Building Codes in Massachusetts: Building Code Violations and Key Contract Terms

Prepared by:
Drew W. Colby, Esq.
Partridge Snow & Hahn, LLP

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BUILDING CODE VIOLATIONS AND KEY CONTRACT TERMS

PREPARED AND PRESENTED BY:

Drew W. Colby, Esq.
Partridge Snow & Hahn, LLP
1700 West Park Drive, Suite 200
Westborough, MA 01581
dwc@psh.com
www.psh.com

BUILDING CODE VIOLATIONS ARTICLE

I. INTRODUCTION

The Massachusetts Building Code (i.e., 780 Code of Massachusetts Regulations- hereinafter "Building Code") sets forth minimum standards to be followed when performing construction and other services. The Building Code is designed to protect the safety and welfare of the public. Because the Building Code prescribes only minimum standards, there exists virtually no tolerance for those caught violating the Building Code. Regrettably, violations do occur with some degree of regularity. Accordingly, this article

addresses the following three potential consequences for violating the Code: (1) Administrative proceedings, (2) Criminal proceedings, and (3) Civil proceedings.

In overly simplistic terms, each of the three proceedings accomplishes different goals. The goal of the Administrative proceeding is to prevent a Building Code Violator from engaging in wrongful conduct in the future. The goal of the Criminal proceeding is to punish a Building Code Violator for past conduct. The goal of the Civil proceeding is to reimburse the Victim of a Building Code Violator's conduct. Working together, these three consequences are designed to create a great disincentive to those who would otherwise perform substandard work.

II. ADMINISTRATIVE PROCEEDINGS

There exists probably no greater sources of anxiety for a License Holder than being the target of an Administrative proceeding. If the "Administrator" rules against the License Holder, the License Holder may lose his or her ability to make a living in an area which might well represent the License Holder's only employable skill set. Clearly, these proceedings can bring disastrous consequences for a License Holder.

The process for pursuing an Administrative complaint will vary depending upon the State Agency which oversees the particular license at issue. This article will not go through each of the processes for challenging each type of license, but will instead focus on the Construction Supervisor's license. Nonetheless, we direct your attention to footnote "1" that identifies sources of information concerning other license holders as well.[1]

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[1] The following are a list of website which directly or indirectly provide information concerning licensing issues for various license holders:

Architects – Division of Professional Licensure - www.mass.gov/dpl/boards/ar

Challenges to licenses held by Construction Supervisors are administered by the following:

Executive Office of Public Safety and Security
McCormack State Office Building
One Ashburton Place, Room 1301
Boston, MA 02108
Tel 617-727-7532
Fax 617-227-1754
www.mass.gov/bbrs/

The procedures for administering these proceedings are set forth in Footnote 2[2]. Please note: reading this article must not be substituted for contacting the Board of Building

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Asbestors Removal Professionals – Division of Occupational Safety - www.mass.gov/dep/air/asbguid.htm
Concrete Technicians – Board of Building Regulations and Standards – www.mass.gov/eopss/consumer-prot-and-bus-lic/license-type/concrete-field-testing-technician.html
Home Improvement Contractors - Board of Building Regulations and Standards – www.mass.gov/ocabr/consumer/home-improvement-contract/
Deleading Professionals – Division of Occupational Safety – www.mass.gov/eohhs/consumer/community-health/environmental-health/exposure-topics/lead/delead/
Elevator/Escalator Mechanic or Operator – Department of Public Safety – www.mass.gov/dps/elevator
Engineers & Land Surveyors – Division of Professional Licensure – www.mass.gov/dpl/boards/en
Hazardous Waste Site Professionals – Board of Registration of Hazard Waste Site Cleanup Professionals – www.mass.gov/lsp
Plumbers & Gas Fitters – Division of Professional Licensure – www.mass.gov/dpl/boards/pl
Electricians and Alarm System Installers – Division of Professional Licensure – www.mass.gov/dpl/boards/el
Landscape Architects – Division of Professional Licensure – www.mass.gov/dpl/boards/la

[2] The following are the steps involved with the Complaint process against a Construction Supervisor with the Board of Building Regulations and Standards:

1. Obtain a Construction Supervisor License Complaint Form. This form can be found on the website, www.mass.gov/bbrs/, or can be obtained via phone at (617) 727-7532. To find the form online, go into the BBRS Programs link from the homepage, then go into the Construction Supervisor License link (www.mass.gov/bbrs/csl.htm). From there you will see two additional links, the Complaint Form and the Complaint Instructions. Both are available via Adobe Acrobat.
2. Six copies of the Complaint Form must be submitted to the Board of Building Regulations and Standards – License Review Committee.
3. The complaint **must** include violations of the Massachusetts Building Codes. Complaints which do not include violations of the Building Code are beyond the jurisdiction of the License Review Committee and will be dismissed.
4. The Complaint will receive an initial screening by the BBRS (Board of Building Regulations and Standards) to determine if Building Code issues exist.

