COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-10059

JOSEPH IANNACCHINO, VICTOR MARCHESE and SOLEDAD BERRIOS

on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY, and FORD MOTOR COMPANY OF CANADA,

Defendants-Appellees.

Amicus Curiae Brief Of AARP, Massachusetts Academy Of Trial Attorneys, National Association Of Consumer Advocates, National Association of Shareholder and Consumer Attorneys, National Consumer Law Center, Public Citizen and Public Justice In Support Of Plaintiffs-Appellants

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether The Trial Court Erred In Ruling That Under Chapter 93A A Defective Product Cannot Cause "Injury" Until Consumers Suffer A Monetary Loss Or Personal Injury Causally Related To The Product.

INTERESTS OF *AMICI CURIAE*

This brief of *amici curiae* in support of the *Iannacchino* plaintiffs-appellants is collectively submitted by the seven public interest organizations described below. *Amici* share common interests in advancing the interests of consumers and believe that their collective views on the twenty-three years of jurisprudence concerning Chapter 93A's injury requirement will help inform the Court's decision on this matter. *Amici* strongly advocate for the preservation of Chapter 93A's injury requirement as it has been defined by the seminal *Leardi* decision and urge the Court in this case to both clarify *Hershenow* and integrate it into the line of jurisprudence that, as understood by *amici*, compels a finding that the *Iannacchino* plaintiffs-appellants suffered a cognizable injury under Chapter 93A. The respective interests of *amici* are as follows:

AARP

AARP is a non-partisan, non-profit membership organization with almost 40 million members aged 50 and older, approximately 851,000 of whom live in Massachusetts. As the largest membership organization representing the interests of older Americans, AARP is greatly concerned about unfair and deceptive practices targeted at vulnerable consumers (like older persons), including practices that cause easily quantifiable losses of property and money (e.g., out-of-pocket costs), as well as those that cause other losses such as diminished value. Because older persons are disproportionately victimized by many of these practices, AARP supports laws and public policies to protect their rights and to preserve the means for them to seek legal redress when they are harmed in the marketplace. While many older people lose large amounts of money due to unfair and deceptive practices, many others lose relatively small amounts or are subjected to statutory violations with low damage claims. These losses nevertheless are significant to these victims, as is their ability to obtain adequate relief through private litigation. Class actions often present the sole means for them to do so, and AARP has

filed amicus briefs in numerous cases around the country seeking to preserve access to class actions.

Massachusetts Academy of Trial Attorneys

The Massachusetts Academy of Trial Attorneys ("MATA") is a voluntary, non-profit, state-wide professional association of attorneys in Massachusetts. The mission of the Academy is to preserve the American jury system; to protect the health and safety of Massachusetts families; to improve the quality of legal representation through education; to educate the public about consumer issues; to uphold the honor and dignity of the legal profession; and to uphold and defend the Constitution of the United States and the Commonwealth of Massachusetts.

MATA offers its experience and perspective to this Honorable Court as amicus curiae to assist in the resolution of the important issue raised by the present appeal.

National Association of Consumer Advocates

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and

representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

National Association of Shareholder and Consumer Attorneys

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1988. NASCAT's member law firms represent investors (both institutions and individuals) in securities fraud and consumer protection cases throughout the United States. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes and so-called "white collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and improving access to justice and compensation for the wrongs inflicted upon victims. NASCAT advocates the principled interpretation and application of federal and state securities and consumer protection laws to protect investors from manipulative, deceptive and fraudulent practices. NASCAT has previously filed

amicus curiae briefs in the U.S. Supreme Court, federal circuit courts and state supreme courts and courts of appeals in cases involving the construction and application of securities, consumer protection and anti-racketeering laws.

National Consumer Law Center, Inc.

The National Consumer Law Center, Inc. (NCLC) is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a nationally-recognized expert on consumer credit issues, including fringe banking products, and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over 38 years. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC publishes a seventeen-volume Consumer Credit and Sales Legal Practice Series, including, inter alia, Unfair and Deceptive Acts and Practices (6th ed. 2005 & Supp. 2007). NCLC frequently is asked to appear as amicus

curiae in consumer law cases before courts around the country and does so in appropriate circumstances.

Public Citizen

Public Citizen is a national non-profit consumer advocacy organization headquartered in Washington, D.C. It seeks leave to file this brief on behalf of its approximately 90,000 members. Public Citizen engages in research, education, lobbying, and litigation on a broad range of issues that affect consumers. Over the last 35 years, Public Citizen's lawyers have worked in a variety of litigation and legislative contexts to provide consumers full and fair redress for their injuries under federal and state consumer protection statutes, including statutes like Massachusetts's chapter 93A, and traditional state tort and contract principles. As described more fully in the accompanying amicus brief, Public Citizen believes that business misconduct cannot be fully deterred, and its victims fully compensated, unless chapter 93A is construed as the Massachusetts Legislature intended as set forth in the accompanying amicus brief.

Public Justice

Public Justice[1] is a national public interest law firm dedicated to fighting for justice through precedent-setting and socially-significant individual and class action litigation designed to enhance consumers' and workers' rights, environmental protection and safety, civil rights and civil liberties, America's civil justice system, and the protection of the poor and powerless. Public Justice is committed to ensuring that all Americans have meaningful access to justice in their dealings with large corporations.

STATEMENT OF THE CASE

Amici adopt the statement of the case and the facts as presented by the Plaintiffs-Appellants.

Summary Of The Argument

In 1979, the legislature amended G.L. c. 93A, § 9, replacing the requirement that a consumer "suffer any loss of money or property" to obtain relief, with the broader requirement that the consumer merely show that he or she was "injured" by any unfair or deceptive practice. This change led this Court to rule that the

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[1] Public Justice recently shortened its name from Trial Lawyers for Public Justice.

use of a residential lease that contains prohibited provisions constituted an invasion of a legally protected right, and therefore an injury under c. 93A, even though the lease provisions were not enforced. *Leardi v. Brown*, 394 Mass. 151 (1985). *Infra, p. 12-17.* More than twenty years of case law followed *Leardi*, recognizing that consumers can be injured by unfair or deceptive practices even when no damages can be shown. *Infra,* p. 17-22.

