1100

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13108

Ofer Nemirovsky,
Plaintiff-Appellee

v.

Daikin North America, LLC
Defendant-Appellant

On Appeal from a Judgment of the Superior Court for Suffolk County, No. 1684cv02022

Brief of *Amicus Curiae* Product Liability Advisory Council, Inc. In Support of Defendant-Appellant

James M. Campbell (BBO #541882)
jmcampbell@campbell-trial-lawyers.com
Christopher Howe (BBO #652445)
chowe@campbell-trial-lawyers.com
Campbell Conroy & O'Neil, PC
1 Constitution Wharf, 3rd Floor
Boston, MA 02129
(617) 241-3000

SUPREME JUDICIAL COURT RULE 1:21 DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Product Liability Advisory Council, Inc. (PLAC) states it is a domestic non-profit corporation incorporated in Michigan.

PLAC has no parent corporation and no publicly-held corporation has 10% or greater ownership in PLAC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Henningsen v. Bloomfield Motors, 161 A.2d 69 (N.J. 1960)

Hoyt v. Vitek, Inc., 134 Or. App. 271, 894 P.2d 1225 (1995)

Kealoha v. E.I. DuPont de Nemours & Co.,
844 F.Supp. 590 (D. Hawaii 1994)

Mitchell v. Sky Climber Inc., 396 Mass. 629
1986)

Murray v. Goodrich Eng'g Corp., 30 Mass. App. C.
918, 920 (1991)

Pantazis v. Mack Trucks Inc., 92 Mass. App. Ct.
477 (2017)

Nat'l Union Fire Ins. v. Riggs Nat'l Bank, 5 F.3d 554
(D.C. Cir. 1993)

Swartz v. General Motors Corp., 375 Mass. 628 (1978)

Wright v. Federal Mach. Co., 535 F.Supp. 645
(E.D. Pa. 1982)

Statutes

G.L. C. 93A

G.L. c. 106, Section 2-314

G.L. c. 106, Section 3-318

G.L. c. 106, Section 2-607(a)(3)

G.L. c. 106, Sections 2-313 to 2-318

Other Authorities

Restatement (Third) of Torts: Product

Liability (ALI 1998) Section 5

Restatement (Secton) of Torts (ALI 1965)
Section 402A

IDENTITY OF AMICUS CURIAE[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 71 corporate members representing a broad cross-section of American and international product manufacturers. PLAC seeks to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are non-voting members of PLAC. Since 1983, PLAC has filed over 1,200 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product

[1] Pursuant to Mass. R. App. P. 17(c)(5), PLAC declares that no party or counsel for a party authored this brief in whole or in part and that no person other than PLAC, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. PLAC and its counsel further declare that they have not represented one of the parties to the present appeal in any proceeding involving similar issues, not have they been a party or represented a party in a proceeding or transaction that is at issue in the present appeal.

manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

A list of PLAC's corporate members can be found at https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

PLAC's members have a vital interest in courts' consistently and correctly applying product liability law. This case presents an important issue of interest to PLAC because the Superior Court's holding below that Daikin NA, an intermediate seller of a component part, may be liable for damage caused by a design defect in a larger integrated product that it did not design, manufacture, or supply is contrary to well-settled product liability law.

INTRODUCTION

PLAC addresses here only issues related to the superior court's denial of Daikin NA's motions for judgment as a matter of law with respect to Mr. Nemirovsky's claim for alleged breach of the implied warranty of merchantability (Count I) and with respect to so much of the judgment on his claim under G.L. c. 93A (Count IV) as is derivative of the alleged breach of implied warranty finding by the jury. PLAC thinks clarity will be served by recounting here only facts that are material to issues it addresses.

STATEMENT OF FACTS

Daikin NA did not design, manufacture, sell, distribute, or install the Variable Refrigerant Volume (VRV) system that was installed in Mr. Nemirovsky's home or its individual HVAC units. Nor did Daikin NA design or manufacture replacement parts or other components that were installed in the system at later times. App. 1/70 #6; 1/150 ##2 and 29. Rather, Daikin NA was merely an intermediate seller of some replacement evaporator coils, which were designed and manufactured by non-party Daikin Industries, Ltd. and purchased and installed by plaintiff's HVAC servicer after earlier-installed coils failed.[2]

The coils in Mr. Nemirovsky's VRV system, both the originals and the replacements, are components of complex assemblies called Fan Coil Units ("FCUs"). FCUs in turn are themselves components of the individual HVAC units that, together, comprised plaintiff's VRV system. App. 1/149 #2. There are many models of Daikin FCUs that differ in size, shape, weight, heating and cooling capacity, and other ways. App. 3/40 (page 1827), and 3/202-213, 221, and 223-239.

