THE SIX MOST COMMON LAWSUITS AGAINST LANDLORDS IN MA AND HOW TO AVOID THEM

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What Is 93A?

93A FOR LANDLORDS IN MA PER THE ATTORNEY GENERAL:

940 CMR 3.17: Landlord-Tenant

(1) **Conditions and Maintenance of a Dwelling Unit. It shall be an unfair or deceptive act or practice for an owner to:**

(a) Rent a dwelling unit which, at the inception of the tenancy 1 contains a condition which amounts to a violation of law which may endanger or materially impair the health, safety, or well-being of the occupant; or 2. is unfit for human habitation;

(b) Fail, during the terms of the tenancy, after notice is provided in accordance with M.G.L. c. 111, s. 127L, to 1. remedy a violation of law in a dwelling unit which may endanger or materially impair the health, safety, or well-being of the occupant, or 2. maintain the dwelling unit in a condition fit for human habitation; provided, however, that said violation of law was not caused by the occupant or others lawfully upon said dwelling unit;

(c) Fail to disclose to a prospective tenant the existence of any condition amounting to a violation of law within the dwelling unit of which the owner had knowledge or upon reasonable inspection could have acquired such knowledge at the commencement of the tenancy;

(d) Represent to a prospective tenant that a dwelling unit meets all requirements of law when, in fact, it contains violations of law;

(e) Fail within a reasonable time after receipt of notice from the tenant to make repairs in accordance with a pre-existing representation made to the tenant;

(f) Fail to provide services and/or supplies after the making of any representation or agreement, that such services would be provided during the term or any portion of the term of the tenancy agreement;

(g) Fail to reimburse the tenant within a reasonable or agreed time after notice, for the reasonable cost of repairs made or paid for, or supplies or services purchased by the tenant after any representation, that such reimbursement would be made;

(h) Fail to reimburse an occupant for reasonable sums expended to correct violations of law in a dwelling unit if the owner failed to make such corrections pursuant to the provisions of M.G.L. c. 111, s. 127L, or after notice prescribed by an applicable law;

(i) Fail to comply with the State Sanitary Code or any other law applicable to the conditions of a dwelling unit within a reasonable time after notice of a violation of such code or law from the tenant or agency.

(2) **Notices and Demands**. It shall be an unfair or deceptive practice for an owner to:

(a) Send to a tenant any notice or paper which appears or purports to be an official or judicial document but which he knows is not;

(b) Fail or refuse to accept any notice sent to any address to which rent is customarily sent, or given to any person who customarily accepts on behalf of the owner, or sent to the person designated in the rental agreement in accordance with 940 CMR 3.17(3)(b)2.

(c) Demand payment for increased real estate taxes during the term of the tenancy unless, prior to the inception of the tenancy, a valid agreement is made pursuant to which the tenant is obligated to pay such increase.

(3) **Rental Agreements.**

(a) It shall be unfair or deceptive act or practice for an owner to include in any rental agreement any term which: 1. Violates any law; 2. Fails to state clearly and

conspicuously in the rental agreement the conditions upon which an automatic increase in rent shall be determined. Provided, however, that nothing contained in 940 CMR 3.17(3)(a)2. shall be deemed to invalidate an otherwise valid tax escalator clause; 3. Contains a penalty clause not in conformity with the provisions of M.G.L. c. 186, s. 15B; 4. Contains a tax escalator clause not in conformity with the provisions of M.G.L. c. 186, s. 15C;