In 2006, this Court issued its decision in *Hershenow v. Enterprise Rent-a-Car of Boston, Inc.*, holding that although the unenforced rental contract provisions at issue violated state law, the illegal provisions caused no injury to the renters, and as a result, the renters had no claim under c. 93A. In the decision, the Court was careful to point out that its ruling was in no way a departure from the interpretation of "injury" in *Leardi* and the cases that followed it, noting that while the illegal lease provisions in *Leardi* could have adversely affected the tenants and caused them to act differently, the illegal rental car contract provisions could not. *Infra,* p. 22-26. Nonetheless, some courts, including the trial court here, have read *Hershenow* as limiting the scope

of "injuries" required to establish a c. 93A claim to those where some quantifiable loss has occurred. *Infra,* p. 27-32. This misreading of *Hershenow* led the trial court to conclude that the vehicle owners' c. 93A claim was "premature" or "speculative" because the door latches had not yet failed. The court misconstrued the holding of *Hershenow* – that there is no injury when the practice complained of *could not have* affected the consumers – concluding that there was no injury when the practice *had not* yet affected the consumers by causing a monetary loss or personal injury. *Infra,* p. 32-34.

The trial court's decision is contrary to the statutory language, and more than twenty years of case law, including *Hershenow*. If allowed to stand, the decision could leave consumers who suffer injuries long recognized by Massachusetts courts as cognizable under c. 93A, without no remedy. *Infra,* p. 35-41.

ARGUMENT

As the Court has framed it, "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 nonetheless 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*, 445 Mass. 790 (2006); and *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381 (2004)." Oct. 16, 2007, Notice of Docket Entry.

The crux of the issue before the Court may be plainly stated as follows: is a consumer who purchased a car with a defective door latch required to wait until the latch fails or he incurs the cost of repairing or replacing it to assert a claim under Chapter 93A? And more generally, does a consumer who purchased a product with an undisclosed safety defect suffer no "injury" unless or until the defective product causes physical harm or economic loss? Case law interpreting Chapter 93A's "injury" requirement, from *Leardi* through *Hershenow*, plainly indicates that "no" can be the only answer to these questions.

The Court's citation to *Hershenow* and *Aspinall* to frame the question suggests recognition of a perceived tension between these two cases, a circumstance which has created uncertainty about the nature and parameters of Chapter 93A's "injury" requirement as it has been understood since the seminal *Leardi* decision in 1985. Although *both Hershenow* and *Aspinall* explicitly

reaffirmed the validity of *Leardi*, a troubling number of post-*Hershenow* decisions have interpreted it as a departure from *Leardi*, limiting the "injury" concept in ways that cannot be reconciled with *Leardi* or *Aspinall*.

For example, pre-*Hershenow*, disclosing an individual's personal financial data to third parties in violation of G.L. c. 167B § 16 produced a compensable injury under c. 93A. *Commonwealth v. Source One Associates, Inc.*, No. Civ. A. 98-0507, 10 Mass. L. Rptr. 579, 1999 WL 975120 (Mass.Super. Oct. 12, 1999). But, post-*Hershenow*, the intrusive and unauthorized sale of consumers' private financial information to a telemarketer, an "injury" under *Leardi*, is no longer seen as such by the U.S Court of Appeals for the Seventh Circuit. *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 750 n.2 (7th Cir. 2006) (noting that *Hershenow* "appears to have limited the concept of injury articulated in the *Leardi* decision….").

Despite the perceived tension, *Hershenow* is not inconsistent with the *Leardi* through *Aspinall* line of jurisprudence that precedes it. *Leardi* and *Aspinall* span some twenty years of decisions reaffirming *Leardi's* "injury" concept. They encompass an unbroken line of jurisprudence in which courts have found injury

when a consumer shows that he or she is adversely affected by the unfair or deceptive conduct at issue. According to these courts, an adverse consequence occurs when an unfair or deceptive act "*could reasonably be found to have caused a person to act differently* from the way he (or she) otherwise would have acted..." *Hershenow,* 445 Mass. at 801 (*citing Aspinall,* 442 Mass. at 402) (emphasis added). It is only where the challenged practice could not adversely affect the consumer, as in *Hershenow*, that no injury occurs. *Id.* at 800 (c. 93A requires "causal connection between the deceptive act [violation of c. 93A] and an adverse consequence or loss.").

Amici urge the Court to reverse the trial court's decision and resolve any confusion created by *Hershenow* by clarifying that the invasion of a legally protected interest that could reasonably have an adverse effect upon consumers remains a cognizable injury under c. 93A, as *Leardi* originally enunciated.

I. *Hershenow* Clarified, But Did Not Limit, Chapter 93A's Injury Requirement

A. The Context In Which *Leardi* Defined Chapter 93A's Injury Requirement

In *Baldassari v. Public Finance Trust*, this Court was constrained to dismiss the plaintiff's Chapter 93A claims despite allegations of "clear, serious and

continuing violations of…" state debt collection laws, because plaintiffs did not (and, given the nature of the claims, could not) allege any "loss of money or property" as former c. 93A § 9 required. 369 Mass. 33, 34, 44 (1975). The legislature responded with the 1979 amendment to section 9, which replaced the economic loss requirement with "expansive language providing a right of action to '[a]ny person ... who has been injured by . . . any method, act or practice declared to be unlawful.'" *Aspinall,* 442 Mass. at 401.

