

2014 WL 3381908 (Mass.App.Ct.) (Appellate Brief)  
Appeals Court Of Massachusetts.

Gerianne COHEN, Plaintiff-Appellant,  
David ANDELMAN, and Harold Cohen, Plaintiffs,

v.

BROKERS SERVICE MARKETING GROUP, Allanz Life Insurance Company of  
North America, and Sun Life Assurance Company of Canada, Defendants-Appellees.

No. 2014-P-0280.

June 23, 2014.

On Appeal from the (Order/Judgment) in the Essex Superior Court

**Brief for Plaintiff-Appellant**

John B. Flemming, Esq., john@flemminglaw.com, B.B.O. 171660, Leon Nowicki, Esq., leon@flemminglaw.com, B.B.O. 684734, 1 Elm Square, Suite 3C, Andover, Massachusetts 01810, (978) 474-6444, for plaintiff-appellant, Gerianne Cohen.

**\*i TABLE OF CONTENTS**

ISSUES PRESENTED .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	6
ARGUMENT .....	17
I. Standard of Review .....	17
II. Plaintiff's Complaint States a Viable Claim Under G.L. c. 93A .....	18
A. Three Required Elements of Claims under 93A .....	18
a. Unfair or Deceptive Acts .....	18
b. Wrongful Conduct in Trade or Commerce .....	20
c. Causation .....	20
III. The Lower Court Erred In Denying Appellant's Motion to Vacate Based On the Non-Viability of a G.L. c. 93A Claim .....	21
A. The Lower Court Erred in Ruling that the Failure of Appellants' Aiding and Abetting Claim Precluded a G.L. c. 93A Claim .....	21
B. The Lower Court Erred in Ruling that Allegations of Negligence were Insufficient to Support a G.L. c. 93A Claim .....	22
C. Applying the Correct Legal Standards, the Lower Court's Decision must be Reversed .....	23
*ii IV. The Lower Court Erred In Ruling that the Additional Facts Asserted in the Proposed Second Amended Complaint Did Not State a Claim for Aiding and Abetting Liability .....	27
CONCLUSION .....	30

**\*iii TABLE OF AUTHORITIES  
CASES**

<i>Anthony's Pier Four, Inc. v. HBC Associates</i> , 411 Mass. 451 (1991) .....	20
<i>Aspinall v. Phillip Morris Co., Inc.</i> 442 Mass. 381 (2004)...1 .....	8,20
<i>Eigerman v. Putnam Investments, Inc.</i> 66 Mass. App. Ct. 222 (2006) .....	17
<i>Glickman v. Brown</i> , 21 Mass. App. Ct. 229 (1985) .....	22,23
<i>Go-Best Assets Ltd. v. Citizen's Bank</i> , 463 Mass. 50 (2012) .....	27,28,29
<i>Kansallis Finance Ltd. V. Fern</i> , 421 Mass. 659 (1996) .....	19
<i>Kattar v. DeMoulas</i> , 433 Mass. 1 (2000) .....	19
<i>Maillet v. ATF-Davidson Co.</i> , 407 Mass. 185 (1990) .....	20
<i>Miller v. Cotter</i> , 448 Mass. 671, 676 (2007) .....	17
<i>Nei v. Burley</i> , 388 Mass. 307 (1983) .....	19

<i>PMP Associates, Inc. v. Globe Newspaper Co.</i> , 366 Mass. 593 (1975) .....	18, 19, 22
<i>Poznik v. Mass. Medical Professional Association</i> , 417 Mass. 48 (1994) .....	18,20
<i>Slaney v. Westwood Auto, Inc.</i> , 366 Mass. 688 (1975) .....	20
<i>Swanson v. Bankers Life Co.</i> , 389 Mass. 345 (1983) .....	22
<i>*iv Sylvester v. Commissioner of Revenue</i> , 445 Mass. 304 (2005) .....	17
<i>Wang Laboratories, Inc. v. Business Incentives, Inc.</i> , 398 Mass. 854 (1986) ....	25
<i>Zabin v. Picciotto</i> , 73 Mass. App. Ct. 141 (2008) .....	18
STATUTES AND REGULATIONS	
M.G.L. c.93A §2 .....	18, 23
M.G.L. c.93A §9 .....	18
OTHER AUTHORITIES	
Restatement (Second) of Torts §876(b) .....	28
Restatement (Second) of Agency §5 .....	30

### \*1 ISSUES PRESENTED

1. Whether the trial court erred in denying Plaintiffs' Motion to vacate its prior order dismissing plaintiffs' claims against Brokers Service where discovery done after the order of dismissal showed the defendant had actual knowledge that its insurance salesman agent was engaged in misappropriating customer funds and other dishonest conduct.
2. Whether allegations that an insurance field marketing organization which contracted with insurance companies to find insurance producers to sell insurance products under the FMO's umbrella and to supervise such agents and then provided substantial assistance to a dishonest producer in selling insurance products, processing sales, and obtaining customer funds from other financial entities stated a claim for Aiding and abetting the commission of a fraudulent act where such assistance was provided after the FMO was advised its producer/agent was engaging in criminal and other dishonest conduct with customers.
3. Whether allegations that an insurance field marketing organization which contracted with insurance companies to find insurance producers to sell insurance products under the FMO's umbrella and to supervise such agents and then provided substantial \*2 assistance to a dishonest producer in selling insurance products, processing sales, and obtaining customer funds from other financial entities stated a claim for committing an unfair and deceptive business practice where the FMO provided no supervision of its producers and provided such assistance after the FMO was advised its producer/agent was engaging in criminal and other dishonest conduct with customers.

