Cracking the Nut: *Vass v. Blue Diamond Growers* and the Scope of Economic Injury Under Massachusetts Chapter 93A

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I. INTRODUCTION

Contrary to its trade name, recent litigation involving Blue Diamond almond milk has been far from a breeze.[1] Massachusetts resident Casley Vass, on behalf of himself and similarly situated plaintiffs, brought suit against one of the nation's leading almond milk producers, Blue Diamond Growers (Blue Diamond), claiming that the labeling of Almond Breeze almond milk was deceptive.[2] The case is instructive as to the extent of cognizable economic injury under Massachusetts's consumer protection law, Chapter 93A.[3]

In *Vass v. Blue Diamond Growers*,[4] the plaintiff alleged *inter alia* that almond milk labeled as "all natural" was misleading as it actually contained several artificial ingredients.[5] The plaintiff averred that he purchased this "all natural" product relying on its label, and was deceived into thinking it was in fact an entirely "natural" product.[6] As a result, the plaintiff and similarly situated consumers across the country alleged they were injured by purchasing the defendant's product.[7]

In the *Vass* report and recommendation, Magistrate Judge Kelley first discussed whether federal law preempted plaintiff's state law claims as to the "all natural" label.[8] Federal law forbids the misbranding of food sold in interstate commerce.[9] "Misbranded" food includes items with labels that are

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1. *See* Albert v. Blue Diamond Growers, No. 15 Civ. 4087 (VM), 2017 WL 213242, at *1 (S.D.N.Y. Jan. 10, 2017) (discussing pending suits concerning Blue Diamond products).

2. Vass v. Blue Diamond Growers, No. 14-CV-13610-IT, 2015 WL 9901715, at *1 (D. Mass. Aug. 11, 2015), *report and recommendation adopted*, No. 14-CV-13610-IT, 2016 WL 1275030 (D. Mass. Mar. 31, 2016). Vass challenged Blue Diamond's listing of the following synthetic ingredients on the Almond Breeze label: "cocoa (Dutch Process), potassium citrate, Vitamin A Palmitate, Vitamin D–2 and Vitamin D–Alpha–Tocopheral." *Id.* at *2.

3. *See id.* at *8 (discussing what constitutes injury under 93A); *see also* Mass. Gen. Laws ch. 93A, § 2 (2016) (declaring "unfair or deceptive" trade practices unlawful).

4. No. 14-CV-13610-IT, 2016 WL 1275030 (D. Mass. Mar. 31, 2016).

5. *Id.* at *1.

6. *See id.*

7. *See id.*

8. *See Vass*, 2015 WL 9901715, at *3-*6.

9. 21 U.S.C. § 331(a)-(b) (2012).

"false or misleading in any particular."[10] Massachusetts has a similar law prohibiting the misbranding of food.[11] Ultimately, the magistrate judge found that an informal, nonbinding policy pronouncement of the U.S. Food and Drug Administration (FDA) did not preempt state law regarding labeling of so-called "natural" food products.[12] Accordingly, the plaintiff's state law claims could proceed.

II. CHAPTER 93A & ECONOMIC INJURY: *VASS* AND THE BENEFIT OF THE BARGAIN

Chapter 93A protects the public against "[u]nfair methods of competition and unfair or deceptive acts or practices," and authorizes consumers to sue businesses engaging in such activities.[13] In order to make a prima facie case under Chapter 93A, a plaintiff must establish that the defendant's unfair or deceptive act or practice caused her to suffer an economic injury.[14] A plaintiff must show: (1) an unfair act or deceptive trade practice occurred; (2) the unfair or deceptive trade practice caused the plaintiff to suffer an injury; and (3) there is a causal link between the unfair or deceptive act and the alleged injury.[15]

Defendant Blue Diamond moved to dismiss the Chapter 93A claim, arguing that the plaintiffs could not demonstrate actual economic loss.[16] The defendant's argument relied upon the First Circuit's ruling in *Rule v. Fort Dodge Animal Health, Inc*.[17] The plaintiff in *Rule* administered a drug to her pet that was later recalled.[18] Massachusetts courts have interpreted *Rule's* holding to mean that "overpayment for a product is not a recoverable injury where the plaintiff no longer has the product in her possession and did not suffer physical injury or property damage because of the product."[19] The

10. *Id.* § 343(a)(1).