Six years after this legislative reaction to *Baldassari*, the Court interpreted that expansive language to mean that the invasion of a legally protected right was a cognizable injury under the amended statute, even though no harm was shown. *Leardi,* 394 Mass. at 159-60. The Court has framed the context for its interpretation of the injury provision by citing the history of Chapter 93A's enactment, the 1979 amendment to section 9 replacing the economic loss requirement with the "broader predicate" of the "injury" requirement, and the corresponding legislative inaction with respect to section 11's economic loss requirement. *See, e.g., Ciardi v. F. Hoffman-La Roche,*

Ltd., 436 Mass. 53, 72 (2002); *Leardi*, 394 Mass at 158-59; *Hershenow*, 445 Mass. at 797-798.

The Court has also repeatedly emphasized that Chapter 93A is a "statute of broad impact which creates new substantive rights and provides new procedural devices for the enforcement of those rights." *Ciardi*, 436 Mass. at 58 (*quoting Linthicum v. Archambault*, 379 Mass. 381, 383 (1979). It is designed to reach "as-yet-undevised" unfair and deceptive business practices. *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 773 (1980). To achieve these goals, the legislature made the relief available under c. 93A "sui generis … [i]t is neither wholly tortious nor wholly contractual in nature, and is not subject to the traditional limitations of preexisting causes of action.'" *Kattar v. Demoulas*, 433 Mass. 1, 12-13 (2000) (*quoting Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704 (1975)). And, of course, to further its protective purposes, Chapter 93A must be liberally construed: "[T]echnicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice." *Baldassari*, 369 Mass. at 41 (1975).

It was within this context that *Leardi* first interpreted the meaning of "injury" under section nine, as amended. This context has remained unchanged in the intervening twenty-three years, and continues to form the basis of the analysis as to whether a cognizable "injury" has been alleged in the present case.

B. The Invasion Of Legally Protected Rights As An Injury Under Chapter 93A

1. *Leardi* Conformed Chapter 93A's Injury Requirement To Long-Established Common Law Principles

While *Leardi* is the seminal case on the "injury" requirement, its holding on that issue was derived from common law principles. As such, *Leardi* "merely conforms the statutory scheme of consumer remedies to that which prevails under the common law doctrine that, in certain circumstances, plaintiffs are entitled to nominal damages even where no actual damages are shown." *Leardi*, 394 Mass. at 160. (citations omitted). As the Court explained in *Aspinall, when discussing the Leardi decision*:

> Construction of the term [invasion of legally protected interest] was deliberate, framed after careful consideration of the 1979 amendment to the statute… consultation of well-respected legal authorities and treatises construing the term "injury"; decisions by the Supreme Court of the United States; and consumer protection statutes in force in other jurisdictions, as well as State court decisions interpreting those statutes.

442 Mass. at 401.

In discussing the authorities it relied upon in interpreting Chapter 93A's injury requirement, the Court took pains in *Leardi* to distinguish "injury," which the statute requires, from "damage" or "loss," which it does not. Although injury may include those concepts, it is not equivalent to them and is more expansive:

> [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 § 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,' and hence damages are allowed, though there has been no loss or damage." McCormick, Damages § 20 (1935). See, e.g., Rosnick v. Marks, 218 Neb. 499, 504-505, 357 N.W.2d 186 (1984).

Leardi, 394 Mass. at 159-60. *Rosnick* emphasized that although the terms injury and damages often are used synonymously, they are not the same. *Rosnick*, 218 Neb. at 504 (citations omitted).

Leardi recognized that by using the term "injury" in section 9, the legislature codified, for consumers only, the common law principles contained in the Restatement of Torts. In construing the critical injury requirement twenty-three years ago, the Court did not

create a new standard, but merely adopted the understanding of "injury" which the common law had long accepted. "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.'" *Leardi,* 394 Mass. at 159.

2. Post-*Leardi*: Twenty-Three Years Of Consistency With *Leardi's* Principle Of Injury

Scores of cases followed *Leardi,* reiterating its principle that in the context of c. 93A, "'injury' simply refers to 'the invasion of any legally protected interest of another.'" *Clegg v. Butler,* 424 Mass. 413, 418 (1997); *see also Hopkins v. Liberty Mutual Ins. Co.*, 434 Mass. 556, 566 (2001) (injury in context of consumer protection legislation, such as G.L. c.93A, is "the invasion of any legally protected interest of another"); *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 138 n.9 (1993) (distinguishing harm from injury under c.93A; injury defined as the invasion of a legally protected interest); *Maillet v. ATF Davidson Co., Inc.*, 407 Mass. 185, 192 (1990) (compensable injuries under c.93A need not involve loss of money or property but include any invasion of any legally protected interest); *Pine v. Rust*, 404 Mass. 411, 415-16 (1989)

(where no actual harm is shown, plaintiffs are still entitled to statutory damages); *Spring v. Geriatric Authority of Holyoke*, 394 Mass. 274, 288 (1985) (plaintiff seeking nominal statutory damages need only show invasion of legally protected right); *Feijo v. Toyota*, No. 1329, 2000 WL 1880266 (Mass. App. Div. Dec. 20, 2000) (awarding statutory damages for defendant's violation of attorney general regulation regarding deceptive advertising of sale price).

Herman v. Home Depot, Inc., No. 1345, 2001 WL 705725 (Mass. App. Div. June 19, 2001), probably represents the farthest reach of *Leardi's* injury concept. The Appellate Division affirmed the district court's finding that a consumer who bought a product at a store that had no item pricing was "injured" for purposes of c. 93A and entitled to statutory damages and attorney's fees as a result:

> In the instant case, the plaintiff's interest in having prices affixed to items sought to be sold in defendant's store is sufficient. As was pointed out in the amicus brief filed by the Attorney General, the ability of the plaintiff to know the prices without having to make the trip to a cash register to "scan" the item for its price, to be able to comparison shop conveniently without repeated trips to the register to verify prices with the loss of time is a sufficient demonstration of "injury."