### STATEMENT OF THE CASE

The present action was commenced by Harold Cohen, Albert Cohen and the estate of Julie Cohen on January 8, 2010 seeking to recover monetary damages from the defendants Sun Life Assurance Company of Canada (US) (“Sun Life”), Allianz Life Insurance Co. of North America, (“Allianz”), Brokers' Service Marketing group II, LLC, (“Brokers' Service”) Sarah Ely Baldo, and John Baldo (“Baldo”). (R.A. 019-050). Plaintiffs alleged that Sun Life, Allianz and Brokers' Service were legally responsible for Baldo's embezzlement of approximately 1.8 million dollars from the plaintiffs. (R.A. 019-050).

Brokers' Service then served its Motion to Dismiss, which was filed with plaintiff's opposition on July 8, 2010. (R.A. 007-008). On or about October 26, 2010, the Court issued a decision which, inter alia, dismissed all claims against the Defendants, \*3 Brokers' Service.<sup>1</sup> (R.A. 084-095). The Court stated that counts twenty-two and twenty-three of the Complaint against Brokers' Service failed to state claims abating and abetting because the Complaint did not allege that Brokers' Service knew of Baldo's allegedly fraudulent scheme.(R.A. 091).

The parties remaining in the case then commenced discovery.<sup>2</sup> (R.A. 282-285). After Harold Cohen died, David Andelman was appointed executor of Harold's estate and in September of 2011, the Court allowed Plaintiffs' Motion to Substitute Mr.

Andelman as a Party Plaintiff. (R.A. 011). On or about January 11, 2012 the Court allowed the substitution of Gerianne Cohen, as Temporary Conservator for Albert Cohen, as a party plaintiff. (R.A. 011).

On January 20, 2012, Sun Life served its Motion for Summary Judgment. (R.A. 108). Plaintiffs then filed their Emergency Motion to Extend the Time for Them to Respond to the Summary Judgment Motion on February 8, 2012. (R.A. 011). Plaintiffs also sought additional time to conduct discovery, including the outstanding depositions of the defendants' Sun Life, Allianz, and Baldo. (R.A. 106-109). On March 7, 2012 \*4 Sun Life filed its Motion for Summary Judgment. R.A. 012. On April 9, 2012, Allianz filed its Motion for Summary Judgment. (R.A. 012).

On April 17, 2012 the plaintiffs filed their Motion to Set Aside and Vacate the Order dismissing Brokers' Service previously entered in the case. (R.A.013). On June 12, 2012 plaintiffs filed their Motion to Amend Complaint relying upon newly discovered evidence including information obtained through discovery. (R.A. 013).

The proposed amended complaint restated Plaintiffs' claims against Brokers' Service for aiding and abetting liability with more specificity.(R.A. 497-502, 503-535). Plaintiffs also asserted new claims against Brokers' Service predicated upon the commission of unfair and deceptive business practices under G.L. c.93A, §9.(R.A. 497-502, 503-535).

The Court scheduled a hearing on the plaintiffs' motions and the Motions for Summary Judgment filed by Sun Life and Allianz for August 16, 2012. (R.A. 006, 016). On or about August 14, 2012 plaintiffs filed a motion to supplement the record on all pending motions with additional exhibits.<sup>3</sup> (R.A. 016). The Court then \*5 held a hearing on all pending motions on August 16, 2012.<sup>4</sup> (R.A. 016).

On or about May 17, 2013, the Court denied Plaintiffs' Motion to Vacate the prior order of dismissal against Brokers' Service. (R.A.728-730). The Court ruled that the evidentiary facts proffered by Plaintiffs fell short of permitting a reasonable inference that Brokers' Service had knowledge of Baldo's ongoing scheme, and thus were insufficient to support the claim predicated upon aiding and abetting Baldo's fraudulent conduct.(R.A. 728-730). The Court also ruled that Plaintiffs' G.L. c. 93A action could not be sustained because it was derivative to the alleged aiding and abetting claim, and therefore, was similarly deficient. (R.A.728-730). The Court never issued a decision or took any action with respect to Plaintiffs' Motion to Amend the Complaint.<sup>5</sup> (R.A. 001-017,728-730).

\*6 On April 22, 2013, Stipulations of Dismissal as to Sun Life and Allianz were approved by the Court.

(R.A. 017). On October 9, 2013 and October 22, 2013, Stipulations of Dismissal as against the remaining two defendants, Sarah Ely Baldo and John Baldo, were approved by the Court. (R.A.017-018). On October 25, 2013, the plaintiffs filed their Notice of Appeal. (R.A. 731-732).