Regulations and Standards (hereinafter "BBRS") to ascertain their requirements. Their requirements, websites, etc. change frequently.

Although the focus of this Article is on Licensed Construction Supervisors, the suggestions noted below for addressing these Complaints might be applicable to other License Holders as well. Over the past several years, there has been a ground swell of

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5. If NO Building Code violations exist in the complaint, the complaint will be dismissed.
6. If building code violations are alleged in the complaint, a State Inspector will be assigned to investigate the complaint.
7. Once the inspection is complete, the Inspector has two options. If he/she finds that the complaint is not valid, he/she will recommend that no action is required and the complaint will be dismissed. If he/she finds the code provisions have been violated, he/she will recommend that a hearing before the License Review Committee will be necessary.
8. If it has been determined that a hearing is necessary, it will be scheduled by the BBRS.
9. The License Review Committee is generally comprised of any 3 members of the Board of Building Regulations and Standards. It may also be a single Hearing Officer appointed by the Chairman of the BBRS.
10. At the hearing, the State Building Inspector who investigated the complaint will provide the findings of the investigation.
11. The License Holder will then be provided an opportunity to dispute/affirm the findings.
12. The License Review Committee Chair Officer may also allow testimony by the homeowner or aggrieved party.
13. Once all the evidence is heard by the Committee, the following options are available to them:
    a. They can recommend that no action be taken and the complaint be dismissed.
    b. They may issue a letter of reprimand to the License Holder.
    c. They may suspend the Holder's license for a definitive period of time.
    d. The may require the License Holder to take/retake the License Examination.
    e. The may revoke the license.

NOTE: The hearing is not intended to address monetary losses, nor does it award losses. The determination of the hearing may be used in Court Proceedings in the pursuit of monetary losses.

Reapplication (780 CMR R5.2.9.8.2)

If a license has been revoked, the Licensee may reapply for a license only after seeking approval to reapply from the License Review Committee.

Appeals (780 CMR R5.2.10)

The Aggrieved Party may appeal the decision of the Committee to a Court of Law in conformance with M.G.L. c. 30A § 14, Appeals from Final Decisions of Agencies in Adjudicatory Proceedings.

claims against Builders (i.e., License Construction Supervisors) by Homeowners dissatisfied with the work performed on their homes. In many instances, these claims are legitimate. One need only attend a social event or two before the conversation invariably encompasses the topic of substandard work. The potential profitability of a successful construction practice has enticed many individuals into the field who might not be competent, despite passing a licensing examination, to perform some of the work they perform.

Notwithstanding, one of the greatest sources of these claims can be traced to the comparative disproportionate subject matter knowledge between the participants. Specifically, Homeowners typically possess an infinitesimally small percentage of knowledge concerning the construction process when compared with Builders. This great disparity of knowledge often leads to misunderstandings and miscommunications that can, over time, culminate in complaints with Administrative agencies. This is particularly true given the great emotional stake Homeowners have in the construction process. For example, the Homeowner might select a paint based solely upon color as opposed to durability or the ability of the painted surface to resist dirt. When the paint does not perform as the Homeowner envisioned, the Homeowner claims the Builder used an inferior paint, failed to apply the paint correctly, failed to instruct the Homeowner of the characteristics of the paint, etc. The Homeowner then refuses to pay the Builder who then refuses to work which then triggers the Homeowner to file a Complaint with an Administrative Agency. Often these Complaints include allegations that the Builder left the job site in an unsafe and dangerous condition. This scenario plays out every day and puts even legitimate Builders at great risk.

The key to a proper defense to these proceedings is having a thorough contract in place and documenting the construction process. Inadequate contracts are probably the greatest source of litigation. If the contract is complete and the scope of work and material list appropriately identified, most problems can be resolved simply with referencing the contract documents. Conversely, poorly drafted contracts lead to ambiguities which then invariably lead to problems. The minimal costs of having a construction lawyer review a contract is usually money well spent.

The License Holder is always given the opportunity to rebut evidence presented against him or her and, typically, there will be several stages during the proceedings where the "charges" against the License Holder can be dropped. Accordingly, a thorough and complete rebuttal is necessary to maximize one's chances of successfully defending these matters.

Obviously, the best defense to misunderstandings and miscommunications is more information (i.e., preventative medicine). It would be very beneficial to direct Homeowners to websites or written materials (e.g., Consumer Reports, etc.) which rate and explain the differences between products and materials. The Builder might, for example, include a sheet of such references as part of the contract documents. Even if the Homeowner does not consult with such materials, the fact that the Builder made these materials known to the Homeowner should assist the Builder in rebutting any charges based upon misunderstandings and miscommunications.