2001 WL 705725, at *3. This Court implicitly agreed

with the trial court's finding that Mr. Herman had suffered the "invasion of a legally protected interest" when Home Depot violated the item pricing regulation. *Herman v. Home Depot*, 436 Mass. 210, 211-12, 216 (2002).

Home Depot and the flurry of item-pricing class actions which followed it provoked criticism, not just of the item-pricing regulation, but of the *Leardi* conception of "injury" that some saw as enabling similar suits in which the injury was purely vicarious. In some respects, *Hershenow* was seen as the Court's response to the potential of true "vicarious suits," where the injury lacked a causal connection to the reasonable prospect of an adverse effect upon consumers *See, e.g., Coben v. BJ's Wholesale Club, Inc.*, No. 042733BLS1, 2006 WL 1461256, at *3 (Mass. Super. May 1, 2006) (the court found no injury, citing *Hershenow*, and stating: "It is not enough for [plaintiff] to say that he was in a BJ's store and saw items without pricing stickers on them. At a minimum the plaintiff must demonstrate that the absence of those pricing stickers caused him some injury."). But in fact this limitation has always existed. *Leardi* itself emphasized that c. 93A did not authorize "vicarious suits by self-

constituted private attorneys-general." *Leardi*, 394 Mass. at 161.[2]

3. *Aspinall* Reaffirmed *Leardi's* Injury Principle, Applying It To The Deceptive Sale Of A Product

In 2004, this Court affirmed the certification of a class of purchasers of Marlboro Lights cigarettes who alleged that the defendants violated c. 93A by misleading the public into believing that Marlboro Lights would deliver lower levels of tar and nicotine, knowing that this was false. *Aspinall*, 442 Mass. at 382. The defendants contended that a class action could not be maintained because the plaintiffs would have to prove that the deceptive advertising *caused* each class member *actual harm*. Because some class members could actually have received lower tar and nicotine, depending on the way they smoked, individualized issues of causation and injury would "overwhelm any common issues with respect to the defendants' conduct." *Id.* at 394.

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[2] The first critical reference to "vicarious suits", made by Chapter 93A's original drafter, David Rice, was solely directed to deceptive advertising claims brought by consumer gadflies, who "'spot an apparently deceiving advertisement in the newspaper, on television or in a store window,'" and without being adversely affected, bring suit nevertheless. *See Baldassari*, 369 Mass. at 46.

The Court rejected this contention outright, holding that purchase of a deceptively represented product can, by itself, constitute an ascertainable injury under c. 93A:

> [T]he defendants' *conduct caused compensable injury* to all the members of the class -- consumers of Marlboro Lights were injured when they purchased a product that, when used as directed, exposed them to substantial and inherent health risks that were not (as a *reasonable consumer likely could have been misled* into believing) minimized by their choice of the defendants' "light" cigarettes.

Aspinall, 442 Mass at 395 (emphases added). Thus, it was not relevant whether individual class members actually received less tar and nicotine. As the deceptive advertising "*could reasonably be found* to have caused a person to act differently from the way he [or she] otherwise would have acted," it caused an injury under Chapter 93A. *Id.* at 394 (emphasis added) (*quoting Purity Supreme, Inc. v. Attorney Gen.,* 380 Mass. 762, 777 (1980) (additional citations omitted)).

In *Aspinall,* the Court reinforced the basic principle of *Leardi* that injury, in the context of section 9, includes an invasion of a legally protected interest. 442 Mass. at 400 (*citing Leardi,* 394 Mass. at 159-60). Consumers suffer such an injury when they purchase a product that is not as represented (as here), or when they are subject to illegal contract

provisions that purport to take away their rights (as in *Leardi*). Either circumstance causes injury, because either "*could* reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted." *Aspinall*, 442 Mass. at 394 (emphasis added).[3] The focus is on the likely adverse effect an unfair or deceptive practice could have on consumers, because "regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might *reasonably be expected to have* upon the general public." *Leardi*, 394 Mass. at 156 (citations omitted, emphases added).[4]

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[3] The Attorney General's Regulations are replete with applications of this "tendency or capacity to deceive" standard. *See, e.g.*, 940 CMR §§ 3.04 (deceptive pricing); 3.05 (deceptive claims); 3.09 (door-to-door sales); 3.10 (career schools); 3.16(3)(general regulation deeming unfair or deceptive the failure to "disclose to a buyer or prospective buyer any fact, the disclosure of which *may have influenced* the buyer or prospective buyer not to enter into the transaction") (emphasis added).

[4] *See Commonwealth v. Amcan Enterprises, Inc.*, 47 Mass. App. Ct. 330, 335 (1999) (deception standard for c. 93A is "tendency to deceive...to be construed in the context of the reasonable consumer.").

4. *Hershenow* Explicitly Acknowledged The Continuing Validity Of *Leardi* And *Aspinall*, But Found On Its Unique Facts That The Unfair Or Deceptive Conduct Held No Prospect Of Adverse Effect

In *Hershenow*, the Court acknowledged that the prohibited restrictions in the defendant's collision damage waiver (CDW) contract ran afoul of the statute. *Hershenow,* 445 Mass. at 800. But, unlike the lease terms in *Leardi*, the offending provisions in *Hershenow* did not and could not hold any prospect of an adverse consequence to the plaintiffs and thus could not cause injury: "The statutorily noncompliant clause did not and could not deter the plaintiffs from asserting any legal rights"...(and did not make the) customer worse off during the rental period than he or she would have been had the CDW complied in full...." *Hershenow*, 445 Mass. at 800-801.

Hershenow affirmed that the "adverse consequence" which signals injury occurs where the deception "*could reasonably be found to have caused a person to act differently* from the way he (or she) otherwise would have acted...." *Id.* at 801 (emphasis added). As the flawed contract provisions could not have caused any adverse effect on the plaintiffs, they could not be injured by those provisions. *Id.* at 800 (stating that c. 93A requires "causal connection between the

deceptive act [violation of c. 93A] and an adverse consequence or loss.").