## STATEMENT OF THE FACTS

### The Insurance Entities

Sun Life Insurance Company of Canada (US) is a subsidiary of Sun Life Financial, Inc. (R.A.051). Sun Life is registered in Massachusetts to conduct insurance business. (R.A. 051). In 2005 Sun Life sold an insurance product known as The Keyport Index Multipoint Equity Indexed Annuity Contract to the public. (R.A. 052, 172-173). During this time Sun Life represented to the public that its membership in the Insurance Marketplace Standards Association (IMSA) demonstrated its commitment to

safeguard the consumer and manifested its dedication to fair, honest, and ethical treatment of its policyholders. (R.A. 124-125). In Sun Life's Market Conduct Guide for Individual Life and Annuity Producers, Sun Life stated that it had adopted IMSA's principles of ethical market conduct, including, that business be conducted \*7 in accord with high standards of honesty and fairness and to render that service to its customers which, in the same circumstances, it would apply or demand for itself. (R.A. 130-131). Sun Life further stated that it maintained a system of supervisor's review reasonably designed to achieve compliance with these principles of ethical market conduct. (R.A. 127-163).

Allianz Life Insurance Company of America is a corporation with a primary place of business in Minnesota. (R.A. 052). Allianz is registered to sell insurance and financial products in Massachusetts. (R.A. 052). As of 2004 Allianz touted itself as the number one seller of equity indexed annuities with over eighteen billion dollars in sales. (R.A. 294). Allianz standards include that its producers conduct business in an ethical, honest and fair method. (R.A. 317-319). In 2005 Allianz offered for sale a product known as the Master Dex 10 Annuity.(R.A. 316).

Brokers' Service is a company that functions as a field marketing organization or a managing general agent for insurance companies that do not have in-house sales forces. (R.A. 569-575, 585-593). As a general agent, Brokers' Service agrees to recruit agents to sell an insurer's products and to supervise these agents. (R.A. 569-575, 585-593). Brokers' Services receives commissions based on the product sales by the agents. (R.A. 596-597, 598-599).

\*8 On June 11, 1997, Brokers' Service entered into a National Marketing Organization Agreement with Allianz. (R.A. 585-593). Under this Agreement Brokers' Service agreed to supervise its employees and agents who submitted and processed applications for Allianz insurance policies. (R.A. 585-593). In submitting agent appointments through Allianz, Brokers' Service agreed to investigate the agent's background and character sufficiently for Brokers' Service, "to assert the agent is honest and suitable to represent the Company." (R.A. 585-593). In 2005, John Baldo filled out an application to receive an appointment from Allianz which was stamped by Brokers' Service Marketing Group. (R.A. 347-349, 599-600). Baldo's application was also signed by David Rea as principal of Brokers' Service Field Marketing Organization. (R.A. 349, 599-600). As part of this application Brokers' Service signed a guarantee of the full and faithful service of Baldo under the Agent Agreement and further certified that it had investigated the character, general reputation and background of the applicant. (R.A. 347-349, 600).

On or about January 1, 2000 Brokers' Service entered into a General Agents' Agreement with SunLife. (R.A. 569-575). Under this contract, Brokers' Service agreed to be responsible for the supervision of all of its producers and that it would provide SunLife with \*9 written notice of claims or complaints made against an independent producer in connection with Sun Life products. (R.A. 569-575). Brokers' Services further agreed to conduct its business and to exercise reasonable supervisory business practices so as to cause all independent producers associated with the General Agent to conduct their business in accordance with SunLife's Code of Business Conduct and Field Compliance manual. (R.A. 574, 599-600). The Agreement further provided that the General Agent was responsible for the supervision of all independent producers associated with the General Agent whether such person was contracted directly with SunLife or contracted solely with the General Agent. (R.A. 572, 599-600).

On or about August 9, 2005, SunLife appointed John Baldo as its General Agent under its Master General Agreement. (R.A. 576-583). The document was processed by Brokers' Service and Brokers' Service is listed as the Master General Agent under the Agreement. (R.A. 585-593).

#### *The Cohen Brothers*

Harold Cohen was born on XX/XX/1921. (R.A. 169-170). On June 1, 2004 he underwent heart surgery and was diagnosed with frontal lobe brain damage following the surgery which caused him to lose his reasoning \*10 ability. (R.A. 169-170). As of August 2005 Harold was 84 years old. (R.A. 169-170). He had a wife, Julie, also 84 years old suffering from dementia who lived in an assisted living facility. (R.A. 169-170). He also had three adult daughters, all of whom were financially dependent upon him. (R.A. 169-170).

Albert Cohen was born on XX/XX/1918. (R.A. 169-170). As of 2006, Albert was eighty-seven years old and living alone in a condominium in Storrs, Connecticut. (R.A. 169-170). His wife had died a few years earlier and he had no children. (R.A. 169-170). As of 2006, Albert's memory was poor, his apartment was cluttered and disorganized, and he was engaging in somewhat strange behavior such as frequently hitchhiking in the area around his home. (R.A. 169-170).