During the construction process, License Holders should perform the following tasks to document their proper work:

1. One should take pictures of the work including any unanticipated conditions that made the work more difficult. The proliferation of digital cameras should negate any rationale for not incorporating picture into the construction process. Progress photographs have brought about the demise of countless license challenges.

2. One should keep running notes of every job. Conditions change as do people's perceptions and realities. A brief diary will assist the License Holder in memorializing these changes and, more importantly, the reasons for the same. This is particularly true with respect to any significant changes on the job. The dates of and reasons for each such change should be duly noted. Additionally, the Homeowner's assent to each such change should be well documented.

3. All changes as well as all relevant events should be memorialized by e-mails. Frequently, one party or the other will claim he or she was not notified of a particular event. E-mails help memorialize events and also provide an early opportunity to avoid miscommunications.

4. One should create a log indicating "freebies" on the job as well. It is often the case that a change is made in the field which might result in the Builder incurring a minor cost increase. Most Builders simply absorb those added costs without pushing them back on the Consumer. This practice often makes sense administratively (i.e., not cost-effect to chase every such minimal cost increase) and should create Goodwill with the Consumer. However, the creation of such a log should also enable Builders to rebut claims they overcharged Consumers.

5. If a problem does arise, one should obtain the Building Permit documents from the appropriate municipality. "Sign offs" on permits provide some evidence of

satisfactory work. Additionally, one might obtain a letter from the Building Inspector vouching for the competence of the Builder.

In short, one should attempt to avoid having his or her license and/or livelihood threatened by an Administrative proceeding by ensuring a complete understanding of what is being done and why. Moreover, one should keep notes and logs memorializing decisions and changes during construction and noting the Owner's assent to the same. Finally, should a Complaint issue, one should be thoroughly prepared with photographs, notes, e-mails, logs, Building Department documents, etc. to defeat meritless allegations.

III. CRIMINAL PROCEEDINGS

Criminal proceedings essentially arise in the following two contexts: (1) when someone performs work without having the appropriate license; and (2) when a License Holder ignores or otherwise fails to obey a properly worded Order from a Building Official.

A. UNLICENSED BUILDERS

It is somewhat surprising how many "Builders" perform construction work without holding the requisite Construction Supervisor's license. Sometimes they get friends who are licensed to pull permits and sometimes they convince the Homeowners to pull their own permits. These "Builders" tend to give legitimate Builders a very bad name because of the quality of their work. However, they flourish because their bids tend to be substantially lower than legitimate Builders. They can bid lower because their costs are less (e.g., less and cheaper equipment, perhaps no Worker's Compensation or liability insurance, etc.). Additionally, they often "fly below the radar screen" because they work on small projects such as decks, sidings or roofing.

When these individuals get caught, it is often the case that criminal proceedings will be commenced against them. There are very few defenses to these cases. If a License Holder pulled the permit for the Builder against whom the charges are brought, the Builder will usually argue he or she was not acting as the License Holder, but rather as a Worker for the License Holder. This defense is often contradicted by the Homeowners who testify they never saw the actual License Holder on the site and, therefore, the License Holder did not supervise the job.

In short, these are tough cases to defend. The preventative medicine approach is the best defense. Specifically, those that are unlicensed should become licensed as soon as possible. Getting licensed is not overly difficult particularly with the plethora of examination preparation courses.

B. LICENSED BUILDERS

Licensed Builders are exposed to criminal proceedings if they fail to follow a properly worded order from the Building Official. See M.G.L. c. 143; 780 CMR 118, et. seq. The situations giving rise to such criminal proceedings typically occur during an inspection by the Building Official. Specifically, the Building Official finds a Building Code violation and orders the License Holder to correct it within a certain period of time. See M.G.L. c. 143, § 3A (provides Building Officials with authority to enforce the Building Code). It should be noted that in order for the Order to provide a basis for a criminal action, the Order must be in writing. See 780 CMR 118 (procedural aspects of prosecution). Additionally, the written Order must direct the discontinuance of the illegal action or condition and must also specify the work or conduct to be corrected or changed. If the Order is not complied with in 30 days, the Building Official can commence a

criminal proceeding. The penalties under 780 CMR 118.4 include a fine of not more than $1,000 or imprisonment for not more than one year or both for each such violation. Importantly, each day a violation exists constitutes a separate offense. The process itself for addressing these situations is set forth in 780 CMR 122.

These cases are also fairly difficult to defend. They often arise when the Homeowner and License Holder have achieved an unworkable relationship. Often the License Holder will have left the site in an unfinished condition without having been paid.