11. Mass. Gen. Laws ch. 94, § 187 (2016) (using same "false or misleading in any particular" language).

12. *See* Vass v. Blue Diamond Growers, No. 14-13610-IT, 2015 WL 9901715, at *4-*6 (D. Mass. Aug. 11, 2015), *report and recommendation adopted*, No. 14-CV-13610-IT, 2016 WL 1275030 (D. Mass. Mar. 31, 2016); *see also* Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466 (Nov. 27, 1991) (to be codified at 21 C.F.R. pts. 5, 101, 105). The Food and Drug Administration stated, "[i]n its informal policy . . . the agency has considered 'natural' to mean that nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there." Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. at 60,466.

13. *See* Mass. Gen. Laws ch. 93A, § 2 (2016) (declaring unfair trade practices illegal); LoConte v. Forest Labs., Inc. (*In re* Celexa & Lexapro Mktg. & Sales Practices Litig.), No. 14-13848-NMG, 2015 WL 3751422, at *8 (D. Mass. June 15, 2015) (explaining consumers may sue businesses for unfair business practices under 93A).

14. *In re* Celexa & Lexapro Mktg. & Sales Practices Litig., 2015 WL 3751422, at *8.

15. *See id.*

16. *Vass*, 2015 WL 9901715, at *8.

17. 607 F.3d 250 (1st Cir. 2010); *see also Vass*, 2015 WL 9901715, at *8 (relying upon *Rule* in reaching its decision).

18. *Rule*, 607 F.3d at 251.

19. Martin v. Mead Johnson Nutrition Co., No. 09–11609–NMG, 2010 WL 3928707, at *1 (D. Mass. Sept. 30, 2010).

defendants in *Vass* argued that the case must be dismissed pursuant to *Rule* because the plaintiff no longer possessed the almond milk product and suffered no harm as a result of any problematic labeling.[20]

The court expressly rejected the defendant's arguments as to the application of *Rule*.[21] In adopting the magistrate judge's recommendation, District Judge Talwani clarified that "the Supreme Judicial Court did not state that current ownership was a required element for such a claim, and certainly made no such requirement for perishable products."[22] Further, Judge Talwani distinguished *Rule* from the instant case.[23] In *Rule*, the plaintiff received the benefit of the purchase, specifically the medicinal effects of the drug prior to its recall with no untoward effects on the pet.[24] By contrast, the instant plaintiff was purchasing a product for its "all natural" contents, and did not receive the benefit of his purchase.[25]

Judge Talwani went on to note that a plaintiff has met the Chapter 93A pleading requirements "[w]here . . . a complaint alleges that a plaintiff did not receive the benefit of the bargain after purchasing a product that misrepresented compliance with a specific regulation."[26] In *Vass*, the plaintiff cited a Massachusetts regulation defining "natural food" as food that "has not been treated with preservatives, antibiotics, synthetic additives, artificial flavoring, artificial coloring, or has been processed in such a manner so that it becomes significantly less nutritive."[27] As some of the "all natural" product's ingredients were synthetic, plaintiff argued that the product was "misbranded" under Massachusetts law.[28]

Judge Talwani's *Vass* decision provides a useful guide in distinguishing the application of Chapter 93A in other contexts. For example, a recent case in the District of Massachusetts, *In re Celexa & Lexapro Marketing and Sales Practices Litigation*,[29] involved a class action lawsuit against anti-depressant

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20. *See* Vass v. Blue Diamond Growers, No. 14-CV-13610-IT, 2016 WL 1275030, at *2 (D. Mass. Mar. 31, 2016).

21. *See id.*

22. *Id*. (emphasis in original). The court went on to grant the defendant's motion to dismiss for failure to plead fraud allegations with sufficient particularity. *Id.* at *3. In the Report and Recommendation, the magistrate judge stated, "The Chapter 93A claim should not be dismissed for failure to allege actual damages" but ultimately recommended dismissing the case, reasoning that "Plaintiff has not pleaded the fraud-based allegations in his Chapter 93A claim with sufficient particularity to comport with Rule 9(b)." Vass v. Blue Diamond Growers, No. 14-13610-IT, 2015 WL 9901715, at *8-*9 (D. Mass. Aug. 11, 2015), *report and recommendation adopted*, No. 14-CV-13610-IT, 2016 WL 1275030 (D. Mass. Mar. 31, 2016). The magistrate judge went on to say the complaint should be dismissed without prejudice. *See id.* at *9.

23. *See* Vass, 2016 WL 127030, at *2.

24. *See id.*

25. *Id.*

26. *Id.*

27. *Vass*, 2015 WL 9901715, at *5.

