act); see also § 445.903(1) (requiring "conduct of trade or commerce"); *Zine v. Chrysler Corp.*, 600 N.W.2d 384, 393 (Mich.

commercial reasons.¹¹⁹ Further, the court concluded that the employment-placement statistics were too vague to be relied upon.¹²⁰ The court ultimately dismissed the case for these two reasons—that is, because the education was purchased for commercial purposes and the data could not be reasonably relied upon.¹²¹

III. ANALYSIS

A. Are Law Schools Engaged in Trade or Commerce When They Publish Employment Statistics?

Any plaintiff in a potential 93A suit must prove to the court that the defendant was engaged in trade or commerce.¹²² If the defendant is not engaged in trade or commerce, then the 93A claim will be dismissed.¹²³ The SJC recognizes a variety of tests or standards to resolve the issue.¹²⁴ Using the analytic framework that the SJC has employed, it is plausible that law schools are engaged in trade or commerce when they publish employment-placement statistics.¹²⁵

Ct. App. 1999) (holding Michigan Consumer Protection Act does not protect purchases for business purposes). The Michigan statute defines trade or commerce as “conduct of a business providing goods, property, or service primarily for personal” use. See § 445.902(1)(g). 93A, however, provides for consumer protection regardless of whether the purchase is for personal or business use. See MASS. GEN. LAWS ANN ch. 93A, §§ 9, 11 (West 2013) (protecting individuals and consumers); see also *supra* note 30 and accompanying text (discussing section 9 of 93A); *supra* note 32 and accompanying text (discussing section 11 of 93A).

119. See *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785, 792 (W.D. Mich. 2012) (expressing plaintiffs purchased education “in order to make money as lawyers”).

120. See *MacDonald*, 880 F. Supp. 2d at 794, 799 (noting “subjective misunderstanding of information that is not objectively false” does not result in fraudulent misrepresentation).

121. See *id.* at 799. The opinion concludes by noting:

The bottom line is that the statistics provided by Cooley and other law schools in a format required by the ABA were so vague and incomplete as to be meaningless and could not reasonably be relied upon. But, as put in the phrase we lawyers learned early in law school—*caveat emptor*.

Id. at 799.

122. See ch. 93A, §§ 9, 11; see GILLERAN, *supra* note 17, § 2.1 (explaining trade or commerce requirement of 93A).

123. See Singal, *supra* note 36 (explaining defendants should file motion to dismiss for failure to show engagement in trade or commerce).

124. See, e.g., *Linkage Corp. v. Trs. of Bos. Univ.*, 679 N.E.2d 191, 208 (Mass. 1997) (explaining public charity engaged in trade or commerce where it sought to solely profit from transaction); *All Seasons Servs. v. Comm’r of Health and Hosps.*, 620 N.E.2d 778, 780 (Mass. 1993) (holding transactions merely incidental to primary function not trade or commerce); *Planned Parenthood Fed’n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 498 N.E.2d 1044, 1052 (Mass. 1986) (reasoning public charity providing free services via unpaid volunteers did not have business motivation); *Begelfer v. Najarian*, 409 N.E.2d 167, 176 (Mass. 1980) (providing factors to identify whether defendant engaged in trade or commerce); *Lantner v. Carson*, 373 N.E.2d 973, 976 (Mass. 1978) (describing need for transaction in business context).

125. See *infra* Part III.A (applying tests and standards to law schools publishing employment statistics). While lawsuits have been filed against law schools in different jurisdictions, this Note will only examine this

1. Plain Language of the Statute

Both sections 9 and 11 of 93A provide that a private action may be brought against any person engaged in trade or commerce.¹²⁶ Section 1 defines “person” broadly enough to include law schools.¹²⁷ Section 1 also defines trade or commerce to include the advertising, offering, rent, or lease of any services and any property.¹²⁸

In *Planned Parenthood*, the SJC considered the plain language of the statute and sought to determine the legislative intent behind it.¹²⁹ It ultimately held that 93A was not intended to reach activities engaged in by a public charity such as Problem Pregnancy.¹³⁰ Unlike Problem Pregnancy, which is a nonprofit, volunteer organization dedicated to providing free services to women in need of assistance during and after pregnancy, law schools charge heavily for their services.¹³¹

Law schools’ employment statistics are held to standards set by The Section.¹³² Superseding the standards by The Section, however, the Higher Education Act explicitly states that employment-placement statistics are “advertise[d] . . . as a means of attracting students to enroll in the institution.”¹³³ According to *Black’s Law Dictionary*, “advertising” is the

issue under Massachusetts law. See *supra* Part II.C (describing past litigation surrounding law schools publishing employment statistics).

