

# Legal Dimensions

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## Massachusetts Appeals Court Limits Manufacturer's Post-Sale Duty to Warn

In *Lewis v. Ariens, Co.*, Appeals Court No. 99-P-811 (June 2, 2000), the Appeals Court refined Massachusetts products liability law by limiting a manufacturer's post-sale duty to warn under the implied warranty of merchantability.

In *Lewis*, the Court rejected the plaintiff's contention that a manufacturer's post-sale duty to warn includes a requirement that the manufacturer update its product warnings by notifying all remote purchasers of dangers discovered by the manufacturer subsequent to the initial sale of the product.

The plaintiff in the case lost four fingers on his right hand when they came in contact with the blades spinning in the discharge chute of a snowblower that he had purchased from the original owner. A Superior Court jury found that the snowblower was not reasonably safe for its intended purposes and awarded damages on the plaintiff's warranty count in the amount of \$205,000 against the manufacturer, Ariens. The plaintiff's count for damages under Mass. Gen. Laws Chapter 93A was reserved for the trial judge.

Following the verdict, the trial judge found that Ariens violated Chapter 93A by failing to warn its customers about dangers that were discovered subsequent to the original sale of the snowblower. The evidence indicated that Ariens was aware of studies conducted shortly after the original sale that demonstrated the dangers inherent in the design of the subject snowblower.

In addition, the evidence proved that Ariens made subsequent safety design changes without providing warnings

to owners of the snowblowers that were already in the stream of commerce.

### Massachusetts Precedent

A post-sale duty to warn of defects discovered subsequent to the sale of a product was announced in *DoCanto v. Ametek*, 367 Mass. 776 (1975), in which the Supreme Judicial Court held that a manufacturer has a duty to warn at least the original purchaser of defects which the manufacturer learns of or reasonably should have learned of after the original sale. The Court reiterated the *DoCanto* holding in *Hayes v. Ariens*, 391 Mass. 407 (1984), without deciding whether the duty extended to remote purchasers.

A significant change in Massachusetts products liability law was announced in *Vassallo v. Baxter Healthcare*, 428 Mass. 1 (1998), in which the Supreme Judicial Court held that a manufacturer is only required to provide warnings in accordance with the "state of the art" at the time of sale. The Court affirmed its prior holding, however, that a manufacturer would be held to the standard of knowledge of an expert in its respective field and be subject to a continuing duty to warn immediate purchasers of risks discovered by the manufacturer following the sale of the product. Again, the Court did not address the issue of whether the post-sale duty to warn would extend to remote purchasers.

### The Lewis Decision

Against this backdrop of Massachusetts precedent, the Lewis Court reversed the trial court's award of damages on the plaintiff's Chapter 93A count and remanded the case to the trial court for entry of judgment in favor of Ariens.

The Court stated that it would not accept a general rule extending a manufacturer's post-sale duty to warn to remote purchasers of products. The Court reasoned that such a rule would provide too diffuse a universe of product users for manufacturers to identify, and impose a financially daunting and unreasonable burden upon sellers of products.

The Court distinguished between original purchasers and subsequent purchasers of products, and noted that a manufacturer may reasonably be expected to identify original purchasers by offering inducements to customers to register their purchases with the manufacturer. The Court acknowledged that the same contact points are not available between the manufacturer and remote purchasers.

### Door Not Closed

The decision stopped short, however, of announcing a bright-line rule forever closing the door on a manufacturer's potential liability to remote purchasers for failing to warn of latent defects discovered after the initial sale.

In a footnote, the Court noted that such a duty may arise in cases in which the newly-discovered defect presents an urgent danger to such a great number of people that the manufacturer may be expected to warn remote purchasers through advertising on the Internet or through the electronic and print media.

The Court went on to decide that Ariens could not have violated Chapter 93A in the present case as the snowblower in question was manufactured prior the enactment of the statute. Because Chapter 93A created substantive rights, the Court refused

to apply the statute retroactively. Therefore, products manufactured and sold prior to the effective date of Chapter 93A (March 26, 1968) are not subject to the provisions of the Chapter.