#### Baldo's Embezzlement

John Baldo's embezzlement scheme began in the latter part of 2005. (R.A.379). In October of 2005 Baldo embezzled funds from Martina Evans ("Evans") of Boxford, Massachusetts, a client of Baldo who had purchased a life insurance policy and an Allianz annuity through Baldo in early 2005. (R.A. 380-381). On or about October 19, 2005 Baldo deceived Mrs. Evans into writing out a check made payable to Evans for \*11 \$20,000, allegedly as an insurance premium payment. (R.A. 380-381, 411-415). Baldo forged Evans' signature and deposited the check into his personal bank account and used it to pay for his honeymoon. (R.A. 381, 675-678)

Evans confronted Baldo about the check and the life insurance policy and reported Baldo to the FBI for forging her signature on November 22, 2005. (R.A. 380). On or about November 30, 2005, Attorney Andrew Evans contacted Jesse D. Greenberg ("Greenberg") of Brokers' Service via email informing Brokers' Service of his mother's complaint against Baldo. (R.A. 411-415). On or about December 5, 2005, Attorney Evans sent Greenberg a letter setting forth in detail Baldo's acts of forgery, embezzlement and misrepresentation. (R.A. 411-415).

Baldo then obtained a \$30,000 check from Harold Cohen. (R.A. 675-679). Baldo told Harold the money would be used to buy an annuity paying \$482.00 a month. (R.A. 675-679). Baldo instead used the proceeds to pay Martina Evans back. (R.A. 676-679).

Baldo's embezzlement occurred in two stages. (R.A. 379-380). First, Brokers' helped Baldo establish credibility as a Sun Life and Allianz sales agent by \*12 processing the purchase of actual annuities. (R.A. 172-173, 354-360). On or about September 19, 2005, Baldo and Brokers' Service processed the purchase of an annuity for Harold Cohen from Allianz in the amount of \$162,589.82. (R.A. 315). Baldo and Brokers' Service then processed the purchase of an additional annuity for Harold's retirement trust from Allianz on September 20, 2005 with a single premium payment of \$133,331.94. (R.A. 316).

On January 17, 2006, Brokers' Service and Baldo processed the purchase by Albert Cohen of a single premium \$694,178 Keyport Multiflex Annuity by arranging for the transfer of funds from investment accounts Albert had with Traveler's Life & Annuity Company. (R.A. 424-428, 620-621). On February 3, 2006 Allianz issued a single premium MasterDex 10 annuity to Albert Cohen in the amount of 110,083.78. (R.A.313). Both before and after setting up these annuities Baldo also took 10 checks, totaling \$1,580,600, directly from Albert. (R.A. 384-385). Baldo told Albert these checks would be used to increase his existing Sun Life annuity. (R.A. 382-383, 389-390). Baldo instead stole the funds. (R.A. 384-389).

\*13 In the second phase, after stealing most of Albert's invested assets, Baldo turned his attention to the two annuities Albert or Harold had purchased with Sun Life and Allianz. (R.A. 462-470). In July and August Baldo processed withdrawals of approximately \$580,000 from Albert's SunLife annuity and stole the proceeds. (R.A. 462-480)<sup>6</sup>. He processed a withdrawal for Albert's entire Allianz annuity and stole the funds. (R.A. 481-486, 694-701). Baldo also convinced Harold Cohen to withdraw \$150,000 in funds from the Harold and Julie Cohen Allianz annuities to purchase an alleged immediate annuity which would pay Harold \$2,070.00 (R.A. 390). Baldo again stole these funds.<sup>7</sup> (R.A. 389-390).

#### *The Conduct of Brokers' Service Relative to the Embezzlement*

Brokers' Service recruited and processed Baldo's application to become a producer for both Sun Life and Allianz. (R.A. 347-349, 576-583). In doing so, \*14 Brokers' Service agreed to sufficiently investigate the background and character of Baldo to assert that Baldo was honorable and suitable to represent Allianz. (R.A. 585-593). Brokers' Service agreed with SunLife that it would exercise sufficient supervision to cause all producers associated with Brokers' Service to conduct their business according to high standards of honesty and fairness. (R.A. 127-163, 569-575).

In fact, Brokers' Service did not do any investigation into the background of Mr. Baldo at any time. (R.A. 600-601). The fact that Baldo had a criminal record of forgery and fraud with a credit card was not discovered. (R.A. 381, 600-601, 615). Brokers' Service never asked Baldo for a resume, for references or for permission to contact prior employers. (R.A. 601). Brokers' Service did not even ask Baldo for the name of his prior employer. (R.A. 601-602).

After Baldo had been appointed by SunLife and Allianz, Brokers' Service performed no supervision of Baldo. (R.A. 615-617). According to Brokers' Service, it is not a supervisory firm and its only role is to \*15 facilitate and process its agents' business. (R.A. 615-617).