126. See MASS. GEN. LAWS ANN. ch. 93A, §§ 9, 11 (West 2013) (allowing private actions against persons engaged in trade or commerce); see also *supra* note 30 and accompanying text (describing section 9 of 93A); *supra* note 32 and accompanying text (describing section 11 of 93A).

127. See *Linkage*, 679 N.E.2d at 209 (declaring Boston University engaged in trade or commerce); see also ch. 93A, § 1 (defining person); *supra*, note 26 (providing language of statute). The statute is written broadly enough to encompass almost any entity, but government actors have been held to be outside the wide range of possible persons. Compare *M. O’Connor Contracting, Inc. v. City of Brockton*, 809 N.E.2d 1062, 1067 (Mass. App. Ct. 2004) (indicating governmental entities acting by legislative mandate not within 93A), with *City of Bos. v. Aetna Life Ins. Co.*, 506 N.E.2d 106, 110 (Mass. 1987) (recognizing city as “person” in suit under section 11 of 93A).

128. See ch. 93A, § 1(b) (defining trade or commerce); see also *supra* Part II.A.2 (discussing interpretation of person engaged in trade or commerce).

129. See *Planned Parenthood*, 498 N.E.2d at 1052 (looking to plain language of 93A). The SJC used *Black’s Law Dictionary* as a second source for definitions. See *id.* (contemplating traditional meanings of trade and commerce); *supra* note 58 (providing definitions used by SJC).

130. See *Planned Parenthood Fed’n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 498 N.E.2d 1044, 1051-52 (Mass. 1986); see also *supra* note 58 and accompanying text (detailing SJC’s interpretation of legislature’s intent).

131. See *Planned Parenthood*, 498 N.E.2d at 1052 (describing Problem Pregnancy’s services); Zaretsky, *supra* note 90 (showing law school can cost up to \$53,226 per year); *Problem Pregnancy*, *supra* note 60 (describing mission statement of organization).

132. See ABA STANDARDS, *supra* note 97, at 39 (providing standards for law schools publishing employment-placement statistics); see also *supra* Part II.C.1 (discussing Higher Education Act and delegation to The Section).

133. 20 U.S.C. § 1094(a)(8) (2012). The statute requires all job-placement rates be provided to prospective students prior to application and with enough information to substantiate the truthfulness of the advertisements. See *id.* (providing requirements for advertising employment-placement statistics); see *supra* notes 93-96 and accompanying text (discussing Higher Education Act and delegation to The Section).

action of drawing attention to something to promote its sale.¹³⁴ Because law schools' published statistics are calculated into rankings, such as the *U.S. News & World Report* rankings, inflated employment-placement statistics result in a more favorable ranking that theoretically attracts more applications.¹³⁵ A plain-language reading of 93A would lead to the conclusion that advertising for a service—such as a legal education—is engaging in trade or commerce.¹³⁶

2. "Business Context" and the *Begelfer* Factors

The *Begelfer* court established a set of factors to weigh when assessing whether a transaction occurred in a business context.¹³⁷ The factors ultimately look toward the motivation, participation level, frequency, and nature of the circumstances to make a determination.¹³⁸ The facts are determined on a case-by-case basis.¹³⁹

More often than not, a law school's motivation behind publishing employment-placement statistics is to promote its accomplishments to prospective students and legal employers, both directly through the statistics themselves and through their effect on the rankings.¹⁴⁰ The law school is the original source of the employment-placement information; all other sources have received their information from the schools.¹⁴¹ As evidenced by the affidavit submitted in the *Alaburda* matter, the character of that law school has been brought into question because of deliberate tampering with employment-placement statistics.¹⁴² If a court finds that a law school advertises

134. BLACK'S LAW DICTIONARY 63 (9th ed. 2009).

135. See Harawa, *supra* note 92, at 612-13 (suggesting high rankings for law schools equate to high revenues); see also *supra* note 116 (reviewing *U.S. News & World Report* ranking information).

136. See § 1094(a)(8) (referring to job placement rates as advertisement for attracting students); MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 2013) (including advertising for services in definition of trade or commerce); see also *Law Schools and Reputation*, *supra* note 110 (discussing factors used to evaluate schools, including employment-placement statistics).

