



# SUPREME JUDICIAL COURT TO ADDRESS “INJURY OR LOSS” REQUIREMENT OF G.L. C. 93A

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“[W]hat constitutes an injury or loss for purposes of a G.L. c. 93A claim, where the plaintiffs had purchased automobiles with allegedly defective door latches, were nonetheless able to use the vehicles, and had not suffered any direct personal injury or economic injury?” That is the question that has been certified to the Supreme Judicial Court in *Joseph Iannacchino & others v. Ford Motor Company & another*, SJC-10059.<sup>1</sup> Oral argument occurred on Feb. 4, 2008, and the case is expected to be decided by June 2008.

Whether the court recognizes a valid Chapter 93A claim on the facts presented in *Iannacchino* has broad implications for Massachusetts consumers as well as local, national and international businesses that are potential litigants in the courts of the commonwealth.

### Claims, defenses, and procedural posture

The *Iannacchino* plaintiff class contends that the defendants violated Chapter 93A by failing to recall and fix certain vehicles that allegedly have a defect in their door latching mechanisms which exposes consumers to the risk of serious injury or death. The plaintiffs further contend that the alleged defect amounts to a violation of the implied warranty of fitness. The defendants had evaluated the latch mechanisms and decided against initiating a recall. The defendants contend that the door latches comply with applicable requirements and do not present an unreasonable safety concern. The plaintiffs counter by alleging that the defendants are guided predominantly by economic considerations in declining to initiate a recall.

The Superior Court in *Iannacchino*<sup>2</sup> granted the defendants' motion to dismiss the

plaintiffs' Chapter 93A claim upon finding that the plaintiffs had been able to use the allegedly defective vehicles and had not suffered any direct personal or economic injury as a result of the alleged defect. In the pending SJC appeal, the plaintiffs challenge the trial court's dismissal of the Chapter 93A claim.<sup>3</sup>

### Overview of arguments on Chapter 93A claim

The plaintiffs argue that their Chapter 93A claim should not have been dismissed because they are seeking redress *before* they suffer any physical injury and because the defendants' conduct has invaded their legally protected rights sufficient to satisfy Chapter 93A's injury or loss requirement. The latter argument relies on commentary set forth in *Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381 (2004), discussed below.

The defendants rely upon *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 802 (2006), where the court decided that the Chapter 93A claim was properly dismissed because the plaintiffs could not show any actual injury or loss.

### Chapter 93A precedent highlighted by the SJC

In its request for amicus briefs, the SJC specifically referenced *Hershenow* and *Aspinall*, as follows:<sup>4</sup>

In this reported class action, the issue presented, among others, is: what constitutes an injury or loss for purposes of a G.L. c. 93A claim, where the plaintiffs had purchased automobiles with allegedly defective door latches, were nonethe-



less able to use the vehicles, and had not suffered any direct personal or economic injury. See *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790 (2006), and *Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381 (2004).

*Hershenow* addressed whether consumers who had rented cars and purchased optional collision damage insurance were harmed by a waiver provision in the rental contract that failed to comply with statutory requirements (G.L. c. 90, §32E½, regulating such collision damage waivers), even though the consumers had not been in an accident while driving the rented vehicles. The *Hershenow* plaintiffs appealed from the trial court's order granting the defendant rental car agencies summary judgment and judgment on the pleadings. The SJC on its own initiative took direct appellate review of the case. After consideration of legislative changes to Chapter 93A made in 1979, described by the SJC in *Hershenow* as "intended to permit recovery when an unfair or deceptive act caused a personal injury loss such as emotional distress, even if the consumer lost no 'money' or 'property,'" the Court affirmed the outcome and held that "a plaintiff seeking a remedy under G.L. c. 93A, §9, must demonstrate that even a *per se* deception caused a loss."

The *Hershenow* plaintiffs' inability to demonstrate an injury or loss was fatal to their Chapter 93A claim regardless of whether there had been any unfair or deceptive conduct.

[T]he statutorily noncompliant terms in [the] automobile rental contracts did not and could not deter the plaintiffs from asserting any legal rights. Nor did the plaintiffs experience any other claimed economic or noneconomic loss. The [waiver] made neither rental customer worse off during the rental period than he or she would have been had the [waiver language] complied in full with [statutory] requirements . . . . Assuming that the [rental agreement] was *per se* unfair and deceptive because it did not [so] comply . . . , the plaintiffs have nevertheless failed to establish that the "per se" deception caused a loss. For that reason, there can be no recovery under G.L. c. 93A, §9(1).

*Hershenow*, 445 Mass. at 800-01; 840 N.E.2d at 534-35.

*Aspinall* involved a plaintiff class of consumers that sued the manufacturers of "light" cigarettes under a theory of false advertising. A single justice of the Appeals Court decertified the class. The SJC granted the plaintiffs' application for direct appellate review and reversed, reasoning that a class action was not merely an appropriate means to address the allegations that had been raised, but was in fact the only means for doing so. *Aspinall*, 442 Mass. at 393; 813 N.E.2d at 486.