As a practical note, a License Holder should never leave a job site in a more dangerous condition than existed before the License Holder started its work. In fact, the License Holder should reasonably try to address conditions that present serious risks of injury even if the License Holder did not make the situation materially less safe. This risk reduction process may include simply notifying the Owner via email about the existence of the situation. The frustration brought about by the unworkable relationship should not blind the License Holder to its potential liability (e.g., Administratively, Criminally, and Civilly) for failing to take at least minimal steps to maintain a reasonably safe job site.

License Holders should also take pictures of the job site before departing to establish what existed at that time. It is not unheard of that a License Holder will be accused of creating a dangerous situation on a job when the condition was, in reality, created after the License Holder's departure. The License Holder should also seek to immediately have his or her name removed from the Building Permit. Again, it is not

entirely uncommon to have a subsequent Contractor begin work under the Licensed Holder's Building Permit. This situation needs to be avoided at all cost.

Some defenses to such criminal actions include the following:

1. the Building Official misinterpreted the Building Code;
2. the Order was not in writing; and
3. the Order was not sufficiently specific. See Commonwealth v. Eakin, 43 Mass. App. Ct. 693, 685 N.E.2d 1196 (1997)(notice must identify what changes are necessary to meet requirements of Building Code); Commonwealth v. Duda, 33 Mass. App. Ct. 933, 597 N.E.2d 1382, rev. denied, 413 Mass. 1107, 602 N.E.2d 1094 (1992)(notice must contain description of necessary changes).

In short, unless one is absolute convinced that the Building Official's interpretation of the Building Code is erroneous or that the Building Code violation was not the responsibility of the License Holder, a License Holder should do what he or she has been ordered to do. Additionally, the License Holder should not leave the site in an unreasonably unsafe condition. It is also imperative that the License Holder document the conditions on the job and how those conditions changed with time. This task can be accomplished through the use of notes and photographs. Lastly, the License Holder should have his or her name removed from the Building Permit as soon as possible.

IV. CIVIL PROCEEDINGS

It is worth reiterating that the Building Code establishes only minimal standards of conduct. Berman & Sons, Inc. v. Jefferson, 379 Mass. 196, 451, 396 N.E.2d 981, 985 (1979); Crowell v. McCaffrey, 377 Mass. 443, 451, 386 N.E.2d 1256, 1261-1262 (1979). The parties cannot lower the standard of care utilized below that set forth in the Building Code. Because the Building Code sets forth only the minimum standard and because its intent is to protect everyone's health and welfare, those that violate the Building Code are dealt with quite harshly. This point is particularly true in the context of civil liability.

The civil consequences of violating the Building Code are quite severe. The Code Violator will, in all likelihood, be found liable for damages and, as will be explained in Section V (M.G.L. c. 93A) below, possibly multiple damages plus costs and attorneys' fees. Additionally, the Code Violator may well be subject to injunctive relief which, in essence, could compel the Code Violator to cease code violating conduct and, perhaps, rectify the code violations he or she created.

There is also a more subtle though perhaps more insidious consequence of violating the Building Code which is worth noting. Specifically, one might experience negative reputation damages which can have a profound impact on one's business. These types of damages are more common now with the free flow of information enabled by the internet (e.g., Google searches, Facebook, etc.) including rating services (e.g., Checkbooks, www.angieslist.com, etc.) as well as personal emails. For example, it is not uncommon for individuals to email everyone they know to ask whether anyone knows a good Electrician or whether anyone has any information about a Builder someone is considering hiring. In this day of almost instantaneous information, the fact that someone has been found to have performed work which does not comply with the Building Code can be devastating. These damages can easily bankrupt a company over a very short period of time.

The Building Code mandates a certain level of minimal performance and prohibits construction practices inconsistent with those standards. Any violation of the Building Code can provide a basis for establishing civil liability provided certain requirements are met. 780 CMR 117.1 ("All work shall be conducted, installed and completed in a workmanlike and acceptable manner so as to secure the results intended

by 780 CMR [State Building Code]".); 780 CMR 118.1 (unlawful to violate "any of the provisions of 780 CMR."). However, in order to establish liability under the Building Code, one must understand which Building Code applies and, in any action seeking damages other than for the non-conforming work itself, one must causally connect the violation with the damages sustained (e.g., contractor's violation of shingle installation would not be relevant to damages caused by motor vehicle driving into the side of the house).