(b) It shall be an unfair or deceptive practice for an owner to enter into a written rental agreement which fails to state fully and conspicuously, in simple and readily understandable language: 1. The names, addresses, and telephone numbers of the owner, and any other person who is responsible for the care, maintenance and repair of the property; 2. The name, address, and telephone number of the person authorized to receive notices of violations of law and to accept service of process on behalf of the owner; 3. The amount of the security deposit, if any; and that the owner must hold the security deposit in a separate, interest-bearing account and give to the tenant a receipt and notice of the bank and account number; that the owner must pay interest, at the end of each year of the tenancy, if the security deposit is held for one year or longer from the commencement of the tenancy; that the owner must submit to the tenant a separate written statement of the present condition of the premises, as required by law, and that, if the tenant disagrees with the owner’s statement of condition, he/she must attach a separate list of any damage existing in the premises and return the statement to the owner; that the owner must, within thirty days after the end of the tenancy, return to the tenant the security deposit, with interest, less lawful deductions as provided in M.G.L. c. 186, s. 15B; that if the owner deducts for damage to the premises, the owner shall provide to the tenant, an itemized list of such damage, and written evidence indicating the actual or estimated cost of repairs necessary to correct such damage; that no amount shall be deducted from the security deposit for any damage which was listed in the separate written statement of present condition or any damage listed in any separate list submitted by the tenant and signed by the owner or his agent; that, if the owner transfers the tenant’s dwelling unit, the owner shall transfer the security deposit,

with any accrued interest, to the owner's successor in interest for the benefit of the tenant.

(c) It shall be unfair and deceptive practice for an owner to fail to give the tenant an executed copy of any written rental agreement within 30 days of obtaining the signature of the tenant thereon.

(4) **Security Deposits and Rent in Advance**. It shall be an unfair or deceptive practice for an owner to:

(a) require a tenant or prospective tenant, at or prior to the commencement of any tenancy, to pay any amount in excess of the following: 1. rent for the first full month of occupancy; and 2. rent for the last full month of occupancy calculated at the same rate as the first month; and 3. a security deposit equal to the first month's rent; and, 4. the purchase and installation cost for a key and lock. or, at any time subsequent to the commencement of a tenancy, demand rent in advance in excess of the current month's rent or a security deposit in excess of the amount allowed by 940 CMR 3.17(4)(a)3.

(b) fail to give to the tenant a written receipt indicating the amount of rent in advance for the last month of occupancy, and a written receipt indicating the amount of the security deposit, if any, paid by the tenant, in accordance with M.G.L. c. 186, s. 15B;

(c) fail to pay interest at the end of each year of the tenancy, on any security deposit held for a period of one year or longer from the commencement of the term of the tenancy, as required by M.G.L. c. 186, s. 15B;

(d) fail to hold a security deposit in a separate interest-bearing account or provide notice to the tenant of the bank and account number, in accordance with M.G.L. c. 186, s. 15B;

(e) fail to submit to the tenant upon receiving a security deposit or within ten days after commencement of the tenancy, whichever is later, a separate written statement of the present condition of the premises in accordance with M.G.L. c. 186, s. 15B;

(f) fail to furnish to the tenant, within 30 days after the termination of occupancy under a tenancy-at-will or the end of the tenancy as specified in a valid written rental agreement, an itemized list of damage, if any, and written evidence indicating the actual or estimated cost of repairs necessary to correct such damage, in accordance with M.G.L. c. 186, s. 15B;

(g) fail to return to the tenant the security deposit or balance thereof to which the tenant is entitled after deducting any sums in accordance with M.G.L. c. 186, s. 15B, together with interest, within thirty days after termination of occupancy under a tenancy-at-will agreement or the end of the tenancy as specified in a valid written rental agreement;

(h) deduct from a security deposit for any damage which was listed in the separate written statement of present condition given to the tenant prior to execution of the rental agreement or creation of the tenancy, or any damages listed in any separate list submitted by the tenant and signed by the owner or his agent;

(i) fail, upon transfer of his interest in a dwelling unit for which a security deposit is held, to transfer such security deposit together with any accrued interest for the benefit of the tenant to his successor in interest, in accordance with M.G.L. c. 186, s. 15B;

(j) fail, upon transfer to him of a dwelling unit for which a security deposit is held, to assume liability for the retention and return of such security deposit, regardless of whether the security deposit was, in fact, transferred to him by the transferor of the dwelling unit, in accordance with M.G.L. c. 186, s. 15B; provided, that 940 CMR 3.17(4)(j) shall not apply to a city or town which acquires property pursuant to M.G.L. c. 60 or to a foreclosing mortgagee or a mortgagee in possession which is a financial institution chartered by the Commonwealth or the United States, or;

(k) otherwise fail to comply with the provisions of M.G.L. c. 186, s. 15B. 940 CMR 3.00 shall not be deemed to limit any rights or remedies of any tenant or other person under M.G.L. c. 186, s. 15B(6) or (7).