28. *See* Vass v. Blue Diamond Growers, No. 14-13610-IT, 2015 WL 9901715, at *5 (D. Mass. Aug. 11, 2015), *report and recommendation adopted*, No. 14-CV-13610-IT, 2016 WL 1275030 (D. Mass. Mar. 31, 2016).

29. No. 14-13848-NMG, 2015 WL 3751422 (D. Mass. June 15, 2015).

manufacturers.[30] In that case, the plaintiffs alleged that certain drug manufacturers had misled the public as to the efficacy of the drugs to treat depression in children by withholding information about negative studies.[31] In the *In re Celexa* order, the Chapter 93A claim was dismissed for failure to allege any actual harm.[32] Such a ruling squares well with *Vass*: the mother and son received the benefit of the bargain by obtaining anti-depressive effects over several years.

By elucidating the "benefit of the bargain" rationale in *Vass*, Judge Talwani provided a useful avenue to better understand the distinctions between an injury that is cognizable under Chapter 93A and one that is not. The holding in the complex case of *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*[33] provides an example. The Eastern District of New York applied Chapter 93A to the alleged misrepresentations involving the safety and efficacy of an antibiotic drug.[34] In relevant part, plaintiffs argued that doctors would never have prescribed, and plaintiffs would never had paid for, the drug absent the deceptive actions of the defendant drug manufacturer.[35] Applying *Rule*, the *Sergeants* court examined whether the plaintiffs possessed the drug, whether they suffered physical harm, and whether they incurred additional purchases due to any ineffectiveness of the drug.[36]

Examining the benefit of the bargain may assist in piecing together a more cohesive rule. While the Eastern District of New York's ruling applying Massachusetts law is only persuasive in the District of Massachusetts, it is useful to note that the *Vass* rationale is not inconsistent with *Sergeants*. In *Vass*, the plaintiff allegedly overpaid for a product characteristic that did not exist; in *Sergeants*, the beneficiaries received the drug, got the medicinal effect, and suffered no reported ill effects. Accordingly, the *Vass* court found the presence of economic injuy, and the *Sergeants* court did not.

Rather than applying the formalistic test in *Rule*, *Vass* offers a more refined way to interpret Chapter 93A's injury requirement by evaluating whether the plaintiff had received the benefit of the bargain. Consistent with the benefit of the bargain test, if someone uses a product but a latent defect or undisclosed hazard exists and such ill effect is never realized and can never be realized in the future, the law cannot find cognizable harm under Chapter 93A.[37]

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30. *See id.* at *1.

31. *Id.* at *2 (claiming defendants "engag[ed] in . . . aggressive marketing campaign designed to mislead consumers . . . about the [anti-depressants'] efficacy").

32. *See id.* at *8-*9. Judge Gordon noted plaintiff's failure to allege economic injury or the drug's ineffectiveness despite the fact that her son took the anti-depressant Lexapro for six years.

33. 20 F. Supp. 3d 305 (E.D.N.Y. 2014), *aff'd*, 806 F.3d 71 (2d Cir. 2015).

34. *Id.* at 335-36 (applying Massachusetts law to facts of New York case).

35. *Id.* at 336 (differentiating plaintiffs' argument from price effect theory).

36. *Id.*

37. *See* Hershenow v. Enterprise Rent–A–Car Co. of Boston, 840 N.E.2d 526, 535 (Mass. 2006) (stating consumer not entitled to recover where no loss suffered).

III. UNRAVELING "TANGLED" CASE LAW: COMPARING *VASS* WITH *SHAULIS V. NORDSTROM INC.*

The concept of injury is central to the prima facie Chapter 93A case. Ferreting out cognizable injury from non-injury can be a challenge for jurists. The *Rule* court noted that Massachusetts state-court precedent was "still evolving" on this issue.[38] Unfortunately, as one judge highlighted, previous cases have largely failed in effectively defining cognizable injury under Chapter 93A.[39]

Shaulis v. Nordstrom Inc.,[40] a case concerning apparel discounting, demonstrates just how "tangled" the case law on injury has become.[41] As the *Shaulis* court noted, it is difficult to assess a "cognizable 'injury' within the meaning of Chapter 93A . . . with a high degree of confidence" given the intricate web of case law.[42]