137. See *Begelfer v. Najarian*, 409 N.E.2d 167, 176 (Mass. 1980) (listing factors to consider); see also *supra* Part II.A.2.b (discussing *Begelfer* decision).

138. See *Begelfer*, 409 N.E.2d at 176; see also *supra* Part II.A.2.b (reviewing *Begelfer* factors).

139. See *Begelfer*, 409 N.E.2d at 176; see also *Linkage Corp. v. Trs. Of Bos. Univ.*, 679 N.E.2d 191, 209 (Mass. 1997) (emphasizing fact-specific nature of inquiry).

140. See *Morris & Henderson*, *supra* note 116, at 803-05 (discussing post-graduation employment reporting to *U.S. News & World Report*); see also *Methodology: Best Law School Rankings*, *supra* note 116 (explaining effect of employment-placement statistics on ranking). The Higher Education Act contemplates the use of employment-placement statistics as advertisements to prospective students. See 20 U.S.C. § 1094(a)(8) (2012) ("In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, the institution will make available . . . the most recent available data concerning employment statistics."); see also *supra* note 94 and accompanying text (discussing use of employment-placement statistics as advertisement); *supra* Part II.C.1 (discussing Higher Education Act and The Section).

141. See ABA STANDARDS, *supra* note 97, at 39-40 (providing standards for disclosure of information to law schools); *McEntee & Lynch*, *supra* note 92, at 21 (detailing efforts of career-services officers at law schools to collect information).

142. See generally Declaration of Karen Grant, *supra* note 91 (claiming Thomas Jefferson School of Law deliberately tampered with employment-placement statistics). Ms. Grant recalls only changing graduates from

employment-placement statistics by using information solely in the school's possession, and that the information may have been tampered with, then it could also find the law school acts in a business context using the *Begelfer* factors.¹⁴³

3. *Incidental to Charitable Mission*

A court would also have to ask whether the publishing of employment-placement statistics was merely incidental to the primary function of the school.¹⁴⁴ In other words, if the school's primary function is to educate and train future lawyers, the court will have to decide whether the means used to increase or build enrollment are merely incidental to the primary function.¹⁴⁵ In *All Seasons*, the court held that contracting for vending services at a hospital was merely incidental to the primary function of providing medical services.¹⁴⁶ Under that reasoning, a court would likely find the means used to increase enrollment incidental to the primary function of the law school because the school cannot function without students.¹⁴⁷

4. *Planned Parenthood Dissent and Marketization*

The majority in *Planned Parenthood* determined that Problem Pregnancy was not engaged in trade or commerce because it did not have business motivations and did not seek to profit from providing its services.¹⁴⁸ Justices Abrams and Liacos dissented in part, focusing on the relationship between Problem Pregnancy and Planned Parenthood rather than the business

unemployed to employed, but not vice versa. *See id.* at para. 5. Ms. Grant also placed graduates in the employed category even if they were not employed when she spoke to them. *See id.* at paras. 6, 8. Ms. Grant concluded that Thomas Jefferson School of Law inflated their employment statistics. *See id.* at para. 11; *see also Methodology: Best Law School Rankings*, *supra* note 116 (explaining effect of employment-placement statistics on rankings).

143. *See Begelfer v. Najarian*, 409 N.E.2d 167, 176 (Mass. 1980) (explaining factors to determine business context).

144. *See All Seasons Servs., Inc. v. Comm'r of Health and Hosps.*, 620 N.E.2d 778, 780 (Mass. 1993) (holding contracting for vending services incidental to hospital's primary function and therefore not subject to 93A); *see also supra* Part II.A.3.b (discussing *All Seasons* decision).

145. *See supra* note 144 (discussing *All Seasons* holding). Again, the court must look at each case in light of the specific circumstances. *See Begelfer*, 409 N.E.2d at 176; *see also Linkage Corp. v. Trs. of Boston Univ.*, 679 N.E.2d 191, 209 (Mass. 1997) (emphasizing fact-specific nature of inquiry).

146. *See All Seasons Servs.*, 620 N.E.2d at 780; *cf. Linkage*, 679 N.E.2d at 208 (finding university's relationship with extra-educational administrator did not involve anything "purely incidental to [its] educational mission"). Admittedly, it is unlikely for a charitable institution to engage in trade or commerce when it is furthering its core mission. *See Linkage*, 679 N.E.2d at 208; *see also Singal*, *supra* note 36, § 6.2.2 (outlining defenses to 93A claim).