Mr. Nemirovky's system contained 28 FCUs of various models. App. 3/261, 3/281, and 3/403. The FCUs were generally similar to each other in that each had to include parts to serve particular functions, e.g., each had to have a fan, a housing,

[2] Mr. Nemirovsky's attempt to hold Daikin NA liable for Daikin Industries's conduct on a "piercing the corporate veil" theory was dismissed pretrial. App. 1/455. That dismissal was not appealed.

an evaporator coil, etc. App. 3/43 (pages 1836-37). There was no evidence, however, that those common elements were all of the same design or installed in the same configurations, or of the extent to which they were or were not interchangeable among the different FCU models.

The evaporator coils in the Daikin FCUs are similar to each other in important respects, but they are not identical. App. 3/32 (page 1794) (noting different sizes and capacities). Each has multiple loops of copper tubing to which are affixed aluminum fins, and at the ends of each loop the tubing passes through perforations in a zinc-galvanized steel end plate. There are different sizes of evaporator coils to fit the various FCUs, *see* App. 3/358, but there was no evidence of how many different sizes there are, what other differences there are among evaporator coils to accommodate differences among Daikin FCUs, or the extent to which coils suitable for use in one model FCU are also suitable for use in one or more other models.

It was undisputed that use of copper tubing, aluminum fins, and steel and zinc end plates in VRV evaporator coils is standard in the industry, appropriate, and not a defect. More generally, there was no evidence the evaporator coils Daikin NA sold were themselves defective in any way at the time of sale. What was defective, said Mr. Nemirovsky's expert witness Professor Eagar, was "the system" into which the coils were installed. App. 2/333-334; 2/347, pages 1023-1024. Eagar's focus in criticizing the "system" was its use of Styrofoam drain pans, which he said should

have been made of metal so they would conduct galvanically-produced electric current away from the coil and out of the FCU. The same result could have been achieved by other changes to the FCUs, said Eagar, App. 2/334 (pages 971-972), but neither he nor anyone else suggested any change to the coil itself could cure the problem. There was nothing wrong with the coil; the problem was "the system."

Despite the lack of any evidence of a defect in the coils themselves, however, the jury found Daikin NA breached its implied warranty of merchantability with respect to at least one of the four replacement evaporator coils it had sold. App. 2/16 (##11 and 12).

SUMMARY OF THE ARGUMENT

In the product liability tort context, Massachusetts courts have adopted the so-called component parts doctrine, as have courts in virtually all, if not all, other states that have faced the issue. The doctrine is so well established that the American Law Institute has explicitly endorsed and incorporated it in a separate section of the Restatement (Third) of Torts, Product Liability ("Third Restatement"). Under the doctrine, the seller of a component part that is not defective is not liable for harms that arise from the integrated product into which the component is incorporated; rather, the supplier is only liable if its own product, i.e., the component, is defective. In adopting the doctrine, courts and the ALI have noted that a contrary result would be both unjust and inefficient, as the component supplier does not have the benefit

of the integrated product's price into which the costs of its risks can be incorporated, the integrated product manufacturer has the expertise to know the uses to which that product may be put, and placing responsibility on the component manufacturer would require it to waste resources to develop the expertise that the integrated product manufacturer already has. Pages [ ] - [ ]

The trial court here did not suggest that the component part doctrine does not apply in contract-based implied warranty claims such as plaintiff's just as it does in strict liability or tort-based warranty claims, and plaintiff advances no authority for such a suggestion. Consistent with the development in many jurisdictions of strict liability—as ultimately described in Section 402A of the Restatement (Second) of Torts—to avoid warranty law constraints such as the requirement of privity and possibility of warranty or remedy disclaimers, the Massachusetts legislature amended our version of the Uniform Commercial Code so that it largely mirrors what is available under strict liability. But the legislature did not by its amendments make warranty liability even *broader* than under strict liability, nor has this Court has done so by interpretation. Moreover, the same fairness and efficiency concerns that underlie the component part doctrine in tort are equally applicable to a contract-based warranty claim for purely economic harm. In addition, the UCC's text and comments clearly require proof of a "defect" in the defendant's "goods" in order to recover, i.e., in the case of a component part supplier a defect in the component itself,

and decisions of this Court and the United States Court of Appeals for the First Circuit recognize this. In short, the component part doctrine is fully as applicable in contract-based warranty claims as under tort law. Pages [ ] - [ ]

