FOLEY HOAG LLP

Product Liability **Update**

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Foley Hoag LLP publishes this quarterly Update concerning developments in product liability and related law of interest to product manufacturers and sellers.

United States Supreme Court Holds Federal Locomotive Inspection Act Preempts Entire Field of Regulating Locomotive Equipment, Including State Law Claims Alleging Defective Design or Failure to Warn Based on Asbestos Content

In *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (Feb. 29, 2012), a welder and machinist for a railroad carrier, whose duties included installing brakeshoes on locomotives and stripping insulation from locomotive boilers, alleged he developed malignant mesothelioma thirty years after his retirement from asbestos in the locomotive parts. He and his wife sued fifty-nine distributors of the parts in Pennsylvania state court alleging that they were defectively designed and defendants had failed to warn of the dangers of asbestos or provide instructions regarding its safe use. Following dismissal of fifty-seven defendants, the remaining two – a brakeshoe distributor and the successor to an engine valve manufacturer – removed the case to the United States District Court for the Eastern District of Pennsylvania and moved for summary judgment, arguing plaintiffs' claims were preempted by the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701 et seq. The district court granted defendants' motion, and the United States Court of Appeals for the Third Circuit affirmed. The United States Supreme Court granted certiorari to address the preemption issue.

In 1915, Congress enacted the LIA, which provided that "a railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances: (1) are in proper condition and safe to operate without unnecessary danger of personal injury; (2) have been inspected as required [by the LIA and regulations thereunder]; and (3) can withstand every test prescribed by the Secretary [of Transportation] under [the LIA]." In *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), the Supreme Court held that the LIA preempted the entire field of regulating locomotive equipment, including "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), which granted the Secretary of Transportation broad authority to prescribe regulations and issue orders supplementing existing railroad safety laws and regulations. The FRSA included an explicit preemption provision, which provided in part that "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety [only] . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement."

Plaintiffs advanced two arguments supporting their contention that state law claims relating to the use of asbestos in locomotive equipment were not within the LIA's preempted field. First, plaintiffs contended *Napier* no longer defines the preempted

field because it was narrowed by the later FRSA. The Court rejected that argument, however, because the FRSA did not alter or supplant pre-existing federal statutes or regulations addressing railroad safety, such as the LIA, but instead supplemented them. Second, plaintiffs argued their claims were not preempted even under *Napier* because: (1) the claims arose out of the repair and maintenance of locomotives, rather than their "use on [a] railroad line"; (2) even if defective design claims were preempted, failure-to-warn claims were not because they are not based on "the design, the construction [or] the material" of locomotive parts; (3) at the time plaintiff was exposed to asbestos, the LIA only regulated railroads, not manufacturers; and (4) the LIA's preemptive scope does not extend to state common law claims, only legislation or regulations.

The Court rejected each of these arguments as contrary to the field preemption recognized in *Napier* – *i.e.,* "the entire field of regulating locomotive equipment." First, *Napier's* description of the preempted field made no distinction between hazards arising from repair or maintenance and those arising from use on the line. Second, the gravamen of the failure-to-warn claims still was directed at locomotive equipment – *i.e.,* that plaintiff suffered injury from exposure to asbestos in that equipment. Plaintiffs' third argument was inconsistent not only with *Napier* – which defined the preempted field on the basis of the physical elements regulated, not the entities subject to regulation – but common sense. The Court noted that, while plaintiffs' proposed rule would allow a state to impose locomotive part requirements on manufacturers but not railroads, "a railroad's ability to equip its fleet of locomotives in compliance with federal standards is meaningless if manufacturers are not allowed to produce locomotives and locomotive parts that meet those standards." Finally, the categorical field preemption established by *Napier* covered all state law requirements, and made no exception for common law duties.