Notwithstanding its failure to perform its contractual obligation of supervision, by early December of 2005, Brokers' Service received clear evidence that Baldo was embezzling funds from an **elderly** customer and was dishonest. (R.A. 609-612). At that time Attorney Andrew Evans informed Brokers' Service that Baldo had stolen \$20,000 from his mother and made misrepresentations in the sale of another insurance product. (R.A. 609-613). Brokers' Service also had been advised by Baldo's former business partner, Rebecca Bohn, that Baldo was dishonest, a thief, and living a life of lies. (R.A. 417-420). After receiving the letter from Attorney Evans, Brokers' Service felt that an agent within its hierarchy could be engaging in dishonest activity with respect to its customers and viewed the letter as raising a red flag about Baldo. (R.A. 612-613). Nevertheless, Brokers' Service did nothing to confirm nor refute the allegations and did not notify either Sun Life or Allianz of the forgery and embezzlement allegations. (R.A. 613). Instead, Brokers' Service continued working with Baldo, calling Sun Life the day \*16 after the report of the embezzlement to ask about the status of commission payments. (R.A. 421-422).

Brokers' Service then proceeded to assist John Baldo in getting access to the assets of Albert Cohen. On January 9, 2006 Baldo processed a Sun Life application form through Brokers' Service which misrepresented that Albert Cohen was 77 years old when in fact he was 87 years old.<sup>8</sup> (R.A. 423). On January 17, 2006 Brokers' Service received transfer forms for Albert's pending SunLife contract to effectuate a transfer of \$694,178.10 from Traveler's Life and Annuity to Sun Life.<sup>9</sup> (R.A. 202-207, 433-436).

At or about the same time, Brokers' Service assisted on the opening shell accounts with SunLife to be funded with additional money from Albert Cohen.<sup>10</sup> (R.A. 619, 621-622, 663-664).

On January 18, 2006 Brokers' Service was assisting Baldo in gaining access to Albert's accounts \*17 with Smith-Barney and AARP/Scudder to fund the shell accounts. (R.A. 196-201, 621-622, 663-664, 702-707). Jesse Greenberg from Brokers' Service continued to monitor the shell accounts and informed Sun Life on or about April 3, 2006 that an additional \$200,000 would be coming directly from the client and that another shell account had \$80,000 from Smith Barney in it. (R.A. 211-212). The shell accounts were never funded and Baldo instead stole the money. (R.A. 686-689).

## ARGUMENT

### I. STANDARD OF REVIEW



Appellate Courts scrutinize without deference the legal standard applied by a trial court to facts. *Sylvester v. Commissioner of Revenue*, 445 Mass. 304, 308(2005). The decision by a trial court that a complaint fails to state a cause of action is reviewable de novo. *Eigerman v. Putnam Investments, Inc.* 66 Mass. App. Ct. 222, 225(2006). The legal conclusion in a summary judgment decision that a party is entitled to judgment as a matter of law is subject to de novo review. *Miller v. Cotter*, 448 Mass. 671, 676(2007). The ruling of a trial court that a particular course of conduct was not unfair or deceptive constitutes an ultimate conclusion of law \*18 subject to a de novo review. *Zabin v. Picciotto*, 73 Mass. App. Ct. 141, 170 (2008).

In the present case the lower court denied plaintiffs' motions to vacate and to amend based on the legal ruling that the alleged conduct failed to state claims under an aiding and abetting theory or under G.L. c.93A. The Court's legal conclusions are subject to de novo review.

## II. PLAINTIFFS' COMPLAINT STATES A VIABLE CLAIM UNDER G.L. C. 93A.

### A. The Required Elements of Claims under 93A §9.

In order to prevail on a 93A section 9 claim Plaintiff must prove the following three elements: 1.) that the Defendant's conduct was unfair or deceptive. *PMP Associates Inc., v. Globe Newspaper Co.*, 366 Mass 593, 598 (1975); 2.) that the alleged wrongful conduct occurred in a business context. *Poznik v. Mass. Med. Prof'l Ins. Ass'n*, 417 Mass. 48, 52(1994); and 3.) the existence of a causal connection between the unfair or deceptive act and loss. *Aspinall v. Phillip Morris Co. Inc.*, 442 Mass. 381, 401. (2004).

#### a. Unfair or Deceptive Acts.

G.L. c. 93A §2 makes unlawful any “unfair act or deceptive act or practices” in the conduct of trade or commerce. In evaluating what constitutes a unfair or \*19 deceptive act, the Supreme Judicial Court has recognized the following conjunctive factors: 1.) whether the Defendant's conduct fell within the penumbra of some common law, statutory or other established concept of unfairness; 2.) whether the Defendant's conduct was unfair, immoral, unethical, oppressive or unscrupulous; and 3.) whether Defendant's conduct causes substantial harm to consumers or businesses. *PMP Associates Inc.*, 366 Mass at 596. Massachusetts courts do not have a static definition of unfair or deceptive. *Kattar v. Demoulas*, 433 Mass. 1, 14 (2000). Instead, unfair or deceptive conduct is discerned from the circumstances of each case. *Id.* The legislative intent for enacting 93A was to allow the terms “‘unfair’ or ‘deceptive’” to grow and change with the times.” *Nei v. Burley*, 388 Mass. 307, 313 (1983). G.L. c. 93A is designed to offer broader and more comprehensive relief to victims of dishonesty than may be available at common law. *Kansallis Finance Ltd. v. Fern*, 421 Mass. 659, 671 (1996). Relief under G.L. c. 93A is not limited by traditional contract or tort requirements. *Nei*, 388 Mass. at 312. The legislature left G.L. c. 93A “sufficiently open-ended to embrace causes of action for which there are no common law analogues.” *Id.*