In this case, the judge upheld the implied warranty verdict against defendant on the theory that the replacement evaporator coils it sold could only be used in a Daikin-brand fan coil unit, and the coils had corroded during that single intended use so "therefore" they were actually defective. As an initial matter, there was no evidence to support the judge's "single-use" conclusion. More importantly, however, whether a component, or for that matter any other product, has one or multiple uses, the mere fact that it failed does not mean it is defective. To the contrary, products can fail for innumerable reasons other than defects, including improper handling, installation or maintenance, misuse, environmental factors, other external circumstances and third party conduct. Here it was undisputed that the coils' design was completely standard and fully adequate to carry out their cooling and de-humidifying tasks, and indeed plaintiff's own expert explicitly identified the cause of the corrosion as lying in the design of plaintiff's larger HVAC "system," not the coils themselves. Pages [ ] - [ ]

ARGUMENT

A. The Seller of a Defect-Free Component Part is not Liable for Injuries Caused by a Defective Integrated Product into Which the Component is Incorporated

In the product liability tort context, Massachusetts courts have long held that the supplier of a non-defective component part that is installed in an integrated product that the component supplier did not design, manufacture or sell is not liable for the consequences of defects in the integrated product. The component supplier is generally liable for defects in its own products when they leave its hands, *not* defects in the products of others. *Mitchell v. Sky Climber Inc.,* 396 Mass. 629, 631 (1986); *Pantazis v. Mack Trucks Inc.* 92 Mass. App. Ct. 477, 482-484 (2017); *Murray v. Goodrich Eng'g Corp.,* 30 Mass. App. Ct. 918, 920 (1991); *Cipollone v. Yale Ind. Prods.,* 202 F.3d 376, 379 (1st Cir. 2000) (Massachusetts law).

In this respect, Massachusetts law is consistent with the law of virtually all, if not all, other states. See generally the cases cited in *Davis v. Komatsu America Industries Corp.,* 42 S.W.3d 34, 38-39 (Tenn. 2001) (collecting cases and stating that "every court presented with the issue has adopted the component parts doctrine.") See also, *e.g. Buonanno v. Colmar Belting Co.,* 733 A.2d 712, 717 (R.I. 1999) (unless it participated substantially in the design of the integrated product, a component part seller is liable only if its component is defective in itself, which is to be determined at the time of sale or distribution rather than when it is integrated with other component parts) (citing Section 5 of the Restatement (Third) of Torts: Product Liability); *Wright v. Federal Mach. Co.*, 535 F. Supp. 645, 649-650 (E.D. Pa. 1982) (the seller of replacement rollers for a press it did not design or sell was

not liable under Pennsylvania law, either in strict liability or for breach of the implied warranty of merchantability, for injuries caused by the absence of a guard over the rollers as installed on the press because the rollers themselves were not defective).

The national consensus regarding the component part doctrine in the tort context was reflected by the doctrine's adoption in Section 5 of the American Law Institute's Restatement (Third) of Torts: Product Liability (ALI 1998) ("Third Restatement").[3] The ALI explained its rationale for adopting the doctrine in Comment a to that section:

> If the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective. Imposing liability would require the component seller to scrutinize another's product which the component seller has no role in developing. This would require the component seller to develop sufficient sophistication to review the decisions of the business entity that is already charged with responsibility for the integrated product.

Not surprisingly, numerous courts have echoed the ALI's description of the injustice and inefficiency that would occur if they were to disregard the component part doctrine. For example, in *Crossfield v. Quality Control Equip. Co., Inc.*, 1 F.3d 701 (8th Cir. 1993), defendant sold a replacement chain to plaintiff's employer for use in a food processing machine. The chain had been specifically manufactured to

[3] This Court has previously relied upon multiple portions of the Third Restatement, most recently in *Doull v. Foster*, 487 Mass. 1 (2021) (repeatedly citing Third Restatement in abandoning use of "substantial factor" in analysis of factual causation and concluding but-for standard governs most multiple cause cases).

fit the employer's machine but defendant had not designed, manufactured, or sold the machine. Plaintiff was injured when her arm became entangled with the chain, which was unguarded—a fact that defendant knew. 1 F.3d at 702-703.