This adverse effect has always been a criterion of injury. *See Aspinall*, 442 Mass. at 403, n.2 (Cordy, J. *dissenting*) ("This court and the Appeals Court have consistently made clear that a defendant's deceptive act must adversely affect the plaintiff before recovery under G.L. c. 93A, § 9, is permitted.") (*citing Gurnack v. John Hancock Mut. Life Ins. Co.*, 406 Mass. 748, 753 n.5 (1990); *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 678 (1983)); *Lord v. Commercial Union Ins. Co.*, 60 Mass. App. Ct. 309, 321 (2004); *Schwartz v. Travelers Indem. Co.*, 50 Mass. App. Ct. 672, 676 n. 5 (2001); *Abdella v. United States Fid. & Guar. Co.*, 47 Mass.App.Ct. 148, 153 (1999). *See also Siegel v. Berkshire Life*, 64 Mass. App. Ct. 698 (2005) (finding plaintiff adversely affected when insurance company placed interest in insurance policy in jeopardy and required plaintiff to take legal action to protect interests).

In short, to suffer an "injury" the plaintiff must show at least the reasonable prospect of a detrimental consequence to the illegal act or deception. Without a causal connection between deception and the prospect of

adverse effect, the deception is not actionable. *See Lord v. Commercial Union Ins. Co.*, 60 Mass. App. Ct. 309, 323 (2004) (finding no injury because the insurer's failure to send plaintiff notice of an inspection requirement of which he was already aware had no adverse effect on him, and thus no causal connection to his loss); *Van Dyke*, 388 Mass. at 678 ("Even if St. Paul violated G.L. c. 176D, § 3(9)(*d*) and (*f*), the plaintiffs had to be adversely affected by that violation in order to be entitled to recover under G.L. c. 93A, § 9.").

Hershenow pointed out the contrast between its facts, where no prospect of adverse effect existed, and those of *Leardi*, which presented a continuing prospect of adverse effect. *Hershenow*, 445 Mass. at 800. The Court emphasized that in *Leardi* the defendant's deception *could have* caused a tenant to act differently – to forego important legal rights: "confronted by unhabitable conditions, the illegal lease terms would deter tenants from exercising their legal rights on pain of loss of their tenancy. Stated differently, the illegal lease terms acted as a powerful obstacle to a tenant's exercise of his legal rights." *Id.*, at 800. As the Appeals Court correspondingly noted in

distinguishing *Leardi* from the plaintiff's position in *Lord*, the illegal lease held the prospect of "a *continuing* deprivation of statutory rights because the tenants were misled to believe that such rights did not exist." *Lord,* 60 Mass. App. Ct. at 314-15 (discussing *Leardi)* (emphasis added).

An injury leaves a plaintiff in a worse position than otherwise would have been the case: "The mere existence of statutorily prohibited lease provisions placed all tenants in a worse and untenable position than they would have been had the leases complied with the requirements of Massachusetts law." *Hershenow,* 445 Mass. at 800 (discussing *Leardi*). This does not mean, however, as has been mistakenly advocated by some like Ford here, that the plaintiff must show a causal connection with a loss that is equivalent to "some quantum of harm." *Leardi,* 394 Mass. at 158. *Aspinall* followed *Leardi* in rejecting this argument, reaffirming that the invasion of a legally protected interest "effect[s] a *per se injury* on consumers…." *Aspinall,* 442 Mass. at 392-93.[5]

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[5] Although the purchase of a misrepresented product may create the causal connection to show injury (*cf. Coben*, 2006 WL 1461256, at *3 (Mass. Super. May 1, 2006), injury does not require either purchase or use of a

5. Post-*Hershenow*: Uncertainty and Confusion

Despite the consistent jurisprudence described in the preceding sections, portions of *Hershenow*, considered outside this historical context, have been read to limit *Leardi's* injury concept. The trial court here described *Hershenow* as "far from clear, particularly in light of the other cases discussed in Justice Cowin's concurrence at 802-810, which provide more latitude in the definition of what constitutes cognizable injury under Chapter 93A." Memorandum of Decision and Order ("Order"), at 5. The trial court also recognized the conundrum created by its contrary finding that the *Iannacchino* Plaintiffs' breach of warranty claim *did* allege injury sufficient to survive the motion for judgment on the pleadings. *Id.* (citing *Slaney*, 366 Mass. at 702.)[6] It was this confusion that

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product. *See, e.g., Brow v. Stanton*, 12 Mass. App. Ct. 992, 993 (1981) (finding injury where defendant violated debt collection regulation prohibiting contact with represented debtor).

[6] "An alleged breach of an express warranty [is]… a virtual per se violation of [c. 93A]." *Canal Electric Co. v. Westinghouse Elec. Corp.*, 756 F. Supp. 620, 628 (D. Mass. 1990) (citations omitted). *See Doe v. Baxter Healthcare Corp*, C.A. No. 93-5750, slip op. at 15 (Middlesex Superior Court 1997) *aff'd, Vassalo v. Baxter Healthcare Corp*,, 428 Mass. 1 (1998) ("In light of my determination that [defendant] was negligent and breached its implied warranty of merchantability in connection with the silicon breast implants,

compelled the trial court to invoke Rule 64, and presumably prompted this Court to take direct appellate review.

As it now stands, the trial court's holding is that even if, as alleged, the non-compliant door latches make the "vehicles … unsafe …, and worth less than they would be if compliant," until owners are in collisions "where the door latches failed …[there is no] cognizable injury." Order, at 3, 5. Before *Hershenow*, such a finding would have been without any basis, and in direct conflict with *Leardi* and *Aspinall*. Further muddying the waters, as the trial court recognized, Judge Billings reached the opposite conclusion in *Holtzman v. General Motors Corp.*, No. 02-1368, 2002 WL 1923883 (Mass. Super. July 2, 2002). That case involved defective tire jacks and nearly identical safety and injury issues as here: "[i]f a jack is incapable of raising a car to change a flat tire, it is unfit for normal usage. If it is incapable of raising the car without unreasonably placing those nearby in danger of serious bodily injury, it is likewise unfit to be used." *Holtzman*, at *2. The vehicle owners here

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[defendants'] liability under c. 93A would appear to follow as a matter of course." (citing *Maillet v ATF-*

have stated a claim for breach of warranty. Order, at 8. Therefore, "[h]aving pleaded breach of warranty, the plaintiffs have pleaded a Chapter 93A claim." *Holtzman,* at *4.