#### \*20 b. Wrongful Conduct in Trade or Commerce.

To satisfy this element, Plaintiff must prove that the alleged wrongful conduct took place in a business context. *Poznik*, 417 Mass. at 52. Massachusetts Courts determine the context of the wrongful conduct by the nature of the transaction, the character of the parties, and whether the transaction was motivated by business or personal reasons. *Id.* Plaintiff does not need to be a consumer or in privity with the Defendant to recover under section 9 of 93A. *Maillet v. ATF-Davidson Co.*, 407 Mass 185, 192 (1990).

#### c. Causation

To prove the element of causation, Plaintiff must show a causal connection between the unfair or deceptive conduct and the loss. *Aspinall*, 442 Mass. at 401. In the context of unfair conduct, Plaintiff must prove that the alleged conduct was unfair or deceptive and led to Plaintiff's injury. *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 473-474 (1991)

In the misrepresentation context, Plaintiff does not need to show actual reliance on a misrepresentation by the defendant. *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703 (1975). Instead, a misrepresentation is actionable if it has the capacity to mislead consumers, acting reasonably under the circumstances. *Aspinall*, 442 Mass. at 396. The statement may be true as a literal matter, but still \*21 be deceptive or misleading. *Id.* at 395. There is no requirement that the Defendant intend for the statement to deceive or to know that the statement was false. *Id.* at 394.

### **III. THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE BASED ON THE NON-VIABILITY OF A G.L. c. 93A CLAIM.**

In its memorandum of decision, the Lower Court ruled that Appellants' G.L. c. 93A claim was not viable. The Lower Court reasoned that the G.L. c. 93A claim appeared to be a derivative of Appellants' aiding and abetting claim. The Lower Court ruled that since the aiding and abetting claim was deficient, the G.L. c. 93A claim failed as well.

The Lower Court also ruled that Appellants' G.L. c. 93A claim, to the extent it asserted a negligence theory, failed because a G.L. c. 93A claim requires more than a finding of negligence. Both rulings were wrong as a matter of law.

#### **A. The Lower Court Erred in Ruling that the Failure of Appellants' Aiding and Abetting Claim Precluded a G.L. c. 93A Claim.**

G.L. c. 93A was designed to offer broader and more comprehensive relief to consumers than that available at common law. G.L. c. 93A provides consumers relief even where there is no analogous action under common law. Any deficiency in Appellants' aiding and abetting claim does not necessarily \*22 preclude a G.L. c. 93A claim. Since G.L. c. 93A is designed to offer broader relief, it was error for the Lower Court to interpret Appellants' G.L. c. 93A claim as being wholly dependent on the viability of their claim for aiding and abetting liability. The Court must evaluate the totality of the circumstances to determine whether the conduct alleged was unfair or deceptive. See *PMP Associates Inc.*, 366 Mass. at 596. Instead, the Lower Court in the present case limited its analysis to only aiding and abetting liability, impermissibly constricting its analysis under G.L. c. 93A.

#### **B. The Lower Court erred in Ruling that Allegations of Negligence were Insufficient to Support a G.L. c. 93A Claim.**

Massachusetts law is clear that negligence can form the basis of a G.L. c. 93A claim. *Swanson v. Bankers Life Co.*, 389 Mass. 345, 349 (1983) (“We agree that recovery may be had for a deceptive act that is the result of a defendant's negligence”); *Glickman v. Brown*, 21 Mass App. Ct. 229, 235 (1985) (“Although a negligent act, standing by itself, does not amount to a violation of [G.L. c. 93A] a deceptive act, which is the result of a defendant's negligence is actionable without more.”)

Plaintiff must prove that the underlying negligent conduct was unfair or deceptive. *Id.* But a negligent misrepresentation of fact, the truth of \*23 which is reasonably capable of ascertainment, has been held as an unfair and deceptive act or practice within the meaning of G.L. c. 93A section 2. *Glickman*, 21 Mass App. Ct. at 235 (1985).

While Appellants concede that not every negligent act constitutes an unfair or deceptive practice, it was reversible error for the Lower Court to rule that negligence cannot form the basis of a 93A claim. Instead, the proper inquiry is whether the Plaintiffs' alleged sufficient facts that, when viewed in their totality, including the negligent conduct, would warrant a finding that the defendant's acts were unfair or deceptive.