In *Crossfield*, as in this case, there was no evidence of any defect in the component part itself; rather, the defect was in the design of the machine for which the component had been designed and into which it was installed. *Id.* at 703-704. The Court of Appeals therefore concluded:

> [T]he primary duty was owed by the designer of the machine, not the supplier of only one component part, in itself a non-defective element.
>
> To impose responsibility on the supplier of the chain in the context of the larger defectively designed machine system would simply extend liability too far. This would mean that suppliers would be required to hire machine design experts to scrutinize machine systems that the supplier had no role in developing. Suppliers would be forced to provide modifications and attach warnings on machines which they never designed nor manufactured. Mere suppliers cannot be expected to guarantee the safety of other manufacturers' machinery.

Id. at 704-705. "[E]xtending the duty to make a product safe to the manufacturer of a non-defective component part would be tantamount to charging a component part manufacturer with knowledge that is superior to that of the completed product manufacturer," *id.* At 706 (internal quotation marks omitted), the court continued, quoting *Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 49 (6th Cir. 1989).

Childress involved a valve that defendant sold to the plaintiff's employer for incorporation in a log splitter, and the splitter's manufacturer provided the

specifications for the valve. The valve was not defective in itself; rather, the plaintiff alleged its installation in the splitter caused the latter to be defective and that the seller, because it knew the specific product into which its part would be incorporated, was obliged to analyze the overall design of that product to determine if incorporation of its component would render the splitter defective. 888 F.2d at 49.

The court held, however, that "there is a marked difference between knowing the identity of the equipment into which a component part will be integrated and anticipating any hazardous operation by that equipment that might be facilitated by the addition of the component part." *Id.* Charging the component part supplier with responsibility for evaluating the safety of the integrated product if the component is installed in it "would be contrary to public policy, as it would encourage ignorance on the part of component part manufacturers or alternatively require them to retain an expert in the client's field of business to determine whether the client intends to develop a safe product." *Id.* (internal quotation marks omitted). Because the seller's component in itself had no defect, the Court of Appeals affirmed dismissal of the claim.

In *Kealoha v. E.I. DuPont de Nemours & Co.,* 844 F. Supp. 590 (D. Hawaii 1994), the court distinguished the strict liability responsibilities of those throughout the chain of distribution from those of component suppliers. Defendant DuPont, which invented and sold Teflon, was sued because it manufactured and sold Teflon

to a medical device manufacturer which used Teflon in manufacturing the device. The court held that "[a] manufacturer of a nondefective component part has no duty to analyze the design and assembly of the completed product of an unrelated manufacturer to determine if the component is made dangerous by the integration into the finished product."[4]

The court noted that manufacturers can insure against liability and then incorporate the insurance cost into the price of the product. But the cost to the seller of a product that is not in itself defective to obtain insurance against injuries caused by use of its non-defective product in other sellers' defective integrated products would be prohibitive. *Id.* at 595. Indeed, though the court in *Kealoha* did not discuss the issue, it is difficult to see how a seller of non-defective components could even calculate in a rational way how much insurance it would need to protect against losses of that type, or how insurers could calculate a rational price for such coverage.

It is a commonplace that one principle underlying product liability law is that companies in the business of selling products should be incentivized to make them safe. A similar principle underlies much of modern tort law generally as well as law under the Uniform Commercial Code. *Compare, e.g., Edwards v. Honeywell, Inc.*, 50 F.3d 484, 490 (7th Cir. 1995) (negligence case); *Nat'l Union Fire Ins. v. Riggs*

[4] See also, *Hoyt v. Vitek, Inc.*, 134 Or. App. 271, 894 P.2d 1225, 1233 (1995).

Nat'l. Bank, 5 F.3d 554, 557 (D.C. Cir. 1993) (Silberman, C.J., concurring) (UCC Article 4 case).

"Placing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures and ensures that such measures would have the greatest marginal effect on preventing the loss." *Riggs*, 5 F.3d at 557. Conversely, "[p]lacing liability on secondary defendants may dilute the incentive of the primary defendant to avoid the injury." *Edwards*, 50 F.3d at 490. When, as in this case, a defect in an integrated product damages a non-defective component part, and thereby causes injury, the designer, manufacturer, and seller of the integrated product should be incentivized to make its product safe because they are in the best position to do so.