1. Which version or versions of the building code applies?

The question of which Building Code applies can be more difficult to answer than first appears. As a general rule, the applicable Building Code is the one in effect at the time when the building or structure was constructed. 780 CMR 102.5.2. In other words, if the work complied with the Building Code at the time of construction, it is often "Grandfathered" from subsequently enacted Building Codes. 780 CMR 3400. This general rule, however, has exceptions. The performance of certain work may remove or limit the Grandfather protection. 780 CMR 102.1 and 102.5. Additionally, certain elements of buildings and structures must be kept current with the latest Codes. See e.g., 780 CMR 103; 780 CMR 1004.2.1. The Appeals Court, in Perry v. Salem Housing Authority, Docket No. 03-P-1250, addressed this point in a "Memorandum and Order Pursuant to Rule 1:28". In Perry, the Court held the following:

> The judge correctly ruled that the fourth edition of the State building code, which was the version in effect when the premises were built, was, as a general matter, the applicable code, but the provisions contained in the sixth edition, which was in effect at the time of the accident, nevertheless were relevant and could be called to the jury's attention. Although the sixth edition generally "grandfathers" existing buildings, it also provides, in substance, that any means of egress that was acceptable under the code when the building was constructed may be

> required to be upgraded if it is not safe under current standards. 780 Code Mass. Regs. § 1004.2.1 (1997). Accordingly, there was no error in the admission of the drop-off provision in the sixth edition, 780 Code Mass. Regs. § 1016.5.1 (1997), to shed light on the question whether the defendant maintained the walkway in a reasonably safe condition at the time of the accident.

Id. at 1-2. In short, it is important to identify which version or versions of the Building Codes apply and then determine whether that Building Code was violated. It is also important to understand what aspects of the structure or building are and are not subject to "Grandfathering."

2. Causally connecting violation with consequential damages

The next requirement for establishing liability for a Building Code violation involves causally connecting the Building Code violation with the claimant's damages. See Kralik v. LeClair, 315 Mass. 323, 326, 52 N.E.2d 562, 564 (1943)("Evidence of such violation, however, does not make out actionable negligence unless the violation is shown to have been actually a proximate cause contributing to the injury suffered."). For example, did the shingles blow off because they were defectively installed or would the extreme weather conditions have blown them off even if they were adequately installed? Stated differently, does the Building Code violation pass the "so what" test? If the storm was so severe the shingles would have blown off no matter what, then the Building Code violation might become irrelevant.

3. Theories of recovery

The most common theories of recovery asserted against Building Code Violators are the following: (1) Breach of Contract; (2) Negligence; (3) Warranty Violation; (4) Implied Covenant of Good Faith and Fair Dealings Druker v. Roland Wm. Jutras Associates, Inc.,348 N.E.2d 763, 370 Mass. 383 (1976); (5) Injunctive Relief; and (6)

M.G.L. c. 93A Violation (outlined in Section V below). There are a plethora of other less utilized theories (e.g., fraud, deceit, misrepresentation, etc.) that will not be addressed in this chapter.

(a). Breach of Contract

A contract can be defined as agreement by two or more parties supported by consideration. See Massachusetts Superior Court Civil Practice Jury Instructions, Chapter 14 (MCLE 2001)(detailed outline of requirements, defenses, etc.). In Massachusetts, the Building Code is incorporated into all construction contracts. See Mayor of Salem v. Warner Amex Cable Communications Inc., 392 Mass. 663, 467 N.E.2d 208 (1984)(law existing at time contract entered into becomes part of agreement). Therefore, if someone violates the Building Code during the performance of one's work, that person has breached the contract.

It is important to note that unlike a negligence claim, the Code Violator can be found liable despite an honest and good faith effort to perform its work competently. Specifically, if a Builder was instructed by an Architect to use a certain grade of **non**-conforming lumber, the Builder would have breached the contract by using that lumber despite being told to use it.[3] In short, if a Builder fails to perform without excuse or justification the work set forth in the contract, then the Builder breached the contract. There are, of course, exceptions to this statement. However, suffice it to say, that one who fails to construct in accordance with the Building Code will almost invariably be found liable for breach of contract. Therefore, breach of contract claims are routinely asserted in actions arising from Building Code violations.

[3] The negligence standard, as will be outlined below, requires a greater degree of culpability than the contract standard.

(b). Negligence

Liability for negligent conduct generally arises when someone fails to exercise that degree of care which a reasonably prudent person would have exercised under the circumstances. See Massachusetts Superior Court Civil Practice Jury Instructions, Chapter 2 (MCLE 2001)(detailed outline of requirements, defenses, etc.). In the construction context, the standard of care is set forth in the Building Code. When one violates the Building Code, that individual will invariably be found to have breached the contract, but the individual may also be found to have been negligent. Frequently, both theories are plead to a fact finder so liability will be found on at least one theory.

Moreover, negligence cases often cover areas or subject matters not explicitly covered by the Building Code. For example, the construction contract might not have included a completion date. The Owner may feel the Contractor took too long to perform whereas the Contractor might feel it performed timely given weather conditions, material scarcity, etc. Negligence actions often are invoked in the areas not directly encompassed by the contract.