Massachusetts Federal Court Holds Supreme Court's *Wal-Mart v. Dukes* Rulings That (i) Non-Incidental Monetary Relief Prevents Certifying Injunctive Class, and (ii) Class-Wide Common Question Exists Only Where it Drives Resolution of Entire Action, Do Not Justify Decertifying Class Action Seeking Monetary Award for Medical Monitoring Program

In *Donovan et al. v. Philip Morris USA Inc.,* 2012 WL 957633 (D. Mass. Mar. 21, 2012), a class of asymptomatic Massachusetts individuals with a history of over twenty pack-years of smoking sued the defendant cigarette manufacturer in the United States District Court for the District of Massachusetts asserting claims for breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), negligence and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute), and seeking a court-supervised program of medical monitoring to detect early signs of lung cancer. The district court approved plaintiffs' motion for class certification under both Fed. R. Civ. P. 23(b)(2) and (b)(3) for the implied warranty claims, but not the negligence claims, ruling that plaintiffs should be able to pursue the claims as a class even though they still had significant work to do to establish liability (*see July 2010 Foley Hoag Product Liability Update*). After a three-judge panel of the United States Court of Appeals for the First Circuit denied defendant's petition for interlocutory review of the certification decision (*see October 2010 Foley Hoag Product Liability Update*), defendant moved to decertify the class in light of the United States Supreme Court's recent ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Under Fed. R. Civ. P. 23(a)(2), a prerequisite to any class action is that "there are questions of law or fact common to the class"; Rule 23(b)(2) then authorizes class actions where declaratory or injunctive relief "is appropriate respecting the class as a whole," and Rule 23(b)(3) authorizes such actions where, among other things, the legal or factual questions "common to class members predominate over any questions affecting only individual members." Plaintiffs in *Dukes* had sought certification of a class of 1.5 million female Wal-Mart employees to obtain injunctive and declaratory relief, as well as a monetary award of back pay, to remedy allegedly gender-discriminating practices by Wal-Mart. The Supreme Court held, however, that a claim for monetary relief that is not "incidental" to injunctive or declaratory relief cannot be certified

under Rule 23(b)(2), and the equitable nature of the back pay remedy did not automatically convert it from monetary relief to the type of injunctive or declaratory relief permitted under Rule 23(b)(2). The Court also held that ostensibly "common" questions such as whether the putative class members are all female Wal-Mart employees who were denied hiring or advancement are not the type of common questions required to satisfy Rule 23(a)(2); rather, a common question exists only where it can "generate [a] common answer[] apt to drive the resolution of the litigation." As plaintiffs offered no evidence of "a common answer to the critical question why was I disfavored," they could not satisfy that class action prerequisite.

In *Donovan*, defendant argued primarily that plaintiffs' class was not certifiable under Rule 23(b)(2) because their request for medical monitoring, although an equitable remedy, would require defendant to pay money to fund the monitoring program and hence, like the back pay request in *Dukes*, was not injunctive relief within the meaning of the rule. Defendant also argued: (i) the causation and medical necessity elements of plaintiffs' claims were not provable on a class-wide rather than individual basis, and thus were not common questions under Rule 23(a)(2); and (ii) that the membership of the class was not even ascertainable, failings which required decertification under both Rules 23(b)(2) and (b)(3).

In denying the motion for decertification, the court asserted that defendant was merely using *Dukes* to resurrect arguments on which it already had lost. The court earlier had rejected defendant's argument that the medical monitoring program could not be injunctive relief because it would require the payment of money, holding that the requested relief was "wholly injunctive" and that "[s]imply because an injunction requires the defendant to pay money does not convert it into a monetary action." Because neither *Dukes* nor its progeny addressed whether a judgment requiring payment for a medical monitoring program constitutes injunctive relief, plaintiffs' class was properly certified under Rule 23(b)(2).

The court also rejected defendant's argument that there were too many individualized issues to satisfy Rule 23(a)(2)'s commonality requirement, or Rule 23(b)(3)'s requirement that common issues predominate over individual ones. Although *Dukes* clarified that the relevant inquiry on commonality is whether a class-wide proceeding can generate common answers apt to drive the resolution of the litigation, the court asserted that certain questions that went to the heart of plaintiffs' medical monitoring claim could be answered "yes" or "no" for the entire class and would not vary by individual. Specifically, nothing in *Dukes* precluded the court from reaching a class-wide determination as to whether persons meeting the class definition need medical monitoring, even if individualized examination of some class members' medical records might yield a different answer.