In *Shaulis*, the plaintiff's accused a retailer of "deceptive and misleading labeling and marketing of [its] merchandise."[43] While browsing a Nordstrom Rack shop, the putative class representative Judith Shaulis saw "Compare At" tags on the clothing around the store purportedly to offer discounts on products.[44] She found a sweater tagged with a price of $49.97 and a "Compare At" label of $218.00.[45] She purchased the item in Boston in November 2014, which is approximately the time of year where sweaters are most useful.[46] Her receipt claimed, "You SAVED: $168.03 Congratulations! You saved more than you spent. You're a shopping genius!"[47] This "shopping genius" eventually unraveled that Nordstrom Rack never sold—and never intended to sell—the merchandise at the higher price, and claimed that other retailers did not offer the sweater at the "Compare At" price.[48]

As in *Vass*, the *Shaulis* plaintiff pointed to specific codes to contend that the defendant's practices violated Massachusetts law.[49] Specifically, the plaintiff alleged that the price comparison violated 93A.[50] The *Shaulis* court noted that Massachusetts regulations appear to prohibit the type of price comparison

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38. Rule v. Fort Dodge Animal Health Clinic, Inc., 607 F.3d 250, 251 (1st Cir. 2010).

39. *See* Ferreira v. Sterling Jewelers, Inc., 130 F. Supp. 3d 471, 478 (D. Mass. 2015) (stating "the jurisprudence on cognizable injuries . . . leaves much to be desired by way of clarity").

40. 120 F. Supp. 3d 40 (D. Mass. 2015).

41. *See id.* at 52 (holding ultimately no cognizable injury existed).

42. *Id.*

43. *Id.* at 42.

44. *Shaulis*, 120 F. Supp. 3d at 43.

45. *Id.*

46. *See* SWEATER WEATHER, THE NEIGHBOURHOOD (Columbia Records 2012) ("[I]t's too cold . . . so let me hold . . . your hands in the holes of my sweater").

47. Shaulis v. Nordstrom Inc., 120 F. Supp. 3d 40, 43 (D. Mass. 2015).

48. *Id*; *see also* WEEZER, UNDONE (THE SWEATER SONG) (DGC Records 1994) ("If you want to destroy my sweater, hold this thread as I walk away, watch me unravel . . . I've come undone").

49. *See Shaulis*, 120 F. Supp. 3d at 46.

50. *Id.*

Nordstrom Rack utilized.[51] Section 6.05(2) of the Code of Massachusetts Regulations proscribes price comparisons as "unfair or deceptive" without an explanation of "basis for the price comparison."[52] A seller may, however, publish a price comparison without providing the basis if the seller has previously sold the item at the former price "openly and in good faith for a reasonably substantial period of time in the recent past."[53]

The court, however, found a wrinkle in the plaintiff's Code of Massachusetts Regulations argument: consumers have "no private right of action" against retailers for violations of the price comparison rules.[54] Although the alleged violations of the regulations could not stand, they were sufficient to establish that an unfair trade practice had likely occurred, satisfying the first prong of the Chapter 93A analysis.[55]

Having satisfied the first prong of the Chapter 93A test, the court then addressed whether the unfair practice caused a cognizable injury.[56] The court described the Chapter 93A injury jurisprudence as "to say the least, somewhat muddled."[57]

Among the problems in the "tangled" case law was precedent elsewhere in the District of Massachusetts that a Chapter 93A claim did not require a determination of injury.[58] In one such case, a consumer sued a gas station chain over the requirement that she punch in her zip code when making a credit card transaction.[59] The plaintiff alleged that the zip code entry violated a Massachusetts law prohibiting businesses from obtaining personal identifying information, such as an address, in a credit card transaction.[60] The court ruled that a plaintiff may pursue injunctive relief "absent any *injury* distinct from the collection of cardholder identification information in and of itself."[61] In *Shaulis*, the court expressly rejected the *Diviacchi* holding, finding it "unpersuasive."[62] Instead, the *Shaulis* court pointed to the "plain language of Chapter 93A" that allowed suit only when one had "been *injured* by another."[63]

Reviewing cases in *Shaulis*, Judge Saylor described the "tangled" state of the case law.[64] He found cases that supported a finding that actual loss was