#### **C. Applying the Correct Legal Standards, the Lower Court's decision Must be Reversed.**

Plaintiffs provided evidence which would permit the finder of fact to infer and conclude:



1. Brokers' Service represented to Sun Life and Allianz that it had investigated Baldo's background when it had done no such thing (R.A.569-575, 585-593,600-601);
2. Brokers' Service attested to the integrity and character of Baldo when in fact he had a criminal background. (R.A. 381,600-601,615);
3. Brokers' Service agreed to Supervise Baldo when it had neither the intention nor capacity to do so. (R.A.615);
4. Brokers' Service accepted Baldo into its hierarchy as an agent in August of 2005. (R.A. 347-349, 576-583);
- \*24 5. By December of 2005, Brokers' Service had actual knowledge that Baldo was untrustworthy. (R.A. 411-420,609-612);
6. By December of 2005, Brokers' Service had actual knowledge that Baldo was misrepresenting terms of insurance contracts to potential customers. (R.A. 411-420,609-612);
7. By December of 2005 Brokers' Service had actual knowledge that Baldo was a forger and an embezzler, yet did nothing. (R.A. 411-420,609-613);
8. Brokers' Service felt that the information it received about Baldo raised concerns that an agent within its hierarchy could be engaging in dishonest activity with respect to its customers. (R.A.612-613);
9. Brokers' Service did not notify Sun Life or Allianz about Baldo's known history of forgery and theft from the **elderly**. (R.A. 613);
10. Brokers' Service did not remove Baldo from its hierarchy. (R.A. 610-615, 630);
11. Brokers' Service continued to assist Baldo in processing annuity applications from the Cohens in order to obtain commissions. (R.A.421-422, 630-631); and
12. Brokers' Service enabled Baldo to access the safe and secure retirement accounts that Albert Cohen held elsewhere (R.A. 621-622, 663-664, 702-707).

The foregoing facts establishes an ongoing scenario where Brokers' Service intentionally misrepresented what it had done to investigate Baldo's character, and what it was going to do to supervise him. Brokers' Service certification of Baldo's integrity without any basis to do so was reckless. By \*25 facilitating Baldo's appointment as agent, Brokers' Service put Baldo in a position to prey on the **elderly** and infirm. When notified that Baldo in fact was committing financial **abuse** on the **elderly**, Brokers' Service did nothing, said nothing, and continued to help Baldo access the Cohens' lifetime savings in order to get commissions.

Brokers' Services' conduct, viewed in its totality, falls within the penumbra of the common law tort of intentional misrepresentation and negligent misrepresentation. Brokers' Service's conduct also evidences negligent and deliberate indifference to the economic safety of purchasers of insurance products, including the **elderly**. Brokers' Service's conduct constituted the intentional breach of its contractual duty to supervise Baldo and report wrongdoing in order to obtain financial gain in the form of commissions. See *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451,474 (1991)citing *Wang Laboratories, Inc. v. Business Incentives, Inc.*, 398 Mass. 854, 857 (1986.) (“[Conduct] in disregard of known contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes.”)

\*26 The unfair conduct of Brokers' Service is causally related to the loss suffered by the Appellants.<sup>11</sup> Brokers' Service accepted Baldo into its hierarchy and vouched for his character and integrity to Sun Life and Allianz. Even after finding out that he was a known forger, embezzler, and liar, Brokers' Service continued to process business for Baldo. If Brokers' Service supervised Baldo in any way, notified Sun Life and Allianz about his illegal activities, or fired him on its own, Baldo would never have had access to Appellants money.

G.L. c. 93A is designed and intended to protect consumers from precisely this type of conduct. The purpose of G.L. c. 93A is to provide more comprehensive relief found at common law. The spirit of the statute is to provide consumers with relief from unfair or deceptive acts even when there is no analogous claim at common law. The Lower Court clearly erred by analyzing the viability of Plaintiffs' claims based on whether the Plaintiffs' sufficiently stated an aiding and abetting claim or included allegations of negligent conduct. G. L. c. 93A encompasses a \*27 greater breadth of conduct and the Lower Court failed to analyze Brokers' Service's conduct in the totality of the circumstances. As such, the Lower Court's ruling must be reversed.

#### **IV. THE LOWER COURT ERRED IN RULING THAT THE ADDITIONAL FACTS ASSERTED IN THE PROPOSED SECOND AMENDED COMPLAINT DID NOT STATE A CLAIM FOR AIDING AND ABETTING LIABILITY**

The Lower Court, in denying the plaintiffs' motion to vacate, ruled that there was an absence of evidence to allow an inference that Brokers' Service knew that Baldo was conducting an ongoing embezzlement of funds from the Cohens. (R.A.728-731). The Court therefore ruled that the plaintiffs' claims for aiding and abetting liability were legally deficient. (R.A. 728-731).