The component part doctrine is and long has been part of Massachusetts product liability law, and should remain so. The reasons for its essentially universal adoption throughout the country are as sound.

B. The Component Part Doctrine Is Applicable to Contract-Based Claims for Breach of the Implied Warranty of Merchantability

The judge never suggested that she believed the component part doctrine did not apply in contract-based breach of implied warranty cases just as it does in tort-based ones. Rather, her post-trial memoranda rejected the component part doctrine as dispositive of the implied warranty claim in this *particular* case based on what she thought the facts were. *See* App. 2/7-8 and App. 2/137. While her rationale was

incorrect for reasons discussed later in this brief, *infra* at **[ ]**, she did not assert that there should be any different doctrine between tort-based and contract-based claims.

Ordinarily, a party who asks a court to make new law advances affirmative reasons, if there are any, why the law should be as the party wishes. Mr. Nemirovsky, for his part, cites no decisional or statutory authority from anywhere to uphold the supposed distinction the trial judge relied upon. Nor does he cite any scholarly authority for it. Indeed, he offers no analytical reason, based on the language of Sections 2-314 and 2-318 or any policy-based reason why a doctrine well established in Massachusetts tort-based implied warranty claims under Section 2-314(2)(c) should be jettisoned in contract-based claims arising under the identical statute.

To the contrary, there are strong, long-standing reasons to reject an argument that, despite the absence of support in the text or decades of court decisions under the UCC, seeks to impose more stringent liabilities upon component suppliers in contract-based warranty claims than are imposed by modern product liability tort law. Section 402A-type strict tort liability developed because courts and commentators perceived that the remedies provided by warranty laws were too encumbered by contract-based concepts to be adequate outside a strictly commercial context. The focus in warranty law on the fitness of the product, rather than the state of mind or culpability of the seller, was adequate as a standard of liability but concepts like privity, the enforceability of contractual warranty disclaimers and

limitations on remedies, and the requirement of notice to permit a seller to cure a defect made the availability of relief under that standard too narrow. Courts searched for and found, or created, ingenious ways to avoid the contract-based restrictions but they were often inconsistent, confusing, unconvincing, or inadequate. *See generally Henningsen v. Bloomfield Motors*, 161 A.2d 69, 77-78, 80-90, 95 (N.J. 1960) and *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900-901 (Cal. 1963).

Responding to the same concerns that actuated the courts in *Henningsen* and *Greenman*, in 1965 the American Law Institute promulgated the Restatement (Second) of Torts, in which Section 402A effectively codified the tort of strict product liability. The ALI's adoption of 402A was a bold step, often criticized, at a time when only a handful of states had extended tort law in such a manner. See, e.g. Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 Stan. L. Rev. 713 (1970). Dean Prosser's landmark article, *The Assault on the Citadel* (Strict Liability to the Consumer), 69 Yale L Rev. 1099 (1960), recognized the limits of contract/warranty claims; his solution was to escape the limitations of contract law by extending product liability tort law for a variety of cases that did not fit into contract law.

Under Section 402A, as under warranty law, liability was available only against commercial sellers of products, and only for defects that were present in the product when it left the seller's hands. Similarly, the standard for judging liability

was the condition of the product, not the seller's state of mind or culpability. Section 402A did, however, eliminate from strict tort product liability the warranty doctrines and defenses such as the requirement of privity that were suited only to a truly commercial context. Section 402A, in other words, was intended to, and did, create *broader* liability in tort than the contract-based liability that had previously existed under the Uniform Sales Act or the then-new UCC.

This Court elected not to adopt Rule 402A-type strict tort liability judicially, as courts in many other states did. *Swartz v. General Motors Corp*., 375 Mass. 628, 629-31 (1978) (declining to recognize strict liability in tort for claims arising before legislature's modification of warranty law applicable to personal injury claims to be nearly as comprehensive as strict liability). Instead, it deferred to the Legislature to modify G.L. c. 106 to provide as broad a strict liability remedy as the Legislature deemed appropriate.

As this Court has noted, the Legislature has done that. It has made our breach of implied warranty liability congruent in nearly all respects to Section 402A-type strict liability. *Back v. Wickes Corp.*, 375 Mass. 633, 639-640 (1978). It enacted c. 106, Section 2-318, so that, as under Section 402A, lack of privity is not a defense to breach of warranty claims under Sections 2-313 to 2-315; it created a new statute of limitations to give personal injury plaintiffs under Sections 2-313 to 2-315 the benefit of the same discovery rule they would have in a tort case; and it enacted

Section 2-316A to make unenforceable in breach of warranty claims for personal injury or property damage all warranty disclaimers and limitations of remedies.