Finally, as to ascertainability, defendant pointed to the recent decision of the United States District Court for the Northern District of California in *Xavier v. Philip Morris, Inc.*, 787 F. Supp. 2d 1075 (N.D. Cal. 2011), another medical monitoring case with a substantially identical proposed class definition, which held the proposed class was not ascertainable and could not be certified because there was no reliable way to determine an individual's smoking history without individual adversarial proceedings. Defendant argued that *Dukes'* holding that "Wal-Mart is entitled to individualized determinations of each employee's eligibility for back pay" essentially confirmed *Xavier's* ruling on ascertainability. The court, however, had previously rejected defendant's ascertainability argument, and noted the court was neither bound nor persuaded by *Xavier*. The court then rejected defendant's argument that *Dukes* required an individualized determination of each proposed class member's membership in the class before class certification. Instead, the court held, such questions were to be determined either after defendant's liability to the defined class was established, or as an element of plaintiffs' proof of liability.

First Circuit Holds Expert Testimony, Based on Odds Ratios from Published Studies, that Drug Treatment Increases Chances of Recovery by More than 50% Inadmissible to Prove Patient More Likely than Not Would Have Recovered with Treatment

In *Samaan v. St. Joseph Hospital*, 2012 WL 34262 (1st Cir. Jan. 9, 2012), plaintiff suffered a stroke while flying from Milan to New York and was treated at a hospital in Maine after his flight was diverted there. At the hospital, doctors did not administer an intravenous dose of tissue plasminogen activator (t-PA), a drug designed to reduce neurologic injury from stroke, and plaintiff was partially paralyzed and unable to work. He sued the hospital and attending physician in Maine state court alleging professional negligence for failing to administer t-PA, which plaintiff alleged proximately caused him harm by diminishing his chances of stroke recovery.

Defendants removed the action to the United States District Court for the District of Maine, and thereafter moved to exclude the testimony of plaintiff's expert under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and for summary judgment. *Daubert* requires the proponent of expert testimony to demonstrate both its reliability, and its relevance or "fit" to the legal issues.

Defendants argued Maine law requires a medical malpractice plaintiff to prove the alleged negligence was "more likely than not" a substantial cause of the injury, while plaintiff argued Maine would recognize the "lost chance" doctrine and permit recovery whenever a patient's chances are diminished to some degree by a doctor's negligence. The district court held Maine had not adopted the "lost chance" doctrine and excluded the expert's testimony on the ground that his statistical calculations, which were tailored to the "lost chance" theory, did not address whether failure to administer t-PA more likely than not caused plaintiff's disability. Thus, although the court did not seriously question the expert's qualifications or the reliability of his methodology, his testimony failed to meet the *Daubert* threshold for "fit" with the governing legal issue. As plaintiff lacked admissible expert opinion on causation, the court entered summary judgment.

On plaintiff's appeal, the United States Court of Appeals for the First Circuit first agreed with the district court that Maine does not permit "lost chance" recovery. As to the "fit" issue, the expert presented analyses of statistical data from two published studies examining odds ratios between patients who had received t-PA and a placebo group, and concluded from these ratios that a patient's chances of improvement increased by over 50% with t-PA compared to non-treatment. Based on this, the expert then purported to conclude that plaintiff likely would not have suffered his injuries had he been given a timely t-PA injection.

The appellate court affirmed exclusion of this opinion and the entry of summary judgment. "When a person's chances of a better outcome are *50% greater* with treatment (relative to the chances of those who were not treated), that is not the same as a person having a *greater than 50% chance* of experiencing the better outcome with treatment. The latter meets the required standard for causation; the former does not." While the court did not completely foreclose the possibility that relative calculations may suffice in particular circumstances to meet the causation standard, here, the court held, "[t]here is simply too great a divide between the numbers that [the expert] employed and the conclusions that he tried to wring from them."