(5) **Evictions and Termination of Tenancy**. It shall be an unfair and deceptive practice for an owner to:

(a) Deprive a tenant of access to or full use of the dwelling unit or otherwise exclude him without first obtaining a valid writ of execution for possession of the premises as set forth in M.G.L. c. 239 or such other proceedings authorized by law;

(b) Commence summary process for possession of a dwelling unit before the time period designated in the notice to quit under M.G.L. c. 186, s. 11 and 12, has expired; provided, however, nothing in 940 CMR 3.17 shall effect the rights and remedies contained in M.G.L. c. 239 s.1A.

(6) **Miscellaneous**. It shall be an unfair and deceptive practice for an owner to:

(a) Impose any interest or penalty for late payment or rent unless such payment is 30 days overdue;

(b) Retaliate or threaten to retaliate in any manner against a tenant for exercising or attempting to exercise any legal rights as set forth in M.G.L. c. 186, s. 18;

(c) Retain as damages for a tenant's breach of lease, of the failure of a prospective tenant to enter into a written rental agreement after signing a rental application, any amount which exceeds the damages to which he is entitled under the law, or an amount which the parties have otherwise agreed as to the amount of the damages;

(d) Require payment for rent for periods during which the tenant was not obligated to occupy and did not in fact occupy the dwelling unit unless otherwise agreed to in writing by the parties;

(e) Enter a dwelling unit other than (i) to inspect the premises, or (ii) to make repairs thereto, or (iii) to show the same to a prospective tenant, purchaser, mortgagee or its agents, or (iv) pursuant to a court order, or (v) if the premises appear to have been abandoned by the tenant, or (vi) to inspect, during the last 30 days of the tenancy or after either party has given notice to the other of intention to terminate the tenancy, for

the purpose of determining the amount of damage, if any, to the premises which would be cause of reduction from any security deposit held by the owner.

(f) To violate willfully any provisions of M.G.L. c. 186, s.14.