What is common to the Legislature's amendments to the warranty provisions in G.L. c. 106 is that they all reflect an intent to broaden our warranty law in ways that are consistent with Section 402A-type strict liability. But none has enlarged the scope of our warranty law *beyond* that of Section 402A, and this Court has not seen fit by interpretation to broaden c. 106 beyond what the Legislature has provided.[5] Declaring the component part doctrine inapplicable to "contract-based" breach of implied warranty claims would be inconsistent with these longstanding approaches, which have worked well. The Court should not depart from them where, as here, no compelling reason for abandoning the component part doctrine has been articulated, no identifiable injustice has been shown, and no support by court precedent, scholarly analysis, or other justification has been found .

Moreover, *Bay State-Spray & Provincetown Steamship Authy. v. Caterpillar Tractor Co.,* 404 Mass. 103, 111 (1989), cited in Daikin NA's reply brief at page 12, identifies a specific policy of Massachusetts product liability law bearing on the issue, to wit, that our law should not make it more difficult for victims of personal

[5] The principal respect in which our breach of warranty law appears to differ substantively from Rule 402A strict liability law is that the Legislature retained, albeit with modifications, the warranty defense of untimely notice. *See* G.L. c. 106 Sections 2-318 and 2-607(a)(3).

injuries to recover compensation than it does for victims of purely economic loss. 404 Mass. at 109-110. That articulated policy is consistent with the foregoing history, but squarely *inconsistent* with judicially abolishing the component part doctrine in contract-based claims under Section 2-314(2)(c), as by that measure a person like Mr. Nemirovsky, with only pecuniary loss, would be entitled to recover against sellers of non-defective component parts but people with personal injuries would not.

In addition, the rationales for the component part doctrine articulated by the American Law Institute in Its Comment a to Section 5 of the Third Restatement, and by the courts in *Crossfield, Childress, Keoloha* and the many other decisions cited in *Davis*, are just as appropriate in "contract-based" implied warranty claims as they are to strict product liability or tort-based warranty claims. The same threat of inefficiency and unfairness would apply. Component suppliers would still be "required to hire machine design experts to scrutinize machine systems that the supplier had no role in developing, … forced to provide modifications and attach warnings on machines which they never designed nor manufactured," and in effect "to guarantee the safety of other manufacturers' machinery." *Crossfield*, 1 F.3d at 705. The component supplier would still be forced to "anticipat[e] any hazardous operation [of some other seller's integrated piece of by equipment] that might be facilitated by the addition of the component part." *Childress*, 888 F.2d at 49. And it

would still be "contrary to public policy, … [to] encourage ignorance on the part of component part manufacturers or alternatively require them to retain an expert in the client's field of business to determine whether the client intends to develop a safe product." *Id.*

Relatedly, in a contract-based warranty claim just as much as a tort-based one, the same kinds of uncertainty among product sellers with respect to insurance coverage and pricing would apply. It is likely that component part sellers, newly liable not only for any defects in parts they sell but also for defects in products in which other people install those parts, would increase their prices to integrated-product manufacturers who use their components; and because integrated products often contain parts supplied by many different component suppliers, the costs to consumers could be magnified exponentially. Also, where component parts as in this case are repair parts, and not parts sold to an integrated product manufacturer, consumers and repair shops who have to buy such components would have to bear directly the consequences of expanding component suppliers' liability.

And if more were needed, language in the UCC itself, as well as decisions of this Court and others under Massachusetts law, make clear that any contract-based warranty action against a supplier of goods requires that plaintiff prove a defect in the goods themselves, not some larger product or system in which they were installed. For one thing, under c. 106, Section 2-314(1), the implied warranty of

merchantability only applies to the "goods" of any "seller" who is a "merchant", *not* to some larger item in which the seller's goods may be incorporated and which is sold by someone else; similarly, the various examples of merchantability given in Section 2-314(2) all apply only to those "[g]oods." Further, comments 3 and 13 in elaborating on warranty breaches both specifically refer to "defects" or "the defect" in the seller's "goods." [6]

In addition, *Bay State-Spray* involved a contract-based implied warranty claim by a steamship authority against the manufacturer of a marine engine that had failed and hence rendered the vessel in which it was installed inoperable. In that context this Court clearly viewed it as an essential element of plaintiff's claim that it prove that the engine failed due to a defect in the engine, and not in some other aspect of the vessel, as in discussing which of two statutes of limitation should apply the Court referred to the time "the allegedly defective product left the manufacturer's control," and a "defect uncovered during the four years after the sale." 404 Mass. at 111.