Massachusetts Federal Court Holds Admissible Experts' Causation Testimony Based on Epidemiologic Study Finding Statistically Significant Increase in Breast Cancer Among Relevant Subgroup of Women Exposed to Drug Even Though No Such Increase Found in Women Overall

In *Fecho v. Eli Lilly & Co.*, 2012 WL 194419 (D. Mass. Jan. 20, 2012), dozens of women developed breast cancer after having been exposed to the anti-miscarriage drug diethylstilbestrol, commonly known as DES, in utero. Plaintiffs sued the drug manufacturers in the United States District Court for the District of Massachusetts asserting, among other claims, negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) on behalf of a putative class of all women born between 1948 and 1972 who were exposed to DES in utero and diagnosed with breast cancer after age 40, excluding women who previously had breast cancer or had a genetic predisposition to the disease. Plaintiffs supported their claims with proffered expert testimony that prenatal exposure to DES increases the risk of breast cancer for women in the proposed class. Defendants moved to exclude the experts' testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which requires a party offering expert testimony to demonstrate its reliability considering such factors as testing, peer review and the like.

In addition to citing data from animal studies and other sources, plaintiffs' experts relied primarily on an ongoing epidemiologic study (the "Palmer study") which compared the rates of breast cancer in women exposed to DES in utero with unexposed women. Neither the original study findings, nor a subsequent update, demonstrated a statistically significant overall association between DES exposure and breast cancer. While the update found no statistically significant relationship in the subgroup of women ages 40 to 49, it did find such a relationship in the subgroup over age 50, which consisted of only 14 women; moreover, when the age 40-49 subgroup was combined with the over-50 subgroup, there was still a marginally significant increased risk, albeit one with wide confidence intervals due to the small sample size. Although other epidemiologic studies cited by defendants had found no statistically significant association between in utero DES exposure and breast cancer, plaintiffs' experts seized upon the Palmer update's over-50 and combined 40-to-49/over-50 subgroup analyses to conclude that there is a causal link

between in utero DES exposure and breast cancer in the proposed class. In their motion to exclude this testimony, defendants contended that reliance on such a subgroup analysis was not proper under the "Bradford Hill" criteria for assessing whether a statistical association is causal, and hence was not scientifically reliable.

The magistrate judge to whom the case was assigned for trial conducted an evidentiary hearing and then denied defendants' motion, holding plaintiffs' experts' methodology rested on a sufficiently reliable foundation. In so concluding, the magistrate noted that one of plaintiffs' experts had cited as providing some additional support to the experts' conclusions another study, which had been published shortly before the hearing, and that study had appeared in the prestigious New England Journal of Medicine. Notwithstanding her allowance of the testimony, however, the magistrate expressly noted that plaintiffs still "face an uphill battle" in ultimately proving causation because, as discussed in *Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11 (1st Cir. 2011) (*see April 2011 Foley Hoag Product Liability Update*), "an observed association between a disease, in this instance breast cancer, and in utero exposure to DES does not, without more, create causation." Here, the temporal relationship between the exposure and the development of the disease tracks the natural age at which breast cancer typically appears, and breast cancer is also not a rare disease.

Massachusetts Federal Court Holds FDA Pre-Market Approval of Medical Device Consisting of Multiple Components Preempts State Law Claims Alleging Defective Design of Individual Component

In *Duggan v. Medtronic, Inc.*, 2012 WL 45503 (D. Mass. Jan. 10, 2012), plaintiff, a diabetes mellitus patient, was injured when an allegedly defective insulin pump – part of an insulin pump and continuous glucose monitoring system – malfunctioned, causing her to suffer a hypoglycemic reaction. Plaintiff sued the device's manufacturer in the United States District Court for the District of Massachusetts alleging, among other things, negligence, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). The manufacturer moved for summary judgment, arguing that all claims were preempted by the Medical Device Amendments ("MDA") to the federal Food, Drug and Cosmetic Act ("FDCA") because the pump and monitoring system had received pre-market approval ("PMA") from the United States Food and Drug Administration ("FDA"). Plaintiff argued that MDA preemption was inapplicable because the insulin pump itself had not received PMA.

