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Sent: 2/19/2014 11:13:31 AM

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Subject: U.S. TRADEMARK APPLICATION NO. 85713043 - LEARDI - N/A - Request for Reconsideration Denied - Return to TTAB - Message 5 of 12

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Count: 1

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small print suggests, as the judge recognized, "a clear and calculated effort to further mislead tenants." It suggests to tenants that their signatures on the lease constitute a waiver of their right to habitable housing.

Paragraph five of the standard apartment lease, which the judge below characterized as "an unabashed attempt to annul or render less meaningful" rights guaranteed by the State sanitary code, seems drafted with the same impermissible purpose which evidently motivated paragraph eight. It provides that "[u]nless Tenant shall notify Landlord to the contrary within two (2) days after taking possession of the premises, the same and the equipment located therein shall be *conclusively presumed* to be in good, tenantable order and condition in all respects, except as any aforesaid notice shall set forth" (emphasis added). So even if tenants are sufficiently sophisticated to understand that paragraph eight is not an absolute disclaimer of the right to habitable housing, paragraph five unlawfully suggests that this right is waived unless notification is made within two days after the tenant moves in. Consequently, we conclude that there was no error in the judge's conclusion that paragraphs five and eight were deceptive and unconscionable, particularly when those provisions are viewed in the context of the fundamental nature of the implied warranty of habitability. [Note 7]

b. Injury Under G. L. c. 93A. The defendants next contend that, regardless of the alleged illegality of the lease, the plaintiffs have not suffered sufficient "injury" to support an award of damages under G. L. c. 93A, Section 9. [Note 8] The defendants argue that,

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even though the 1979 amendment to c. 93A deleted the requirement that the plaintiffs show some loss of "money or property," [Note 9] nonetheless the plaintiffs still must show some quantum of harm. The defendants further argue that the mere presence of unlawful provisions in the lease does not constitute an injury, where the landlord never attempted to enforce the unlawful provisions, and where the plaintiffs have conceded, for the purposes of this motion, that they have never even read the offensive clauses in the lease.

In Baldassari v. Public Fin. Trust, 369 Mass. 33 , 44-46 (1975), we held that a plaintiff's claims under c. 93A should be dismissed where the plaintiff alleged "severe emotional distress," and not the loss of "money or property" required by the version of c. 93A then in effect. The Legislature then amended the statute, providing a right of action to "[a]ny person . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder." The 1979 amendment appears to have been, in part, a reaction to the restrictiveness of our holding in Baldassari v. Public Fin. Trust, supra. See Greaney, Consumer Protection Law, 65 Mass. L. Rev. 88, 89 (1980); Gitlin, Consumer Law, 1979 Ann. Survey Mass. Law 333, 351-353. In fact, we have already recognized that the changes in statutory language "substantially broadened the class of persons who could maintain

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actions under G. L. c. 93A, Section 9." Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671 , 675 (1983).

"Statutes are to be construed in the light of the preexisting common and statutory law with reference to the mischief probably intended to be remedied." Ferullo's Case, 331 Mass. 635 , 637 (1954). We have noted that G. L. c. 93A is a "statute of broad impact," which forms a "comprehensive substantive and procedural business and consumer protection package." Slaney v. Westwood Auto, Inc., 366 Mass. 688 , 693 (1975). "[T]echnicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice." Baldassari v. Public Fin. Trust, supra at 41. We further note that tenants are among those for whose benefit the Consumer Protection Act was passed, Rice, New Private Remedies for Consumers: The Amendment of Chapter 93A, 54 Mass. L. Q. 307, 313 (1969); see, e.g., Wolfberg v. Hunter, 385 Mass. 390 (1982), and we have traditionally been zealous in protecting tenants who have shown that their landlords, for whatever reason, fail to fulfil the obligations imposed upon them by statute and decisional law. See, e.g., Berman & Sons v. Jefferson, 379 Mass. 196 (1979). The question before us now is a close one, but in light of all the circumstances we believe that the tenant class has been "injured" within the meaning of G. L. c. 93A.

The result we reach hinges on our interpretation of the word "injury." "The interpretation of well-defined words and phrases in the common law carries over to statutes" as long as such interpretation "appear[s] fitting and in the absence of evidence to indicate contrary intent." 2A C. Sands, Sutherland Statutory Construction Section 50.03 (4th ed. 1983). See Comey v. Hill, 387 Mass. 11 , 15 (1982). According to the Restatement (Second) of Torts Section 7 (1965), the term "injury" denotes "the invasion of any legally protected interest of another." Moreover, "[t]he most usual form of injury is the infliction of some harm; but there may be an injury although no harm is done." Restatement (Second) of Torts Section 7 comment a (1965). As Professor McCormick has explained, "What the law always requires as a basis for a judgment for damages is not loss or damage, but "injuria."