As with the trial court here, other courts have read *Hershenow* as "appear[ing] to have limited the concept of injury articulated in the *Leardi* decision…." *Mirfasihi*, 450 F.3d at 750 n.2. *See also Denbesten v. Safari Motor Coaches, Inc.,* 68 Mass. App. Ct. 1120 (2007) (citing *Hershenow*, Appeals Court reversed ruling in favor of plaintiffs on c. 93A claim based on undisclosed prior damage to car, on grounds that plaintiffs did not establish that they *would have* made a different decision if the repair had been disclosed); *Ferola v. Allstate Life Insurance Company,* 23 Mass. L. Rptr. 60, 2007 WL 2705534 (Mass. Super. Aug. 30, 2007) (dismissing c. 93A claim where Allstate had plaintiff complete election not to rescind form before rescission period expired, on grounds that plaintiff did not establish that he *would have* rescinded but for the election form, citing *Hershenow*); *Waters v. Earthlink,* 20 Mass. L. Rptr. 527, 2006 WL 1549685 (Mass. Super. June 19, 2006) ("[A] class-wide inability to connect to

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Davidson Co., 407 Mass. 185 (1990)).

the Internet when the class had paid for the service of access to the Internet … does not by itself effect a loss," citing *Hershenow*); *Prohias v. Pfizer, Inc.*, 485 F.Supp.2d 1329 (S.D. Fla. 2007) (citing *Hershenow*, dismissing c. 93A claim, finding that purchasers of Lipitor were not injured under c. 93A when they purchased drug which had been falsely advertised as having coronary benefits, unless they bought Lipitor specifically for its heart benefits, not for its cholesterol lowering benefits). *Cf. Chenlen v. Philips Electronics North America*, 20 Mass. L. Rptr. 652, 2006 WL 696568 (Mass. Super. March 1, 2006) (citing *Leardi* and *Aspinall*, finding that plaintiff "had a legally protected interest in buying products that were not falsely advertised. Accordingly, the alleged deceptive advertising, in this case, if proved, will effect a per se injury on consumers who purchased the lighting products represented to have longer useful lives than is the case.").

Those cases that have read *Hershenow* as modifying *Leardi* share a common element – they implicitly accept the "limitation" of the injury concept that *Mirfasihi* alludes to as requiring the "quantum of harm" that *Leardi* rejected. Even those cases which have found c.

93A liability have resorted to analytical gymnastics to identify such a quantum of harm. *See, e.g., Kelley v. CVS Pharmacy, Inc.*, No. 98-0897, 23 Mass. L. Rptr. 87, 2007 WL 2781163 (Mass. Super. Aug. 24, 2007) (finding injury under c. 93A and *Hershenow* where CVS sold customers' medical information to third party marketer without disclosure, on grounds that CVS obtained $1 per letter mailed to customers); *Terra Nova Ins. Co. v. Metropolitan Antiques, LLC,* 20 Mass. L. Rptr. 430, 2006 WL 280967, at *5, n.5 (Mass. Super. Jan. 24, 2006) (noting that harm to class in Telephone Consumer Protection Act case was not receipt of unwanted faxes, but "what happened to class members facsimile machines, their ink, paper and toner," citing *Hershenow), rev'd on other grounds, Terra Nova Ins. Co. v. Fray-Witzer,* 449 Mass. 406 (2007).

The post-*Hershenow* cases which appear to be seeking the elusive quantum of harm are adding an element to the injury requirement that *Hershenow* did not impose. *Hershenow* merely restates the causation element of injury. "The Legislature never intended § 9 to allow a plaintiff who has not been adversely affected to recover…" under c. 93A. *Hershenow,* at 806. If the legislature wanted "injury" to require a "but for"

economic loss, it undoubtedly would have responded to *Leardi* as it responded to *Baldassari*, with an amendment which clarified its intent.

As the *Lord* court emphasized, the "but for" causation requirement that *Baldassari* was forced to apply was removed from section 9, but preserved for section 11 claims: "We note that cases brought under G.L. c. 93A, § 11, regularly emphasize the requirement that a plaintiff, in order to recover, must demonstrate the existence of an unfair or deceptive act or practice, a loss, and the causation of one by the other. *See Massachusetts Farm Bureau Fedn., Inc. v. Blue Cross of Mass., Inc.*, 403 Mass. 722, 730 (1989); *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115, 125 (1994)." *Lord*, 60 Mass. App. Ct. at 321, n.10. The twenty-three years of legislative silence since *Leardi* are ample evidence that *Leardi* properly interpreted legislative intent. *Hershenow* cannot be read as modifying that intent and also be true to the statute or consistent with *Leardi*.