The court noted that the MDA established a rigorous regime of PMA for many new medical devices, but allowed a substantial number of devices already on the market to be grandfathered in. The MDA also established a less rigorous "510(k) process," named for the relevant section of the statute, under which a new device need not go through PMA if the FDA finds the device is "substantially equivalent" to another device, such as a grandfathered device, that is exempt from PMA. Once a device has received PMA, the MDA forbids the manufacturer to make any changes in design, labeling or anything else that would affect safety or effectiveness unless the FDA approves a supplemental PMA application incorporating the changes. The MDA also includes a preemption provision which the United States Supreme Court has held preempts state law claims relating to a device if the FDA has imposed specific requirements applicable to the device's safety or effectiveness and the state law claim would impose different or additional such requirements. Applying these principles, the Supreme Court has held that design defect claims involving devices granted PMA are preempted, but claims involving devices marketed under the 510(k) process, which does not impose specific federal requirements, are not preempted.

Here, the product that allegedly caused plaintiff's injury was essentially an integration of two different products previously sold by defendant, the glucose monitoring system and the insulin pump. The monitoring system had received PMA before being sold, but the pump had been marketed through the 510(k) process. When the manufacturer sought to integrate the two products into a single device, the manufacturer submitted a supplemental PMA application to the FDA which initially was rejected, but later was approved after the manufacturer implemented the FDA's specific safety recommendations. Plaintiff contended this approval did not constitute PMA for the insulin pump itself, and that its original 510(k) status remained in effect. The court disagreed, following precedent in other jurisdictions holding that once PMA of a combination product is granted, claims relating to all components of the device are preempted even if the component at issue previously had been marketed through the 510(k) process.

Moreover, the court observed that here it was clear FDA had approved all aspects of the device, including the pump. For one thing, when reviewing the manufacturer's supplemental PMA application, the FDA had required defendant to make adjustments to the precise aspect of the pump that plaintiff alleged caused her injury. Additionally, after the FDA approval, plaintiff filed a "citizen petition" seeking clarification of the approval's meaning. In its letter responding to the petition, FDA made clear it intended to grant PMA to the entire device, including the pump. Accordingly, the court held plaintiff's state law claims were preempted.

Massachusetts Federal Court Holds Named Plaintiffs' Claims Not Typical of Putative Class, and Plaintiffs Could Not Adequately Represent Class, Where Defendant Sought Indemnity from Previously Settling Parties Because Settlement Required Some Class Members, But Not Plaintiffs, to Indemnify Settling Parties for Any Judgment

In *Riva v. Ashland, Inc.*, 2011 WL 6202888 (D. Mass. Dec. 13, 2011), over 250 residences, 20 businesses and one school were damaged by an explosion at a plant that was jointly operated by a paint manufacturer and printing ink manufacturer. The explosion occurred after defendant, a chemical manufacturer, delivered several thousand gallons of flammable chemicals to the facility. Plaintiffs alleged that during the process by which the chemicals were offloaded, a highly explosive chemical mixture was created that, within a day, resulted in a vapor cloud explosion that destroyed the facility and caused over $30 million in property damage to the surrounding neighborhood.

Shortly after the explosion, a class action complaint on behalf of all persons and entities who sustained damages or injuries from the explosion was filed against the paint and ink manufacturers, but not the chemical manufacturer. Eventually, the action was settled and the paint and ink manufacturers were given a full release by the plaintiff class, which included a trust benefiting 269 households and businesses affected by the explosion and a group of subrogated insurers that had paid over $20 million in claims. Under the settlement agreement, the trust beneficiaries and the subrogated insurers, but not the other class members, were required to indemnify the paint and ink manufacturers from third-party claims for indemnity or contribution that might be asserted by any non-settling party against whom any indemnitor asserted a claim. Thereafter, two individuals and one insurer filed a new putative class action against the chemical manufacturer in Massachusetts Superior Court to recover damages resulting from the explosion, asserting claims for negligence and breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability), among others. The chemical manufacturer promptly filed a third-party complaint against the paint and ink manufacturers for, among other things, indemnification under the terms of the chemical manufacturer's contracts. After the case was removed to the United States District Court for the District of Massachusetts, the court was asked to certify a class that would be substantially identical to the class in the earlier settled action. The named plaintiffs were two individuals and one insurer, all of whom had been members of the prior class but none of whom was a trust beneficiary or subrogated insurer to which the indemnification provision of the settlement agreement would apply.