Similarly, *AcBel Polytech, Inc. V. Fairchild Semiconductor Int'l, Inc*., 928 F.3d 110 (2019), involved a contract-based implied warranty claim under

[6] Strict liability in tort under Restatement (Second) Section 402A follows analogous concepts. That is, liability only applies to the "product" of a "seller" who "is engaged in the business of selling such a product," and where the seller's product—not that of some other party—is "in a defective condition" (and, in light of the tort context, "unreasonably dangerous to the user or consumer").

Massachusetts law against the manufacturer of voltage regulators that plaintiff had installed in its power supply units which in turn were installed in its customer's data storage devices, after which the power supply units failed, allegedly due to defects in the voltage regulators. *Id*. at 113. There the First Circuit was explicit that plaintiff was required to prove "a defect or unreasonably dangerous condition" in the voltage regulators themselves, *id*. at 116, and that the "defect or unreasonably dangerous condition of the [regulators] constituted the legal cause of the injuries sustained by [plaintiff and its customer]," *id*. at 120.

In short, the component part doctrine is fully as appropriate to contract-based warranty claims as it is to tort-based claims.

C. The Judge Erred in Concluding That The Coils Were Defective Solely Because They Corroded

As previously noted, the trial judge did not reject generally the doctrine that limits the liability of component manufacturers and sellers. She concluded, however, that the coils were "produced specifically and exclusively for the Daikin-brand VRV system," App. 2/137, and "have no use other than as part of a Daikin VRV system," *id*., and since "they prematurely corroded" in such as system, "[t]herefore, they were defective," *id*.

As an initial matter, the court's factual predicate was not supported by any evidence. While there was evidence that a Daikin-brand FCU required a Daikin-

brand coil, there was no evidence that the Daikin coils could not also be used in non-Daikin HVAC systems of appropriate dimensions and capacities.

More fundamentally, however, regardless of whether the coils had but one possible use or many, the court's conclusion that the jury could find a coil defective simply because it corroded is legally erroneous. PLAC's members manufacture a wide variety of products, from pharmaceuticals and medical devices to vehicles to consumer goods and otherwise. As these manufacturers well know, and for that matter as judges and even lay persons equally know, products—whether individual components or fully integrated multi-component products—can fail for *many* reasons. Not every failure is due to a product defect. Under product liability and warranty law in general, therefore, as well as specifically under the component part doctrine as described above, it is essential in any claim against a product's manufacturer or seller that plaintiff prove the failure occurred *because of* a defect in the product itself, and *not* due to other causes such as misuse, poor installation or maintenance, environmental factors, other external circumstances, third party conduct or otherwise.

In this case, for example, whether truly limited to particular Daikin FCU models or otherwise, the Daikin coils could have been used in a wide range of VRV units in a wide variety of VRV systems installed in a wide variety of buildings. Ultimately, the coil might be installed in a building in the desert, a rain forest, in

Alaska, Massachusetts, or Mississippi. The building might be used for different purposes—residential, chemical processing, manufacturing and the like. The coil's use in any VRV system is determined by the VRV units' manufacturer and by the overall system designer, the latter usually an HVAC engineering professional who would select the particular HVAC units (with their particular FCUs) to be employed. The system's installation is determined by a contractor, who may need to exercise judgment even within the specifications provided by the system designer.

Here, although there was evidence that the coils became corroded, there was *no* evidence that the corrosion was due to any defective design or manufacture of the coils. Indeed, it was undisputed that the coils' basic design—involving copper tubing, aluminum fins and zinc and steel end plates—was absolutely standard, and that such coils faithfully fulfill their fundamental purpose of passing a coolant through the tubing to cool and condense moisture from warm air that is blown over the coil by the FCU's fan.

Indeed, plaintiff's own expert expressly opined that the defect lay in "the system" into which the coils were installed. App. 2/333-334; 2/347, pages 1023-1024. Professor Eagar's central criticism of that "system" was its use of Styrofoam drain pans, which he said should have been made of metal so they would conduct galvanically-produced electric current away from the coil and out of the FCU. Id.