Negligence theories are often plead in personal injury cases. In this context, the violation of the Building Code only constitutes some evidence of negligence. See Commonwealth v. Campbell, 394 Mass. 77, 83 n. 5, 474 N.E.2d 1062, 1067 n.5 (1985)(violation of a safety standard, statute, regulation, ordinance or recommended practice is some evidence of negligence). The fact finder is permitted to consider the violation as some evidence of the Building Code Violator's negligence. However, the fact finder may not consider the violation to be negligence per se. Moreover, the Building Code violation must be causally related to the incident giving rise to the

personal injuries for it to be relevant and, hence, considered by the fact finder. Perry v. Medeiros, 369 Mass. 836, 841, 343 N.E.2d 859, 862 (1976).

(c). Warranty

Warranties are somewhat analogous to guarantees and are a sub-species of contract law. Warranties can be express (i.e., written directly into the contract) or implied. An express warranty can be defined as follows:

> An express warranty is created whenever a seller makes any clear and definite promise or statement of fact, either orally or in writing, about some essential quality of an item, and that promise or statement of fact becomes a part of the basis of the bargain between the buyer and seller.

Massachusetts Superior Court Civil Practice Jury Instructions, Chapter 2, § 14.1.16 (MCLE 2001). Implied warranties are simply incorporated into the contract unless excluded (some warranties cannot be excluded) even if the parties had no idea any warranties were part of their contract. In construction, one implied warranty incorporated into all contracts is the following:

> When a party binds himself by contract to do a work or perform a service, he agrees by implication to do a workmanlike job and to use reasonable and appropriate care and skill in doing it.

George v. Goldman, 333 Mass. 496, 131 N.E.2d 772 (1956)(citing Abrams & Co. v. Factory Mutual Liability Ins. Co., 298 Mass. 141, 143, 10 N.E.2d 82, 83 (1937).

In addition, the Commonwealth's highest Court has created another implied warranty in the context of **new** home construction. Specifically, in Albrecht v. Clifford, 436 Mass. 706, 767 N.E.2d 42 (2002), the Court adopted "an implied warranty of habitability that attaches to the sale of new homes by builders-vendors in the Commonwealth." Id. at 710-711, 767 N.E.2d at 47. In order to prevail under this new implied warranty, the Claimant must prove the following:

> (1) he purchased a new house from the defendant-builder-vendor; (2) the house contained a latent defect; (3) the defect manifested itself only after its purchase; (4) the defect was caused by the builder's improper design, material, workmanship; and (5) the defect created a substantial question of safety or made the house unfit for human habitation. In addition, the claim must be brought within the three-year statute of limitations and the six-year statute of repose set forth in G.L. c. 260, § 2B.

Id. at 711-712, 767 N.E.2d at 47. Moreover, this warranty cannot be waived or disclaimed.

In short, a Building Code violation may well provide grounds for the successful assertion of a warranty claim even if such warranties are not explicitly contained within the contract documents.

(d). Implied Covenant of Good Faith and Fair Dealings

Similar in some respects to an implied warranty, the implied covenant of good faith and fair dealings is implied in every contract in the Commonwealth. See Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 471-474, 583 N.E.2d 806, 819-821 (1991). The implied covenant of good faith and fair dealings provides:

> neither party may do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Massachusetts Superior Court Civil Practice Jury Instructions, Chapter 2, § 14.1.12 (MCLE 2001). Clearly, this doctrine has implications in the construction field. If someone builds a structure which does not comply with the Building Code, then that party has destroyed the other party's right to the fruits of the contract. Notwithstanding, if the breaching party made good faith efforts to cure the defects and thus fulfill the terms of the contract, then the implied covenant of good faith and fair dealings might not be applicable. See Ayash v. Dana-Farber Cancer Institute, 443 Mass. 367, 387-389, 822 N.E.2d 667, 684-687 (2005).

(e). Injunctive Relief

Injunctions are called "equitable" remedies. Specifically, rather than a party asking for "damages" (i.e., money), the party asks the Court to compel another party to do or not to do something. The Courts have great latitude to fashion equitable remedies to address wrongs. For example, the Court may order a party to demolish and re-build a non-conforming structure. The Court may also order a party to cease performing non-compliant work or may even order the party to leave the premises. This remedy has application in the context of Building Code violations. For example, the Court may order a Defendant in a lawsuit not to convey any assets until the Injured Party's claims are paid. In short, injunctions are powerful tools to correct wrongs. They can be used independently or in conjunction with the remedies outlined above.