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51. *See id.* at 46-47.
52. 940 MASS. CODE REGS. § 6.05(2) (West 2017).
53. *Id.* § 6.05(3)(a).
54. Shaulis v. Nordstrom Inc., 120 F. Supp. 3d 40, 46 (D. Mass. 2015).
55. *Id.* at 48.
56. *Id.* at 49.
57. *Id.*
58. Diviacchi v. Speedway LLC, 109 F. Supp. 3d 379, 386 (D. Mass. 2015) (ruling no injury required for injunctive relief under Mass. Gen. Laws ch. 93, § 105).
59. *Id.* at 381-82.
60. *See* Mass. Gen. Laws ch. 93, § 105 (a), (d) (2016) (proscribing how requiring personal identifying information constitutes unfair and deceptive business practice).
61. *Diviacchi*, 109 F. Supp. 3d at 386 (emphasis added).
62. Shaulis v. Nordstrom Inc., 120 F. Supp. 3d 40, 50 n.5. (D. Mass. 2015).
63. *Id.* (emphasis original).
64. *See id.* at 49-51.

unnecessary for a finding of "injury," and others that mandated an identifiable harm resulting from the unfair trade practice.[65] Judge Saylor described the extant case law as such:

> Two Supreme Judicial Court cases contain language stating or suggesting that a claim may be brought for a violation of Chapter 93A even if the violation did not cause any actual loss or harm. See Leardi v. Brown, 394 Mass. 151, 474 N.E.2d 1094 (1985) (finding that plaintiff residential tenants sustained an injury within meaning of Chapter 93A where defendant landlord included provisions in their leases that violated state sanitary code, even though provisions were never attempted to be enforced); Aspinall v. Philip Morris Co., 442 Mass. 381, 402, 813 N.E.2d 476 (2004) (explaining that deceptive advertising regarding Marlboro Light cigarettes "if proved, effected a per se injury on consumers who purchased the cigarettes represented to be lower in tar and nicotine," even if those consumers suffered no injury).
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> More recently, however, the SJC has abandoned the notion that a plaintiff in a Chapter 93A action need not prove that the violation caused an injury.
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> Most recently, the SJC has framed the issue as follows:
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>> The invasion of a consumer's legal right (a right, for example, established by statute or regulation), without more, may be a violation of [Chapter 93A], § 2, and even a per se violation of § 2, but the fact that there is such a violation does not necessarily mean the consumer has suffered an injury or a loss entitling her to at least nominal damages and attorney's fees; instead the violation of the legal right that has created the unfair or deceptive act or practice must cause the consumer some kind of separate identifiable harm arising from the violation itself.[66]

Ultimately, the *Shaulis* court found that the discounting practice did not amount to a cognizable injury.[67] Even as Massachusetts regulations appeared to ban the discounting practice, the court found that "no Massachusetts case has ever found an injury under Chapter 93A under such circumstances, where the alleged injury was based entirely on the plaintiff's subjective belief as to the nature of the value she received."[68] The court reasoned that the lead plaintiff had not suffered any "injury in any traditional sense."[69] She had been duped into believing she was getting a bargain, but she actually "purchased a sweater for $49.97 that was, in fact, worth $49.97."[70] Further, no issue was raised relating to the quality, workmanship, or other factors that would suggest that the item was worth less than the amount paid.[71]

The *Shaulis* decision was discussed at length in other District of

65. *See id.* at 49-50.
66. *Shaulis*, 120 F. Supp. 3d at 49-50 (quoting *Tyler v. Michaels Stores, Inc.*, 984 N.E.2d 737, 745 (Mass. 2013)).
67. *Id.* at 52-53.
68. Shaulis v. Nordstrom Inc., 120 F. Supp. 3d 40, 52 (D. Mass. 2015).
69. *Id.* at 42.
70. *Id.*
71. *Id.*

Massachusetts cases. In *Ferreira v. Sterling Jewelers, Inc.*, [72] a Massachusetts consumer complained that a gemstone she had purchased was of lesser value that what she had paid for the item.[73] The plaintiff thought she had purchased a natural, untreated emerald, as suggested by the descriptor "genuine"; instead, she had purchased a stone that had been treated with resin, and she brought suit under Chapter 93A.[74] Agreeing with Judge Saylor's analysis in *Shaulis* of "speculative injury," the *Ferreira* court was unconvinced by the plaintiff's argument that she believed she was purchasing something more valuable than what was sold to her.[75] The court found that the plaintiff had offered "nothing more than conclusory allegations, improbable inferences, and unsupported speculations" to support her claim that she did not get the benefit of the bargain in the transaction.[76]

While the *Shaulis* decision is currently awaiting the First Circuit's decision on appeal, the case presents an important distinction for "injury" under Chapter 93A. The *Vass* lead plaintiff presented a colorable, albeit unsubstantiated, claim under Chapter 93A, while the *Shaulis* court rejected its plaintiff's arguments about cognizable injury. What are the underlying principled reasons behind the different results?