147. *Cf. All Seasons Servs.*, 620 N.E.2d at 780 (finding contracting for vending services merely incidental to hospital's mission).

148. *See Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 498 N.E.2d 1044, 1052 (Mass. 1986) (recognizing Problem Pregnancy's motivation to provide free health services); *see also supra* Part II.A.3.a (describing *Planned Parenthood* decision).

relationship of Problem Pregnancy and its clients, which the majority focused on.¹⁴⁹ The dissent argued that the underlying acts of the lawsuit, namely causing confusion in the marketplace by misleading clients with similarly marked signage, were acts that amounted to unfair methods of competition.¹⁵⁰ The dissent further noted that Problem Pregnancy's unfair methods of competition were used to divert clients and trade away from Planned Parenthood.¹⁵¹ As a result of these acts, the dissent concluded that Problem Parenthood had inserted itself into the market and thereby established the business context of its actions.¹⁵²

The *Planned Parenthood* dissent provides a fitting comparison to both the market today and the law school issue.¹⁵³ It provides a first-hand example of the marketization of nonprofits.¹⁵⁴ Public charities seek to increase their clientele to gain more revenue.¹⁵⁵ In order to increase their clientele, public charities must, colloquially speaking, take a more profit-driven approach.¹⁵⁶ This profit-driven approach prioritizes maximizing revenues from individual fees and services, while minimizing expenses.¹⁵⁷

Additionally, the *Planned Parenthood* dissent's reasoning could provide the

149. See *Planned Parenthood*, 498 N.E.2d at 1053 (Abrams, J., concurring in part and dissenting in part).

150. See *id.* at 1054 (Abrams, J., concurring in part and dissenting in part) (comparing Problem Pregnancy's actions to service mark infringement actively diverting clients from competition). The majority found Problem Pregnancy liable for service mark infringement. See *id.* at 1049-50 (majority opinion) (affirming trial court's finding that Problem Pregnancy's logo caused requisite likelihood of confusion). The dissent had a hard time reconciling this contradiction, stating:

The court itself recognizes that both the plaintiff and the defendant corporations are involved in the distribution of services in its resolution of the service mark infringement issue. The court notes the similarity of services provided by [Problem Pregnancy] and [Planned Parenthood] when it affirms the conclusion of the lower court that the public is experiencing actual confusion as a result of [Problem Pregnancy]'s actions. The court recognizes in part 1 that [Problem Pregnancy] offers services; thus, it is hard to understand what error the judge committed in imposing liability under c. 93A. The inconsistency of the court's analysis is striking.

Id. at 1053-54 (Abrams, J., concurring in part and dissenting in part) (citation omitted).

151. See *id.* at 1054.

152. See *id.* at 1055 (arguing charities may also engage in competitive marketplace behavior); see also *supra* text accompanying note 1 (describing consequences of nonprofits inserting itself into marketplace).

153. See *Planned Parenthood*, 498 N.E.2d at 1055 (Abrams, J., concurring in part and dissenting in part) (analyzing business context of nonprofit organizations).

154. See *supra* Part II.B (describing marketization of nonprofits). Two of the cases described in detail in this Note provide examples of marketization. See *Linkage Corp. v. Trs. of Bos. Univ.*, 679 N.E.2d 191, 196 (Mass. 1997) (diversifying revenue streams to offset overhead); *Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy of Worcester, Inc.*, 498 N.E.2d 1044, 1045-46 (Mass. 1986) (confusing clients to divert more clients to its services).

155. See *supra* Part II.B (explaining nonprofits acting to increase clients).

156. See *supra* Part II.B (providing reasons for more profit-driven approach of nonprofits).

157. See *supra* Part II.B (explaining nonprofits' source of revenue increasingly from private fees and services).

template for a court's ruling on law schools' employment statistics.¹⁵⁸ A law school increases its employment statistics so that its ranking will improve in the *U.S. News & World Report* rankings.¹⁵⁹ By increasing its rankings, a law school positions itself to have an increased number of applications.¹⁶⁰ On the other hand, if a school falls in the rankings, it is less likely to receive applicants than a higher ranked school.¹⁶¹