4. Home Improvement Contractor Program

The Commonwealth of Massachusetts has recognized that many construction claims are too complicated for the average trier of fact or too costly to litigate utilizing the Court system. Accordingly, with respect to residential construction projects having a value over $1,000, the Commonwealth has established a process for resolving these matters before subject matter experts at a fraction of the costs associated with a Court action if the Contractor is registered through the Home Improvement Contractor Program. See M.G.L. c. 142A. In short, if certain criteria are met, a Homeowner can compel a Registered Contractor to participate in a non-binding arbitration program. If an award is issued in favor of the Homeowner, the Contractor risks losing his or her Registration until the award is funded. Moreover, if the Contractor is insolvent, the Homeowner might be entitled to a maximum of $10,000 earmarked for claims the

Contractor is unable to pay. For more information, one should check the statute (i.e., M.G.L. c. 142A) and the following:

Massachusetts Office of Consumer Affairs & Business Regulations
10 Park Plaza, Suite 5170
Boston, MA 02116
(617) 973-8700
http://www.mass.gov/?pageID=ocatopic&L=3&L0=Home&L1=Consumer&L2=Home+Improvement+Contracting&sid=Eoca

V. CERTAIN CONSTRUCTION PRACTICES CONSTITUTE VIOLATIONS OF M.G.L. C. 93A

A. BACKGROUND OF M.G.L. C. 93A AND CONDUCT WHICH VIOLATES THIS STATUTE

Massachusetts has enacted a statute designed to protect people and businesses from unfair and deceptive practices. See M.G.L. c. 93A. The breath of the statute is staggering. It encompasses virtually all unfair and deceptive acts. It has been used extensively in the construction field particularly as to Building Code violations. A party can violate M.G.L. c. 93A in any number of ways such as performing substandard work and failing to remedy substandard work.

Importantly, the statute permits damages which typically are not available under other theories of recovery. For example, most theories of recovery do not allow the prevailing party to recover costs and attorneys' fees. However, M.G.L. c. 93A permits such recoveries. Additionally, most theories of recovery do not permit "punitive" damages because their goal is not to punish the Wrong-doer, but rather to put the Victim in the position the Victim was in before the wrongful conduct. M.G.L. c. 93A, on the other hand, permits "punitive" damages of no less than two and no more than three times actual damages sustained if the unfair and deceptive acts were found to have been willfully or knowingly made. This distinction sets M.G.L. c. 93A apart from almost all

other theories of recovery and, consequently, provides a great incentive for would-be Violators to conform their conduct to acceptable standards.

A party can violate M.G.L. c. 93A in numerous ways including the following:

1. The violation of the Building Code can constitute a violation of M.G.L. c. 93A. See Jablonski v. Clemons, 60 Mass App. Ct. 473, 803 N.E.2d 730 (2004); Piccuirro v. Gaitenby, 20 Mass. App. Ct. 286, 290, 480 N.E.2d 30, 33 (1985)(failure to comply with regulations violates M.G.L. c. 93A). For example, the Building Code forbids (1) performing sub-standard work (780 CMR 117.1 – "All work shall be conducted, installed and completed in a workmanlike and acceptable manner so as to secure the results intended by 780 CMR [State Building Code]".), (2) preventing substandard work from occurring (780 CMR R5.2.15.1- contractor must ensure work complied with Building Code), and (3) failing to properly supervise a job (780 CMR R5.2.15.2 – contractor must supervise workers sufficiently to ensure compliance with Building Code). Moreover, punitive damages may be warranted even if the Party was unaware of its Building Code requirements. See Whelihan v. Markowski, 37 Mass. App. Ct. 209, 212-213, 638 N.E.2d 927 (1994)(property manager's choosing to remain uninformed about code requirements constituted willful and knowing violation of M.G.L. c. 93A and was sufficiently egregious to justify treble damages).

2. Although the mere breach of a contract does not constitute a violation of M.G.L. c. 93A, the breach of a contract coupled with "more" might well constitute such a violation. For example, if the breaching party acted "in disregard of known contractual arrangements" with the intent to secure benefits for itself, then such conduct might well amount to a violation of M.G.L. c. 93A. Anthony's Pier Four, Inc. v. HBC Associates,

411 Mass. 451, 474, 583 N.E.2d 806, 821 (1991); Wang Laboratories, Inc. v. Business Incentives, Inc., 398 Mass. 854, 857, 501 N.E.2d 1163, 1165 (1986).

3. The violation of a warranty may constitute a violation of M.G.L. c. 93A at least when such warranty was given in the Business to Consumer context rather than Business to Business context. See Bachman v. Parkan, 19 Mass. App. Ct. 908, 909, 471 N.E.2d 759, 760 (1984)(builder's failure to comply with warranty obligations constituted a violation of M.G.L. c. 93A); Giannasca v. Everett Aluminum, Inc., 13 Mass. App. Ct. 208 (1982)(if a contractor commits a "substantial and material breach of its warranty obligations," an award under M.G.L. c. 93A is required); see also Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737, 745, 640 N.E.2d 1101, 1105 (1994)(violation of express or implied warranty not per se violation of M.G.L. c. 93A in context of business to business transaction).