C. Under The Principles Of *Leardi*, *Aspinall*, And *Hershenow*, The Plaintiffs Were Injured When They Purchased Vehicles With Safety Defects

The vehicle owners here allege that they were injured when they purchased Ford vehicles which had defective door latches, in that they: (1) own vehicles

that are unsafe; (2) own vehicles that are worth less than if they complied with all safety standards; and (3) will be required to incur the cost of repairing the door latches. Citing *Hershenow*, the trial court viewed the injury alleged as "speculative and premature." Order, at 5. In so holding, the trial court misconstrued c. 93A and the case law. The purchase of a defective or deceptively marketed product is an injury under c. 93A, even before any personal injury occurs or out of pocket expense is incurred. *Aspinall*, 442 Mass. at 395. The injury in this case is not "ethereal" as Ford claimed, nor is it speculative and premature as the trial court concluded.[7]

Each of the vehicle owners is at risk of physical or economic injury because of the defective latches. There is no requirement under c. 93A that the owners wait

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[7] A consumer who purchased a car with an undisclosed safety defect has suffered a direct economic injury, based on diminution in value and breach of warranty. *See Billingham v. Dornemann*, 67 Mass. App. Ct. 1105 (2006) (loss of value in property constitutes injury under c. 93A). The difference between the value of cars with the defective door latches and the amount paid by the plaintiffs represents actual damages. *Aspinall*, 442 Mass. at 399 (measure of actual damages sought was the difference between the price paid by cigarette purchasers and the true market value of the "misrepresented" cigarettes they actually received). The cost to repair the defective door latches is likewise an economic injury.

until the door latches fail or they have incurred the cost of repairing them to bring a claim. As the *Holtzman* court reasoned:

> [i]t would be anomalous to open the courthouse doors to buyers of shoes with separating soles, motorcycles that won't start, engines that won't run, catalogs whose pages stick together, and moldy wine – none of whom has suffered, or is likely to suffer, physical injury from the goods in question – but not to owners of a product who allege a design defect capable of causing injury or death.

Holtzman v. General Motors Corp., 2002 WL 1923883, at *3.

In addition, were a passenger in the consumer's car to suffer personal injuries causally connected to the defective door latch at issue here, the consumer's failure to repair the latch despite knowing of its non-compliance with federal safety standards may well expose the consumer to liability for negligence. And, were a consumer to sell the car with knowledge of the safety defect, liability may well attach were the purchaser injured as a result of the defect, although Chapter 93A does not impose a duty to disclose in a private transaction.

In short, the trial court's reliance on *Hershenow* was entirely misplaced. In *Hershenow,* as discussed, the Court held that the defendant's use of a statutorily

defective CDW contract *could not have* affected the plaintiffs or their legal rights. Here, the defective door latches already have affected the plaintiffs – their vehicles are worth less and they require repairs. In addition, the defective door latches could cause physical injury.

Hershenow has no bearing on this case. Nonetheless, the trial court's view that *Hershenow* prevented recovery under Chapter 93A is further evidence of the confusion caused by *Hershenow* and the need to clarify the law by reinforcing the longstanding case law and principles established by *Leardi* and *Aspinall*.

II. The Trial Court's Interpretation Of *Hershenow* Would Leave Consumers Without Recourse In Many Contexts In Which This Court And The Lower Courts Have Already Recognized A Cause Of Action

Since *Leardi*, both this Court and the lower courts in Massachusetts have consistently recognized that even where there is no quantifiable harm, consumers can be injured in significant ways and therefore entitled to a remedy under c. 93A. In fact, the availability of minimum statutory damages under c. 93A is important to its vigorous enforcement. This Court made clear in *Hershenow* that its decision did

not represent a change in its view of the scope of "injury" for which c. 93A § 9 provides a remedy.

The trial court nevertheless read it to limit *Leardi*, requiring the quantum of harm that *Leardi* expressly rejected. If the Court does not correct the trial court's interpretation of *Hershenow*, consumers subject to practices which Massachusetts courts have long recognized as causing injury may be left with no remedy, and statutory provisions enacted to protect consumers may be left unenforceable. In addition to the issues of intangible harm raised in the areas of residential households and personal privacy,[8] these recognized injuries include the following.

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[8] *See, e.g., Knott v. Laythe,* 42 Mass. App. Ct. 908 (1997) (finding tenant entitled to statutory damages of $25 for inclusion of lease provision requiring tenant to pay utility charges without a written agreement, in violation of the State Sanitary Code); *Poncz v. Loftin,* 34 Mass. App. Ct. 909, 911 (1993) (same); *Commonwealth v. Source One, Assoc. Inc.*, 10 Mass. L. Rptr. 579, 1999 WL 975120 (Mass. Super. Oct. 12, 1999)(wrongfully obtaining consumers' "private financial information by pretext for re-sale to others" injures consumers who suffer the "loss of financial privacy."), *aff'd Commonwealth v. Source One, Assoc., Inc.,* 436 Mass. 118 (2002).

A. Consumers Are Injured When They Rent Housing That Contains Lead Paint, Even Before Any Lead Poisoning Occurs

Despite significant gains, poisonous lead paint pervades the Commonwealth's older housing stock. Our courts recognize both the consequences of actual childhood lead poisoning and the injuries families living in tainted homes suffer as a result of the increased risk to their children. As the court explained in *Barrett v. Savarese*:

> [W]e believe the landlord's representation that he was unaware that the unit contained lead was a deceptive act that caused the tenants to act differently than they otherwise would have had they known of the presence of lead. This deceptive act injured the tenants--injured as the term is used under G.L. c. 93A--who rented the apartment upon the belief that it did not contain lead and that they would therefore not be placing their child in danger.

64 Mass. App. Ct. 1106 (TABLE), 2005 WL 1993536, at *4 (Aug. 18, 2005) (awarding tenants $25 in statutory damages, even though no actual damages were shown). *See also Manzaro v. McCann,* 401 Mass. 880 (1988) (finding landlord violated c. 93A by including provision in lease that tenant assumes responsibility for any costs associated with lead paint, entitling tenant to $25 minimum damages).

Our trial courts have routinely awarded c. 93A damages to families living in housing that contained

lead paint, even before any children are actually poisoned, because the risk of injury to children living there both injures the tenants and reduces the value of that housing to the family. The trial court's interpretation of *Hershenow, if allowed to stand,* would doom an inchoate lead paint claim as "speculative and premature," requiring a family to seek a remedy only after a child is poisoned and allowing landlords to escape liability for renting contaminated housing if the tenants are able to avoid serious damage to their health.