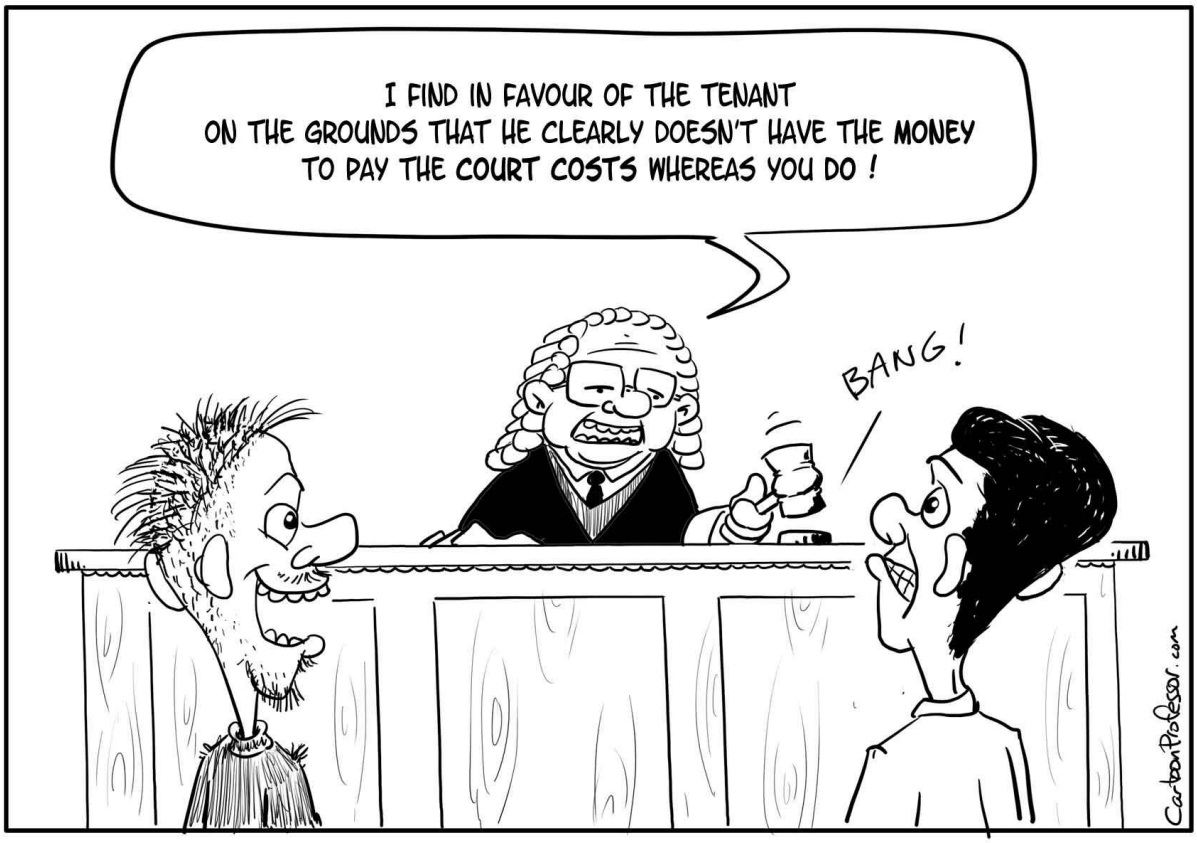
(g) It shall be an unfair practice for any owner who is obligated by law or by the express or implied terms of any tenancy agreement to provide gas or electric service to an occupant: 1. To fail to provide such service; or 2. To expose such occupant to the risk of loss of such service by failing to pay gas or electric bills when they become due or by committing larceny or unauthorized use of such gas or electricity. For the purpose of this regulation a bill shall be deemed "due" only after the owner has had an opportunity to contest it at a Department of Public Utilities hearing or any appeal from such hearing during which termination of service has been stayed.

CASE LAW STANDARD FOR 93A (unfair and deceptive practices) – THIS STANDARD HAS TO BE TAKEN IN CONJUNCTION WITH ATTORNEY GENERAL'S REGULATION 940 CMR 3.17* (*looking only at 940 CMR 3.17 and ignoring recent case law on 93A or the general 93A standards is not allowed) "Although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact, the boundaries of what may qualify for consideration as a [Chapter] 93A violation is a question of law." Schwanbeck v. Federal-Mogul Corp., 31 Mass.App.Ct. 390, 578 N.E.2d 789, 803-04 (1991), rev'd on other grounds, 412 Mass. 703, 592 N.E.2d 1289 (1992). "`[A] practice or act will be unfair under [Chapter 93A] if it is (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business people.'" Morrison v. Toys "R" Us, Inc., 441 Mass. 451, 806 N.E.2d 388, 392 (2004) (quoting Heller Fin. v. Ins. Co. of N. Am., 410 Mass. 400, 573 N.E.2d 8, 12-13 (1991)). Which acts will be considered "deceptive" is less clearly defined in the case law. See Aspinall v. Philip Morris Cos., 442 Mass. 381, 813 N.E.2d 476, 486 (2004). Some cases have held that an act or practice is deceptive "`if it could reasonably be found to have caused a person to act differently from the way he or she otherwise would have acted.'" Id. (quoting Purity Supreme, Inc. v. Attorney Gen., 380

Mass. 762, 407 N.E.2d 297, 307 (1980) A successful claim under this section thus requires, at a minimum, a showing of (1) a deceptive act or practice on the part of the seller; (2) an injury or loss suffered by the consumer; and (3) a causal connection between the seller's deceptive act or practice and the consumer's injury. See G. L. c. 93A, § 9. See also Hershenow, supra at 797. MARK CASAVANT & another [FN1] vs. NORWEGIAN CRUISE LINE, LTD.No. 08-P-2102.Worcester. September 16, 2009. - December 31, 2009.