Law schools could be seen as engaging in acts of unfair competition just as the dissent in *Planned Parenthood* believed Problem Pregnancy was by diverting clients away from Planned Parenthood.¹⁶² By inflating its numbers, a law school could effectively be diverting prospective students to its school from another school.¹⁶³ According to the *Planned Parenthood* dissent, as well as other commentators, once a nonprofit thrusts itself into the competitive marketplace, it is subjecting itself to the rules therein.¹⁶⁴ Based on this analysis, law schools may be placing themselves within the confines of 93A, thus opening their risk to multiple damages and attorney's fees.¹⁶⁵

B. Implications of Nonprofits Entering Marketplace

A law school could plausibly be found to be engaged in trade or commerce when it publishes its employment-placement statistics.¹⁶⁶ If that is the case, then a public charity can be engaged in trade or commerce while furthering its

158. See *Planned Parenthood*, 498 N.E.2d at 1054 (Abrams, J., concurring in part and dissenting in part) (analyzing business context of nonprofit organizations).

159. See Morriss & Henderson, *supra* note 116 (explaining students and employers rely on rankings in marketplace). Because students look toward the rankings as a guide, law schools must work to increase their ranking to induce a greater number of students to apply. See *id.* at 795.

160. See *id.* at 792, 795 (stating students use rankings, especially post-graduation outcomes, as value-of-degree indicator).

161. See *supra* notes 159-160 (stating students use rankings as value-of-degree indicators). Further, the *U.S. News and World Report* rankings are the most accessible composite rankings available, thus often times, out of convenience, students use them. See Morriss & Henderson, *supra* note 116, at 833 (arguing students could make better decisions with additional data).

162. See *Planned Parenthood Fed'n of Am., Inc. v. Problem Pregnancy, Inc.*, 498 N.E.2d 1044, 1055 (Mass. 1986) (Abrams, J., concurring in part and dissenting in part) (arguing Problem Pregnancy's acts diverted clients from Planned Parenthood).

163. See Morriss & Henderson, *supra* note 116, at 795-96 (claiming students rely on *U.S. News & World Report* rankings to make enrollment choice).

164. See *Planned Parenthood*, 498 N.E.2d at 1054-55 (Adams, J., concurring in part and dissenting in part) (arguing nonprofit perpetrating unfair and deceptive competitive acts thrusts itself into marketplace); see also *Linkage Corp. v. Trs. of Bos. Univ.*, 679 N.E.2d 191, 208-09 (Mass. 1997) (holding university contracting for extra-educational classes with business motivations enters marketplace); *supra* text accompanying note 1 (stating nonprofits entering marketplace must abide by same rules as for-profit entities). See generally Part II.B (explaining increasing marketization of nonprofit sector).

165. See *supra* Parts III.A.1-3 (analyzing using plain language, *Begelfer* factors, and merely-incidental reasoning); see also MASS. GEN. LAWS ANN. ch. 93A, § 9 (West 2013) (allowing multiple damages and attorney's fees); cf. MASS. GEN. LAWS ANN. ch. 231, § 85K (West 2013) (limiting tort damages against public charity to \$100,000).

166. See *supra* Part III.A (discussing whether law schools engaging in trade or commerce).

primary mission.¹⁶⁷ As public charities continue to insert themselves into the competitive marketplace, entities such as hospitals, churches, and foundations, become potential 93A defendants.¹⁶⁸ Ultimately, the courts may more easily find nonprofits engaging in trade or commerce, thus exposing more public charities to greater liability.¹⁶⁹

IV. CONCLUSION

This Note focused on whether a law school is engaged in trade or commerce based on its publication of employment-placement statistics. While engaging in trade or commerce is an essential part of any 93A matter, it says little as to whether the school's practices would be considered unfair and deceptive. 93A is intended to regulate business activity and establish an equitable balance between parties by enhancing the disclosure of information in business transactions. Ultimately, because law schools are the sole source of employment-placement information, they should responsibly place the information into the marketplace for consumers to rely on.

Matthew S. Barron

167. See *Planned Parenthood*, 498 N.E.2d at 1054-55 (Adams, J., concurring in part and dissenting in part) (arguing Problem Pregnancy engaged in trade or commerce while furthering core mission). *But see Linkage*, 679 N.E.2d at 207 (acknowledging nonprofits in most circumstances not engaged in trade or commerce while furthering primary mission).

168. See *supra* Part II.B (discussing marketization of nonprofit sector).

169. See *supra* Part III.A (discussing law schools potentially engaging in trade or commerce while furthering primary mission).