

WILMERHALE

JAN 27 2006

January 26, 2006

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Re: Chapter 93A Demand Letter

Dear Mr. Perkins:

I write in response to your letter dated December 16, 2005, directed to Mr. H. Lee Scott, Jr. the President and Chief Executive Officer of Wal-Mart Stores, Inc. ("Wal-Mart"). As I understand your letter, you represent Ms. Katrina McCarty and purportedly a class of women who seek to fill emergency contraception prescriptions in Wal-Mart pharmacies who claim that Wal-Mart has failed to comply with 247 C.M.R. s. 6.02 (4), which requires all pharmacies in the Commonwealth to "maintain on the premises at all times ... commonly prescribed medications in accordance with the usual needs of the community."

You allege that this action violates section 9 of M.G.L. c. 93A as an unfair method of competition and unfair or deceptive trade practice. You demand that Wal-Mart settle this matter by stocking "Plan B" emergency contraceptive medication ("EC") at its Massachusetts pharmacies, and pay statutory damages and reasonable attorney's fees.

It does not appear that your client has suffered any actual damages. Accordingly, Wal-Mart is not obliged to serve a response to your demand letter. We have chosen nonetheless to do so, however, in good faith. As is set forth below, there is absolutely no support – regulatory or otherwise – for your assertion that EC is a "*commonly prescribed medication* in accordance with the *usual* needs of the community." Indeed, a recent statute indicates just the contrary.

The Pharmacy Board Regulation

Wal-Mart has determined that the Board of Registration in Pharmacy has never acted under its long extant Regulation 6.02(4) to identify any particular prescription medication as a "commonly prescribed medication in accordance with the usual needs of the community" which is required to be dispensed at a Massachusetts pharmacy. There is no list or formulary of such medications. We have also determined that neither the Board of Registration in Pharmacy nor the office of the Attorney General has expressed any position on this regulation or its relation to the EC medication.

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The 2005 Legislation

In contrast to the lack of specificity in the regulation, the Massachusetts Legislature recently addressed this issue in Chapter 91 of the Acts of 2005, An Act Providing Timely Access to Emergency Contraception, which became law over the Governor's veto in September 15, 2005. That law required *hospitals* to make EC (Plan B) drugs available. It also *permitted, but did not require*, pharmacies to dispense EC in accordance with written, standardized procedures or protocols developed by an actively practicing physician and filed with the participating pharmacy and with the Board of Registration in Pharmacy before implementation. The law further required that before any pharmacy chose to dispense such EC, its pharmacist would first have to complete a training program approved by the Commissioner of Public Health. Prior to the effective date of Chapter 91, a prescription was required in order to dispense EC medication. While Chapter 91 addresses only non-prescription dispensation of EC medication, it indicated that the Legislature deliberately took a different position with respect to pharmacies than with hospitals and allowed pharmacies the choice of whether to dispense EC.

While Wal-Mart has long had the corporate policy of declining to make available EC medication, based on, among other things, a view that EC medication is not "commonly prescribed" and within the "usual needs of the community", it nonetheless follows a policy of instructing its pharmacists to direct customers seeking such medication to another, nearby pharmacy which chooses to carry the product. Wal-Mart has reminded all of its Massachusetts pharmacies of its policy, and each pharmacy and pharmacist has this information to provide to its customers. Wal-Mart believes that absent a clarification from the Board of Registration in Pharmacy or the Attorney General, its practice meets the usual needs of the community.

Finally, your letter requests \$25.00 in statutory damages, and does not allege any actual harm to members of the putative class. The recent decision of the Supreme Judicial Court in Hershenow v. Enterprise Rent-A-Car Company of Boston, SJC-09359, decided on January 17, 2006, makes clear that a chapter 93A action cannot be brought absent actual harm. Since there is no actual harm alleged here, and since Wal-Mart's policy of informing its customers of nearby alternative pharmacies who fill EC prescriptions meets community needs, there is no causal connection between any alleged deceptive act (the existence of which Wal-Mart denies) and any loss to a consumer.

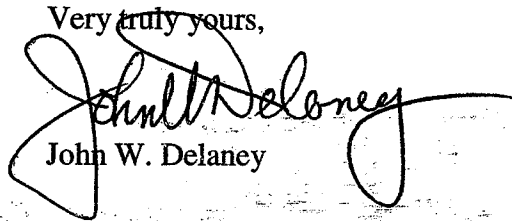
Accordingly, for the above stated reasons, Wal-Mart believes that it is in full compliance with Massachusetts law and regulation with respect to this matter. To ensure, however, that your client does not unnecessarily incur attorneys' fees, Wal-Mart will formally request clarification of the applicability of Section 6.02(4) to EC from the Board of Registration in Pharmacy or the Attorney General. Wal-Mart will abide by the decision of either state agency with regard to this

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matter. In the meantime, Wal-Mart will maintain at each of its pharmacies (and instruct all of its pharmacists to refer to) information which will direct any customer who seeks EC medication to a nearby pharmacy which chooses to fill such prescriptions.

Very truly yours,

A handwritten signature in black ink, appearing to read "John W. Delaney". The signature is stylized with large, sweeping loops and a long horizontal tail that extends to the right.

John W. Delaney