It is important to recall that Chapter 93A is a consumer protection measure. As such, it is worth asking: did the consumers get what they paid for? In *Vass*, the lead plaintiff complained of an immutable characteristic of the product—its ingredients. For the *Vass* class, consumers may have paid less for the product if fully informed of its ingredients. In comparison, the *Shaulis* plaintiff and putative class got exactly what they paid for; the class representative paid $49.97 for a sweater worth $49.97.

To the point, does Judge Talwani's "benefit of the bargain" holding in *Vass* lead to consistent results when applied to *Shaulis* and its progeny? Yes. The *Vass* lead plaintiff was promised an "all natural" beverage but did not receive it. In *Shaulis*, the class representative decided she was getting a good deal by buying a sweater at a certain price point. As for *Ferreira*, the consumer believed she purchased a "genuine" gemstone and she did, as it was undisputed that the emerald came from the ground rather than a synthetic process.[77] In that case, the United States District Court for the District of Massachusetts emphasized that the products were only deceptively labeled "genuine" insofar as they were manufactured or produced artificially.[78] The decision is remarkably consistent when one applies Judge Talwani's language concerning misrepresentations of compliance: the gemstone seller only represented a

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72. 130 F. Supp. 3d 471 (D. Mass. 2015).
73. *See id.* at 475-76.
74. *Id.*
75. *See id.* at 482-83.
76. *Ferreira*, 130 F. Supp. 3d at 483 (internal citations omitted).
77. *See id.* at 475.
78. *See* Ferreira v. Sterling Jewelers, Inc., 130 F. Supp. 3d 471, 477 n. 7, 479 n. 11 (D. Mass. 2015)

"genuine" gemstone, which was factually accurate, and therefore did not misrepresent compliance with a legal rule.[79] Simply put, the *Ferreira* plaintiff got the benfit of the bargain when she purchased a purportedly "genuine" gemstone and received such a gem.

IV. CONCLUSION

Given the centrality of cognizable injury to a prima facie Chapter 93A suit, it is especially unfortunate that the case law is so tangled, muddled, and unclear. While the pending First Circuit appeal in *Shaulis* may provide some much needed clarity, Judge Talwani's decision in *Vass* offers lessons for advocates and jurists about the extent of injury needed to make out a Chapter 93A cause of action.

Vass demonstrates that judges may make distinct determinations about whether a plaintiff has suffered a cognizable injury and whether she has sufficiently proved that injury. The *Vass* court found that the lead plaintiff suffered an economic injury—and did not receive the benefit of the bargain—by purchasing "all natural" milk with synthetic ingredients. Even so, the *Vass* case was ultimately dismissed due to insufficient proof of the injury alleged, as the plaintiff did not plead with requisite particularity where, when, and how often he had made the purchases alleged. The *Vass* court expressly noted that it was the type of harm that could conceivably be redressed with proper proof.

Vass offers opportunities for advocates to better understand and apply the versatile "benefit of the bargain" test. Not only did *Vass* bring additional clarity to the *Rule* standard, but it also provided a gut-check for advocates advancing arguments under Chapter 93A. For example, advocates could ask themselves whether the client received the benefit of the bargain. Put more simply, has the client received what they paid for? If the answer is no, the advocate can articulate ways that the client has not received the promised benefits. If the answer is yes, *Vass* suggests to advocates that they may have difficulty proving cognizable injury. To make their case, advocates could ask: (1) what was the transaction?; (2) what was the promised benefit?; and (3) did the client received the identified benefit? As Judge Saylor noted in *Shaulis*, the plaintiff's subjective belief of value is unlikely to be enough to prove cognizable injury.[80] Illusory injury under Chapter 93A is not enough: the injury must be real and identifiable.[81]

Vass offers further clarity about the scope of cognizable injury under Chapter 93A. Applying Judge Talwani's articulation of the "benefit of the bargain" test may provide jurists and advocates alike a way to unravel what has thus far proved to be a tangled case law.

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79. *See* Vass v. Blue Diamond Growers, No. 14-CV-13610-IT, 2016 WL 1275030, at *2 (D. Mass. Mar. 31, 2016).

80. *See* Shaulis v. Nordstrom Inc., 120 F. Supp. 3d 40, 52 (D. Mass. 2015).

81. *See* CHERYL LYNN, GOT TO BE REAL (Columbia Records 1978).