CASE LAW STANDARD FOR DOUBLING AND TRIPLING DAMAGES UNDER 93A

"Massachusetts courts have not precisely defined what constitutes a knowing and willful violation of Chapter 93A. But such violations usually embody outrageous conduct, often involving (1) coercion or extortion, or (2) fraud or similar forms of misrepresentations. See, e.g., Incase, 488 F.3d at 58 (citing cases). MASS. EYE AND EAR INFIRMARY v. QLT PHOTOTHERAP., 552 F. 3d 47 - Court of Appeals, 1st Circuit 2009)" The cases, again, are unclear about what constitutes willful or knowing behavior, but most of them tend to cluster around findings of: (a) coercion or extortion, see Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 583 N.E.2d 806, 822 (1991) (withholding monies owed as a form of extortion is willful); Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 18 (1st Cir.1985) (withholding payment as a wedge to enhance bargaining power is willful); (b) fraud and similar forms of misrepresentation,[13] see Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 489 N.E.2d 185, 197 (1986); Serv. Publ'ns, Inc. v. Goverman, 396 Mass. 567, 487 N.E.2d 520, 528 n. 13 (1986); see also Computer Sys. Eng'g, Inc. v. Qantel Corp., 740 F.2d 59, 67-68 (1st Cir.1984) (a willful or knowing violation includes "a misrepresentation made with reckless disregard as to its truth or falsity"); or (c) abusive litigation, see Fed. Ins. Co. v. HPSC, Inc., 480 F.3d 26, 37 (1st Cir.2007); Int'l Fid. Ins. Co. v. Wilson, 387 Mass. 841, 443 N.E.2d 1308, 1318 (1983)



Elmir's Non-Lawyer Comments: The 750 housing cases from the past 3 years reveal that 93A is not a local and/or a minor issue. It is major and statewide. It is not a coincidence that the 3 highest amounts in verdicts over the past 3 years from Housing Court against us are 93A- related. The reason for that is that 93A is simply a vehicle to double and triple anything the tenant has already won under all the other claims and the judge can go around a jury if necessary and that makes it even more dangerous.

There are 4 problems with 93A for landlords:

1**. INCORRECT 93A STANDARD USED**. The standard quoted above and used by all other courts in MA is rarely used by Housing Court. Instead, they are using the Attorney General's Regulations 940 CMR 3.17 which were written in 1978 and basically never changed and are not compliant with recent case law – specifically the actual injury requirement. Ruling only on 940 CMR 3.17 and ignoring recent case law is not allowed.

2 . THE ACTUAL INJURY REQUIREMENT IS EITHER NOT KNOWN BY HOUSING JUDGES OR IGNORED. The new case law requires that the tenant was actually injured before they can sue us under 93A. Having an unfair or deceptive language in a contract is not an actual injury if none of the parties of the contract enforced that particular unfair or deceptive clause. “In the context of a Massachusetts consumer protection statute, the term “injury” has two components. In the first instance, it denotes “an invasion of a legally protected interest.” Leardi v. Brown, 394 Mass. 151, 474 N.E.2d 1094, 1101 (1985); see Aspinall v. Philip Morris Cos., 442 Mass. 381, 813 N.E.2d 476, 490-91 (2004). To be actionable, however, that invasion must cause a loss (either economic or noneconomic) to the holder of the legally protected interest. See Hershenow v. Enter. Rent-a-Car Co., 445 Mass. 790, 840 N.E.2d 526, 532-35 (2006).”