The court began by noting the prerequisites for class certification under Federal Rule of Civil Procedure 23(a): (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are factual and legal issues common to the class (commonality); (3) claims or defenses of the class representatives are typical of the claims or defenses of the class as a whole (typicality); and (4) class representatives will adequately protect the interests of the class (adequacy). Because there were at least 350 putative class members with a host of common legal and factual issues, the court found the first two requirements easily satisfied.

Turning to typicality and adequacy, however (which the court essentially merged for purposes of its analysis), the court found that the named plaintiffs' interests were not sufficiently aligned with the rest of the class because of the potential for a conflict to arise from application of the indemnification provision of the prior settlement agreement. While the named plaintiffs were not indemnitors under that agreement, some class members were. Moreover, if the proposed plaintiff class were to obtain a judgment against the chemical manufacturer, and it in turn were to be indemnified by the paint and ink manufacturers, the indemnitor members of the class would be obligated to indemnify the paint and ink manufacturers for the judgment. Accordingly, because the named plaintiffs had an interest in proving defendant's liability and maximizing damages, but the indemnitor class members did not, the interests of the named plaintiffs were not typical of the class as a whole, and the apparent conflict prevented them from adequately representing the interests of the class. The court thus denied class certification.

Massachusetts Federal Court Holds Contractual Privity Required for Breach of Warranty Claims by Commercial Entities Against Product Manufacturers and Sellers

In *First Choice Armor & Equipment, Inc. v. Toyobo America, Inc.*, 2012 WL 834123 (D. Mass. Feb. 17, 2012), the plaintiff body armor manufacturer purchased from a third-party weaving company ballistic fabric, intended for use in bullet-proof vests, which the company had made from woven Zylon fabric manufactured by the defendants. Following two incidents in which police officers were killed or injured when bullets penetrated their Zylon body armor, the National Institute of Justice ("NIJ") conducted a multi-year investigation and concluded that Zylon vests degrade at an unacceptable rate from exposure to light, heat and moisture. The NIJ revoked safety compliance certificates for such body armor and prohibited its future sale in the United States.

Thereafter, plaintiff sued the Zylon manufacturers in the United States District Court for the District of Massachusetts asserting claims for fraud, breach of the implied warranty of merchantability (the Massachusetts near-equivalent of strict liability) and violation of Mass. Gen. L. ch. 93A (the Massachusetts unfair and deceptive practices statute). Plaintiff alleged defendants manufactured, sold and promoted Zylon for ballistic protection applications despite knowing it would be rendered unsafe by gradual degradation, and sought recovery of plaintiff's recall and replacement costs, legal costs for the NIJ investigation, lost profits and damaged reputation. Defendants moved for summary judgment, arguing plaintiff's breach of warranty claims were barred by the absence of contractual privity between the parties, and plaintiff's fraud and ch. 93A claims were time-barred.

The court allowed defendants' motion as to the breach of warranty claims, rejecting plaintiff's argument that it need not establish privity of contract for those claims because the parties had a "significant business relationship." While contractual privity is not required to support a ch. 93A claim if the parties have a "significant business relationship," that rule is inapplicable to breach of warranty claims, which are governed by § 2-318 of Massachusetts' version of the Uniform Commercial Code. Although the issue has not been resolved by the Massachusetts appellate courts, the court followed other federal district court decisions holding that, although § 2-318 does not require contractual privity for *consumers* to assert tort-based warranty claims for personal injury or property damage, privity is required for *commercial entities* that assert contract-based warranty claims for economic injuries. "When a manufacturer sells a product to an intermediary, who subsequently resells it to a commercial retailer, and there is no privity of contract between the manufacturer and the commercial retailer, no implied warranty runs from the manufacturer to the commercial retailer." The two agreements cited by plaintiff – a financial support agreement in furtherance of plaintiff's NIJ certification and a non-disclosure agreement concerning a version of Zylon that defendants never marketed – could not establish privity because neither contract was for the sale of the goods at issue.

As to plaintiff's fraud and ch. 93A claims, the court asserted that the statute of limitations began to run on such claims when plaintiff discovered, or reasonably should have discovered, defendant's fraud. As this presented a triable issue of fact, the court denied summary judgment on these claims.

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