B. Consumers Are Injured When They Are Subject To Harassment By Debt Collectors

The legislature has prohibited certain unfair or deceptive debt collection activities, including: (a) communicating with or implying the fact of the debt to a person other than the actual debtor; (b) communicating with the debtor after being notified of representation by counsel and that all further communications should be through counsel; and (c) communicating with debtors using forms which simulate the form and appearance of judicial process. G.L. c. 93, section 49.

The Banking Commissioner has issued regulations that further define unfair and deceptive debt

collection tactics to include calling the consumer too frequently, misrepresenting the character, amount, or legal status of the alleged debt, failing to provide requisite disclosures, and communicating with the consumer by postcard. *See* 209 CMR 18.14 to 18.18.

These provisions are noteworthy insofar as they apply to conduct which in many instances would not be likely to cause tangible harm. It is reasonable to assume, for example, that calling a debtor three times in a particular week would not result in emotional distress or other tangible harm, yet nonetheless this conduct clearly violates 209 CMR 18.14(d), and consumers subject to such conduct clearly have been injured within the scope of c. 93A. *See, e.g., Brow v. Stanton,* 12 Mass. App. Ct. 992, 993 (1981)(granting plaintiff summary judgment on c. 93A claim where defendant violated debt collection regulation prohibiting contact with represented debtor; because plaintiff established no actual damages, she was entitled to $25).

If courts were to hold otherwise, debt collectors would have absolutely no incentive to comply with statutory restrictions or the Banking Commissioner's regulations. Few consumers could quantify the damage

caused when a debt collector makes repeated harassing or threatening phone calls, or calls a consumer's neighbors and discusses the debt, but this conduct undoubtedly injures the consumer.

C. Consumers Are Injured By Sellers' Misrepresentations and Deceptive Advertising

Courts have had little trouble concluding that a seller who makes a material misrepresentation about a product or about the price of a product commits an unfair and deceptive act in violation of c.93A, even when the misrepresentation does not result in monetary or quantifiable damages. *See Feijo v. Toyota,* 2000 Mass. App. Div. 332, 2000 WL 1880266 (Dec. 20, 2000) (finding car dealer that agreed to sell car at a certain price and accepted a deposit from consumer and then refused to sell the car unless the consumer agreed to a higher price violated c. 93A; consumer entitled to $25.00 statutory damages); *Thompson v. Main Street Auto Sales and Service, Inc.,* 1999 Mass. App. Div. 260, 1999 WL 1034759 (Nov. 9, 1999) (concluding car dealer that intentionally failed to disclose that used car it sold to consumer was former rental car violated c.93A; absent evidence of any loss sustained as a result of car dealer's violation, statutory damages of $25 were assessed). Absent an award of at least statutory

damages, sellers would be free to misrepresent critical aspects of a transaction, knowing that the consumer would have the burden to establish a loss caused by the misrepresentation. Such a result is antithetical to the purposes of c. 93A.

Likewise, as the Court made clear in *Aspinall*, consumers are injured when they purchase a deceptively marketed product.

D. The Many Consumer Protection Statutes That Established Legal Rights, The Violation Of Which Constitutes A Violation Of Chapter 93A, Will Be Effectively Unenforceable If Consumers Have To Establish A Quantifiable Loss

Many statutes expressly provide that a violation of the statute is a *per se* violation of c. 93A. These include: the Used Car Lemon Law, G.L. c. 90 §7N 1/2(6) and New Car Lemon Law, G.L. c. 90 §7N 1/2(7); the Consumer Credit Reporting statute, G.L. c. 93 § 49A, the Credit Services Organization Act, G.L. c. 93 § 68E; statute requiring title certification in mortgage transactions, G.L. c. 93 § 70; the Health Club Services Act, G.L. c. 93 § 84, 96; the Truth in Savings Law, G.L. c. 140E § 3; statute governing contracts for continuing care in nursing homes, G.L. c. 93 § 76; Odometer Tampering prohibition, G.L. c. 266 § 141; and Prohibited Acts by Contractors and Subcontractors, G.L. c. 142A § 17, to name a few.

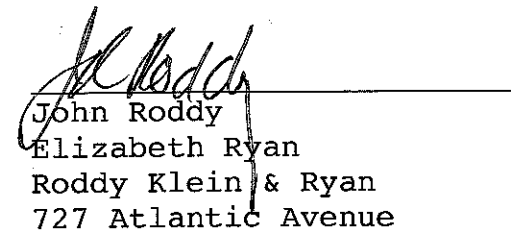
Most of these statutes require certain disclosures or prohibited contract provisions, and violations of these provisions can deprive consumers of important rights which the legislature sought to safeguard. If such violations are only actionable after some quantifiable loss has occurred, the legal rights established by the statutes will be severely weakened, if not eliminated.

III. Conclusion

In guiding lower courts to correctly apply injury and causation requirements, the protective and deterrent principles underlying chapter 93A should predominate. Equally important is that nothing in the public interest or in jurisprudential considerations favors shielding the kinds of conduct that have troubled the courts since *Hershenow*. Certainly, the type of misrepresentation at issue here – that autos meet federal safety standards when they do not – holds a causal connection to the reasonable prospect of an adverse effect upon consumers, and as such is a cognizable injury under c. 93A.

No policy, and no interest, supports a contrary conclusion. This court should reverse the trial court's decision.

Respectfully submitted,



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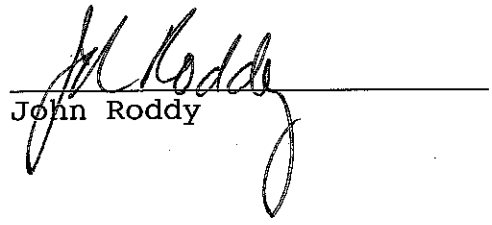
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, undersigned counsel states that this brief complies with the rules of court that pertain to the filing of briefs.



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