3. THE RIGHT TO A JURY. 93A should be given to the jury when the tenant is asking for double and triple damages and attorney fees which is pretty much all the time. A recent case rules that it is against the US Constitution not to give 93A to a jury when they are asking for double and triple damages and attorney fees i.e. so called “legal claims” (MA Eye and Ear Infirmary v. QLT, inc, US District Court for the District of MA, # 00-10783-WGY, July 10, 2007, Judge YOUNG, D.J.) and there is a good argument to be made that this needs to be adopted by the SJC as well in respect to the MA Constitution. The reason why this is important is because if judges are allowed to simply “disagree” with a jury for purposes of 93A, then we have a much larger problem because 93A attaches on the back of many claims and the judge can use 93A to invalidate those claims already decided by the jury. A judge can easily invalidate claims like Discrimination, Warranty of Habitability, Quiet Enjoyment, Retaliation, Emotional Distress and Lead Paint, Mold, etc…using 93A “because it doesn’t come with the right to a jury” as a much easier standard to overturn a jury rather than the usual high standard – using only the evidence most favorable to us and disregarding that which is most favorable to tenants as the standard for overturning jury verdicts requires.

4. INCORRECT STANDARD USED FOR DOUBLING AND TRIPLING. Housing Court judges are not utilizing the standard for doubling and tripling of 93A that other courts are trying to utilize as the emerging high standard quoted above. Instead they are awarding

double and triple damages if the conduct was “egregious”. As we all know “egregious” is one of those vague and imprecise words that doesn’t mean anything or rather can mean anything that anyone wants it to mean just like the word “amazing” which also can mean anything you want to mean. 93A is very easy to charge, very easy to prove and the consequences are substantial and insurance does not cover 93A.

Let me give you 4 examples:

EXAMPLE 1. 06-SP-1090 Judge Fein, Western Housing Court, Aug, 2006. Triples damages under Breach of Warranty of Habitability, Quiet Enjoyment and Retaliation to $58,000.

EXAMPLE 2. NO. 07H84CV00056, Judge Winik, Boston Housing Court. The tenant only lived in the apartment for 3 months! There were poor conditions in the apartment and the tenant’s children were bitten by insects and that made their asthma worse. “They suffered pain and discomfort. Kilyn Vaughn was asthmatic. The insect bites “exacerbated his asthma.” There was also a rodent infestation in the apartment. In addition the water was stopped for 2 days because the landlord had failed to pay it and so because of all of that the tenants were forced to leave. Judge awards $25,000 for Habitability and Pain and Suffering and triples that to $75,000 under 93A $5,000 for Retaliation $5,000 for Security deposit Violations $7,500 for the Tenant’s Lawyer Total close to $100,000 for 3 months of tenancy mostly due to 93A! Keep in mind insurance does not pay for “Intentional Acts” like Retaliation and they do not pay for Security Deposit Disputes and Attorney Fees.

EXAMPLE 3. Judge Edwards, Southeastern Housing Court., 01-CV-00443, October 5th , 2007. The Tenant purchased a mobile home in a mobile home park for $47,000. She spent another $3,000 on landscaping. Her rent was $314. During the first 2 years there were no problems with the septic system and no odors but then the septic system failed due to the intrusion of tree roots into the system. The Landlord installed a new partial septic system for her. In addition the Landlord hired an Engineer to replace the septic system for the whole park. The Landlord and the Engineer settled on one of three