4. The violation of the implied covenant of good faith and fair dealings may also constitute a violation of M.G.L. c. 93A. See Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 583 N.E.2d 806 (1991).

5. Massachusetts has also enacted a statute designed to protect Homeowners from Contractors performing residential remodeling projects. M.G.L. c. 142A. This statute requires the use of a very specific contract that includes very detailed information. The statute also requires that certain Contractors "register" with the Commonwealth. A violation of this statute constitutes a violation of M.G.L. c. 93A. See M.G.L. c. 142A, § 17(violations of M.G.L. c. 142A "shall constitute an unfair or deceptive act under the provisions of chapter ninety-three A.").

B. DEFENSES

There are many defenses both technical and substantive to M.G.L. c. 93A claims. See Chapter 93A Rights and Remedies, (MCLE 2002). Unlike most other theories of recovery that focus exclusively on the Claimant's damages, M.G.L. c. 93A also permits an examination of the Defendant's conduct for purposes of calculating damages particularly multiple damages. Therefore, a Building Code Violator would be wise to stop the wrongful conduct and offer to correct the same as soon as possible.

In the context of a Business to Consumer transaction, the Consumer must send a detailed "Demand" letter before the Consumer can commence an action against the Business. M.G.L. c. 93A, § 9(3); Cassano v. Gogos, 20 Mass. App. Ct. 348, 350, 480 N.E.2d 649, 650-651 (1985). A failure to send such a Demand letter is fatal to the Claimant's M.G.L. c. 93A claim. Moreover, if the Defendant makes a written reasonable settlement offer, this might help cap damages. Heller v. Silverbranch Construction Corporation, 376 Mass. 621, 627-628, 382 N.E.2d 1065, 1070 (1978); RGJ Associates, Inc. v. Stainsafe, Inc., 338 F.Supp2d 215, 238-239 (D.Mass. 2004)(notwithstanding finding of willful or knowing violation, defendant not liable for multiple damages because it tendered reasonable settlement offer). Accordingly, one should always make a timely reasonable settlement offer commensurate with the validity of the claim.

In the context of Business to Business transactions, the standards of "unfairness" are greater and, hence, more difficult for the Claimant to prove. See L.B. Corp. v. Schweitzer-Mauduit International, Inc., 121 F.Supp.2d 147, 154 (D.Mass 2000). Indeed, the Business Claimant might have the burden of proving "the objectionable conduct [attained] a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Levings v. Forbes & Wallace, Inc., 8 Mass. App.

Ct. 498, 504, 396 N.E.2d 149, 153 (1979); see Boyle v. International Truck & Engine Corp., 369 F.3d 9, 15 (1st. Cir. 2004)(provides a more current and descriptive standard). In short, in the Business to Business context, the level of conduct necessary to prevail under M.G.L. c. 93A is typically higher than the Business to Consumer context.

VI. KEY CONTRACT TERMS

A. DIRTY DOZEN

1. Contract Documents
   -What documents comprise the Contract?
   e.g., plans, specs, proposals, standards of care
2. Conflict Resolution
   -What document governs in the event of a conflict
3. Termination
   -Under what circumstances
   -Make sure non-payment provides a basis for termination
   -Distinguish Convenience from Cause
   -Architects
   Instruments of Services
   e.g., when does license expire?
4. Insurance
   -Does insurance cover assumed obligations
   -Does Owner have Builder's Risk
   -Anti-Subrogation
   -Send to Insurance Agent WHO KNOWS CONSTRUCTION
   -Make sure the Contract does not require insurance for un-insurable event (e.g., intentional acts)
5. Indemnity
   -Full or Comparative
6. Retainage
   -New Retainage Law
   -How much?
   -When released?
7. Standard of Care
   -What is the Standard required
   e.g., Building Code, Industry Standard, "Owner's satisfaction"
8. Claims

-Time to make
-Process for making

9. Time Deadlines to
-Accept proposal
-Begin work
-Complete work

10. Scope of Work
-What do Contract Documents require?
-Make sure not assuming obligation to perform complementary work from another division
-"reasonably inferable"

11. Payment
-New Prompt Pay
    -Only applies to certain projects
    -Defines Payment Process
    -Voids most Pay if Paid clauses
-Consequences of not paying timely (interest, walk off, cost to collect, etc.)
-Price escalators for materials
-Design Service Mechanic's Liens

12. Disputes
-Mediation prerequisite
-Arbitration or litigation
-Waiver of Consequential Damages
-Cost to Collect unpaid contract sums

VII. CAVEAT

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