The **Lewis** decision further defines a manufacturer's liability under Massachusetts products liability law and is illustrative of the trend in Massachusetts towards analyzing warranty law in all respects by applying principles of negligence.

While the **Vassallo** decision relaxed the strict liability approach to a manufacturer's duty to warn at the time of the original sale, the **Lewis** decision applies a negligence standard in determining whether a manufacturer will have a post-sale duty to warn remote purchasers of defects discovered after the initial sale by considering the severity of the harm that may be caused by the defect, the number of people who may ultimately be affected, and the burden on the manufacturer in identifying and notifying potential users in light of the potential harm.

The **Lewis** decision represents a further erosion of warranty law to the extent that the Court clearly distinguished between a manufacturer's duty to an immediate purchaser of goods and the duty owed to a remote purchaser of goods. Since the Legislature's abolition of privity in the sale of goods by statute in 1971, there has been no clear limitation on a remote purchaser's rights to assert warranty theories that are available to the original purchaser.

While the **Lewis** decision does not absolutely preclude a remote purchaser from asserting a breach of the post-sale duty to warn, it clearly indicates for the first time that remote purchasers do not stand on the same footing as the original purchaser with respect to duty to warn claims. □

## Correction

A statement in the June 16 issue of **The Standard** incorrectly stated that Massachusetts State Rating Bureau (SRB) Counsel Bob Ross said the Workers' Compensation Rating & Inspection Bureau of Massachusetts has long advocated the adoption of a data quality incentive program. Ross actually said that the SRB had advocated the adoption of a data quality incentive program. □

**The Standard** June 23, 2000

## IVANS to Hold Regional Meeting

IVANS, the industry-owned technology organization that provides electronic communications services to insurers and healthcare companies, will hold a regional industry meeting at the Sheraton in Framingham, Mass. on Thursday, July 20.

The agenda will include a discussion of how agencies can use technology to leverage their business, and how companies are using the Internet, extensible markup language (XML), security systems, and agency/company interfaces. Case studies will be presented and round table discussions will be part of the program.

The meeting will begin at 11 a.m. and end with round table discussions from 1:15 p.m. to 3 p.m. An optional session will begin at 3:15. More information is available from Nicole DeCintio at IVANS, tel., (203) 532-2118. Registration is also available online at [www.ivans.com](http://www.ivans.com). □

## P/C Net Income Drops by a Third

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a sharp increase in loss and loss adjustment expenses. The industry incurred \$56.3 billion in loss and loss adjustment expenses in the first quarter of 2000, up \$4.7 billion or 9.1% from \$51.6 billion in the first quarter of 1999. The 9.1% increase in first-quarter 2000 compares with a 6% increase year-over-year in fourth-quarter 1999 and a 3.5% increase year-over-year in first-quarter 1999.

**Underwriting results deteriorated in first-quarter 2000 primarily because of sharp increase in loss and loss adjustment expenses.**

Overall loss and loss adjustment expenses increased in first-quarter 2000 even though catastrophe losses dipped.

According to ISO's Property Claim Services unit, first-quarter 2000 catastrophe losses totaled \$1.7 billion, down from \$1.8 billion in first-quarter 1999. Other loss and loss adjustment expenses totaled \$54.5 bil-

lion in first-quarter 2000, up 9.7% from \$49.7 in first-quarter 1999.

The deterioration in underwriting results in first-quarter 2000 also reflects an increase in other underwriting expenses. Such expenses rose to \$20.5 billion in first-quarter 2000, up \$0.7 billion, or 3.7%, from \$19.7 billion in first-quarter 1999. The 3.7% increase in other underwriting expenses in the first quarter of this year compares with a 1.9% increase year-over-year in the fourth quarter of 1999 and a 5% increase year-over-year in the first quarter of 1999.

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