suitable places and began construction work. The tenant had trouble accessing her mobile home, there was noise and bad smells from the construction. The vibrations caused items to fall off walls and inside her refrigerator. She had to sleep somewhere else 3-4 times during the year because of utilities disruptions. There was damage to her landscaping. She complained to the landlord about all of this and the Landlord responded: “We will make every effort to repair any damage to your home that we may have caused during the installation of this new system. Additionally, the landscaping in your yard will be returned to its original condition or as close thereto as humanly possible”. She called the Health Board many times to complain about construction noise and bad odors. Finally, the Health Board agreed to condemn her mobile home because of the bad smell. The Landlord paid for her hotel for 5 weeks. The tenant asked the Landlord to move her to an efficiency apartment or to move her whole mobile home to a new lot. The Landlord refused to pay for more hotels or to move her entire mobile home. The tenant asked the health board to lift the condemnation order and they agreed. To accommodate her, the landlord had installed soundproofing and charcoal filtering to decrease noise and odor and also changed the location of the vent. About 2-3 years after she moved back in, she tried to sell her mobile home without any luck and blamed the new sewer system as the reason why she couldn’t sell. She was asking for damages but it is not clear for how much except it is clear that she demanded $27,000 to restore her landscaping. She admitted that she did not have to seek medical treatment from the noise or odors. So here is what the Judge decides: “The Court finds that the Defendant’s actions in constructing and maintaining a community septic system on the Defendant’s Premises were a material breach of the Lease between the parties. More specifically, the Defendant’s decisions to site the community septic system on, under and adjacent to the Plaintiff’s Premises including the placement of a large above-ground compressor shed and exhaust vents for the system directly on the Plaintiff’s front lawn and outside her bedroom window constituted both a material breach of the Lease and a breach of the implied covenant of good faith and fair dealing. The Court finds that as a result of the Defendant’s actions, the Plaintiff suffered economic damages equal to the market value of her manufactured home. There was credible testimony presented by the Plaintiff’s appraiser, Stephen DeCastro, that the market

value of the Plaintiff's manufactured home absent the community septic system and compressor shed was approximately $90,000.00. Judgment enters for the Plaintiff on her claim for breach of the Lease and breach of the covenant of good faith and fair dealing in the amount of $90,000.00 (in exchange for the title), doubled to $180,000.00 pursuant to M.G.L. c. 93A $15,000 for Breach of Warranty of Habitability $29,000 of Breach of Quiet Enjoyment $94,000 Pre-Judgment Interest $85,000 Attorney fees for tenant's Attorney Total Judgment against the Landlord $361,000 (adjusted for back rent, etc) By the way, none of these are covered by insurance except maybe Quiet Enjoyment.

EXAMPLE 4. Judge Kerman, Northeast Housing Court, No. 05-CV-00047, April 16th, 2009. The Landlord owned about 40 and managed another 80 units for his parents and other people. He performed renovations in one building without pulling a permit. The renovations included "installation of a new roof, change of use of the pre-existing carriage house to a dwelling unit, the cutting away of walls and partitions, and rearrangement of structures affecting egress". The roof wasn't repaired properly and caused chronic dampness and mold. The tenant developed asthma and mold allergies. "The tenant was given $726,000 for that landlords' common law negligence, breach of warranty of habitability, violation of quiet enjoyment, and unfair or deceptive acts or practices". The Judge doubled that amount under 93A, awarded $221,000 to the tenant's attorneys for a total real estate attachment of $2,000,000. **Conclusion** As you can see it is very easy to sue a Landlord in MA (as the tenants and their attorneys have nothing on the line and nothing to lose) and it is very easy to win. And this book doesn't even touch on Security Deposit Violations which is another easy area to make money for tenants and their attorneys. However, we as landlords must assume responsibility for our own actions and for knowing the laws and must take every step to comply with them and also to talk to our Representatives to modify and simplify them. The laws as quoted in this book give us a very good idea of what to do and what not to do and how to avoid getting sued in the first place. For more detailed information beyond my Summaries please consult the web sites of the Supreme Judicial Court of MA and the MCAD and for Housing Court cases please consult the Social Law Library. I have never

hired a lawyer to do an eviction for me and you can do the same thing but you need to know the law as outlined in this book and on http://www.MassachusettsLandlords.com. What do you think about the anti-landlord laws in MA and about this book?

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