After the SJC reached its holding on the class certification issue in *Aspinall*, it provided commentary suggesting that deceptive advertising may cause injury sufficient to satisfy the injury or loss requirement in Chapter 93A. Since *Aspinall* focused upon the propriety of the certification of the plaintiff class, however, the commentary *Aspinall* provides regarding the injury or loss requirement of Chapter 93A may fairly be characterized as dicta.<sup>5</sup>

[T]he deceptive advertising, as alleged by the plaintiffs in this case, if proved, effected a *per se* injury on consumers who purchased the cigarettes represented to be lower in tar and nicotine. . . . [A]s a matter of law, because [the defendants' advertising] . . . created the overall misleading impression that all smokers would receive 'lowered tar and nicotine' . . . all [plaintiffs in the class] will be entitled to statutory damages, without regard to whether . . . consumers were overcharged for the deceptively advertised cigarettes.

*Aspinall*, 442 Mass. at 399-400; 813 N.E.2d at 490-91.

In sum, whereas *Hershenow* requires a plaintiff to demonstrate a loss even in instances of *per se* deception, *Aspinall* implies that certain deceptive conduct in and of itself constitutes sufficient injury for purposes of Chapter 93A.

## Consumer protection and the efficient use of resources

Several strong but competing policy arguments exist for the SJC to consider. Consumer advocate groups argue that the

ultimate goal should be improved consumer safety, and that it would be perverse to interpret existing law to require a consumer to suffer physical injury as a prerequisite to bringing her claim where she can establish that a defect exists which reasonably poses an increased risk of causing harm to consumers situated similarly to her. While it is true that marketplace factors have resulted in significant improvements in consumer safety, courts must continue to play their vital role in framing expectations and enforcing a baseline for permissible conduct.

Proponents of the brighter line drawn in *Hershenow* emphasize that consumers are adequately protected under existing law, but even more so by demand for improvements in safety. Manufacturers have an economic interest in achieving safe products where the market demands them, such as in the consumer automobile industry. Litigation regarding an alleged safety defect that has not resulted in any physical injury consumes resources that manufacturers might otherwise invest in product research and development, thereby hindering efforts to advance safety.

Broader societal costs may exist as well. For instance, an unanticipated increase in the litigation risks to which corporations doing business in the commonwealth are exposed could operate as a disincentive to economic growth to the ultimate disservice of many interest groups, including consumers.

## Conclusions

*Iannacchino* has the potential to be a very significant case not only for consumers but for the commonwealth as a whole.

The question facing the SJC has to do with the proximity of the injury or loss necessary to maintain a Chapter 93A claim. At one end of the proximity spectrum is *Hershenow*, which involved a plaintiff class that only fleetingly faced the risk of being injured by an illegal provision in a car rental agreement. The injury never materialized, and the risk of injury terminated with the agreement. Toward the other end of the proximity spectrum is *Aspinall*, which presented a plaintiff class that had purchased and used "light" cigarettes under the misimpression that they were safer than other products on the market. The class' exposure to an inherently dangerous product under such circum-



stances sufficiently constituted an injury for purposes of Chapter 93A.

*Iannacchino* is somewhere in between. It is true that the plaintiffs have been able to use their vehicles and have not suffered any direct injury. Assuming a defect exists in the door latches, however, it is also true that the *Iannacchino* plaintiffs face an elevated risk of injury every time they go for a drive.

## End notes

1. The SJC solicited *amicus curiae* briefs on October 15, 2007.
2. Middlesex Superior Court, Civil Action No. 05-0538.
3. Should the SJC desire to do so, it could dispose of the appeal without

reaching the “injury or loss” issue discussed in this article. The Superior Court granted the defendants’ motion for judgment as to the Chapter 93A claim, but denied the motion as to the plaintiffs’ breach of warranty claim. The court declined to dismiss the warranty claim after concluding that the plaintiff had sufficiently alleged the possibility of economic damages. On appeal, however, the plaintiffs and the defendants both point to a perceived inconsistency in the Superior Court’s rulings on the Chapter 93A and warranty claims. The plaintiffs argue that neither claim should have been dismissed. The defendants argue the

opposite. As the court’s Dec. 1, 2006 order on the defendants’ motion for judgment acknowledged, at Page 5, citing *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 702 (1974), a breach of warranty can constitute a Chapter 93A violation.

4. Oct. 15, 2007 Amicus Announcement, SJC-10059 (<http://www.mass.gov/courts/sjc/amicus/sjc-10059.html>).
5. After reaching its holding, the *Aspinall* court stated as follows: “What has been said above disposes of the class certification issue. We take this opportunity to comment on the nature of damages under G.L. c. 93A.” *Aspinall*, 442 Mass. at 398; 813 N.E.2d at 489-90.