He certainly did not assert the judge's theory that the coils were themselves defective merely because they had corroded.[7]

CONCLUSION

For all the foregoing reasons, therefore, PLAC respectfully requests that the Court make clear in its opinion that in a contract-based breach of implied warranty claim, just as in a tort-based one, a component part supplier is only responsible for its own product, not any larger product or system into which it is incorporated or installed, and that in order to recover plaintiff must prove that the component itself was defective. Further, there is no exception to this doctrine regardless of whether the component has one or multiple possible uses, and the mere failure of a component to function is not sufficient to prove that it was defective. Accordingly, **t**he judgment against Daikin NA on plaintiff's warranty claim should be reversed, as should the judgment on plaintiff's c. 93A's claim, as it is derivative of the legally erroneous breach of warranty finding.

Respectfully submitted,

[7] At least under Massachusetts tort law, a plaintiff under some circumstances may be entitled to pursue a claim against a product manufacturer or seller when the product fails to function properly, even though plaintiff cannot identify the precise mechanism of the failure, but that requires the plaintiff to offer expert evidence and in so doing to eliminate other possible causes of the event. See *Enrich v. Windmere Corp.*, 416 Mass. 83, 87 (1993). While it is not clear that that rule applies in contract-based cases as well, here, as noted, Professor Eagar did not eliminate other possible causes—rather, he expressly *inculpated* them.

The Product Liability Advisory Council, Inc.

By its Attorneys,

/s/ James M. Campbell
James M. Campbell (BBO #541882)
jmcampbell@campbell-trial-lawyers.com
Christopher Howe (BBO #652445)
chowe@campbell-trial-lawyers.com
Campbell Conroy & O'Neil, PC
1 Constitution Wharf, 3rd Floor
Boston, MA 02129
(617) 241-3000

Dated: September __, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 17(c)(9), the undersigned counsel, Christopher Howe, hereby certifies that this brief complies with the requirements of the Massachusetts Rules of Appellate Procedure related to the filing of briefs, including Rules 17 and 20. The undersigned further certifies that this brief has been prepared in a proportionally-spaced typeface (14-point Courier New font) using Microsoft Word (the same program used to calculate the word count), and that it contains ____ words, excluding the parts that can be excluded.

/s/ Christopher R. Howe
Christopher R. Howe

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(e) and 17(c)(10), the undersigned counsel, Christopher Howe, hereby certifies under penalty of perjury that on September __,

2021, a true and accurate copy of the foregoing Brief of the Product Liability Advisory Committee as *Amicus Curiae* in Support of Defendant-Appellant Daikin North America LLC, in Ofer Nemirovsky v. Daikin North America, LLC, No. DAR-28169, was served on all registered counsel and transmitted to the Clerk of the Court via the Court's electronic filing system (ECF), Odyssey File & Serve, which will send notice of such filing to all counsel of record. Additionally, the undersigned caused two (2) copies of the foregoing Brief to be served on the following counsel by electronic and overnight mail:

Jay S. Gregory, Esquire
JGregory@grsm.com
Tara E. Lynch, Esquire
TLynch@grsm.com
James Messenger, Esquire
JMessenger@grsm.com
John Moran, Esquire
JMoran@grsm.com
Gordon Rees Scully Mansukhani, LLP
21 Custom House Street, 5th Floor
Boston, MA 02110

Counsel for Plaintiff/Appellee Ofer Nemirovksy

Don Willenburg, Esquire (Of Counsel)
DWillenburg@grsm.com
Gordon Rees Scully Mansukhani, LLP
1111 Broadway, Suite 1700
Oakland, CA 94607

Mark C. Fleming, Esquire
Mark.Fleming@wilmerhale.com
Felicia H. Ellsworth, Esquire
Felicia.Ellsworth@wilmerhale.com
Harry D. Hanson, Esquire
Harry.Hanson@wilmerhale.com
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Counsel for Defendant/Appellant Daikin North America, LLC

David Robert Fox, Esquire
drfox@jonesday.com
Jones Day
100 High Street, 21st Floor
Boston, MA 02110
(617) 960-3939

Theodore M. Grossman, Esquire
tgrossman@jonesday.com
Jones Day
250 Vesey Street
New York, NY 10281-1047
(212) 326-3939

/s/ Christopher R. Howe
Christopher R. Howe