In *Go-Best Assets Ltd. V. Citizen's Bank*, 463 Mass. 50(2012), the Supreme Judicial Court reviewed the law of aiding and abetting liability. The Court ruled that to prove that a bank had aided and abetted embezzlement of funds by an attorney, the plaintiff needed to prove: (1) that the lawyer had committed the relevant tort; (2) that the bank knew he was committing the tort; and (3) that the bank actively \*28 participated in or substantially assisted in his commission of the tort.<sup>12</sup> *Id.* at 64.

This standard is satisfied in the present case. The record clearly showed that Baldo had embezzled funds from the Cohens. Evidence permitted the inference that Brokers' Service had information that Baldo had been embezzling funds from clients like the Cohens and had been informed that Baldo was a liar and a thief by Baldo's former business partner. (R.A.379-385,411-420,609-613). The evidence further was sufficient to allow an inference that Brokers' Service had provided substantial assistance to Baldo in accessing Albert Cohen's funds by processing paperwork allowing transfers of funds from Albert's existing investment accounts. (R.A.196-207,433-436).

The *Go-Best* decision should not be interpreted as requiring proof that Brokers' Service knew of the actual embezzlement from the Cohens. In *Go-Best*, there was no evidence in the record that any irregularities or overdrafts that had previously occurred in the lawyer's alleged trust fund account had caused any \*29 injury or damage to clients. *Id.* at 55. As a result the Court focused on whether there was an absence of evidence showing that the Bank had knowledge of the attorney's misappropriation of funds from the plaintiff. *Id.* In the absence evidence that the Bank had knowledge of prior misappropriations of the theft from the Plaintiff, the Court ruled that the aiding and abetting claim was deficient. *Id.* at 64.

A rule of law that a party may only be liable for aiding and abetting fraud upon proof of knowledge that the fraud perpetrator was defrauding the actual plaintiff would lead to unreasonable results. For example, a party who continues to refer investors to an individual the party knows has been perpetrating a Ponzi scheme on dozens of individual investors should not be immune from liability absent proof of knowledge that future investors are going to be swindled. The focus should be on knowledge of the tortious conduct in question, not on the specific identity of the individual being wronged.<sup>13</sup>

#### **\*30 CONCLUSION**

The Lower Court erred in the denial of Plaintiffs' Motion to Set Aside and Vacate Order to Dismiss Brokers' Service, and the de facto denial of Plaintiffs' Motion to Amend Complaint. The orders should be reversed and the action remanded to the Superior Court for further proceedings.

Footnotes

- 1 Sun Life and Allianz also filed Motions to Dismiss, and the Court's decision dismissed some but not all of the claims against Sun Life and Allianz. (R.A. 084-095).
- 2 Brokers' Service never moved for Entry of Separate Judgment. (R.A.728).
- 3 The additional exhibits consisted of deposition testimony of John Baldo from June 29, 2012, deposition testimony of Brokers' Service from June 27, 2012, deposition testimony of SunLife from July 5, 2012 and documents produced by the FBI pursuant to subpoena. (R.A.567,668,634).
- 4 By decision dated December 20, 2012, the Court denied the motions for summary judgment of both Sun Life and Allianz. (R.A. 016).
- 5 The Court's Memorandum of Decision did reference the Court's authority to allow the plaintiffs to amend their complaint as to Brokers' Service. It further noted that the lateness of the effort to amend should not be held against the Plaintiffs in view of the time lost while the parties awaited a decision on the original motions to dismiss and the need to seek appointment of party representatives due to the death and failing health of the Cohens. (R.A. 728).
- 6 During this same time period, Baldo also embezzled \$200,000 from another client, Sarah Gentleman-Tiller, who was seeking to purchase an annuity. (R.A. 384-385)
- 7 Baldo told Harold that because the existing contracts were deferred annuities and the new annuity would be an immediate annuity, the funds had to be withdrawn and then reinvested with the annuity company.(R.A.389-390).
- 8 The maximum permissible age under SunLife policy for a Keyport Annuity Contract was 85. (R.A. 191-195).
- 9 Albert paid \$21,186.91 in fees to Travelers to transfer the annuity to SunLife. (R.A. 437-439)
- 10 These shell accounts consisted of numbered accounts containing no investment product. (R.A. 619, 621-622). The accounts all were used to fund future annuities without the need for additional applications or approval from the customer. (R.A. 619, 621-622, 651-652)
- 11 It is incontestable that the unfair or deceptive conduct took place in a business context, namely the selling of defined annuity products.
- 12 The Court applied the test for aiding and abetting liability found in the [Restatement \(Second\) of Torts § 876 \(b\) \(1977\)](#).
- 13 The present case is further distinguishable from *Go-Best* by the difference in the parties' relationship. In *Go Best*, the tortfeasor was simply a customer at the bank, with the parties' rights and remedies determined to a large extent by the Uniform Commercial Code. *Id.* at 56, FN 6. Pursuant to the General Agent under Master Agent Agreement executed by Sun Life, Baldo, and Brokers' Service, Baldo was a subagent of Brokers' Service, in its capacity as an agent for Sun Life, given its agreement with Sun Life to supervise and be responsible for the conduct of Baldo. [Restatement \(Second\) of Agency §5](#).