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Allison E. Cahill

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RECENT CASES

Faulty fire-retardant plywood continues to cause homeowners headaches

by Allison E. Cahill

In ***Morris v. Osmose Wood Preserving*, 667 A.2d 624 (Md. 1995)**, the Court of Appeals of Maryland held that manufacturers of allegedly defective plywood used in the construction of townhome roofs may not be held liable to home buyers for the cost of replacing the roofs. The Maryland court dismissed all of the plaintiffs' complaints because (1) recovery for purely economic loss is only permitted in limited warranty actions; (2) the plaintiffs did not fall within the definition of "buyers" under Maryland's Consumer Protection Act; and (3) implied warranties for new home sales are not enforced against manufacturers of construction materials under Maryland's version of the Uniform Commercial Code ("UCC").

Treated plywood may prematurely deteriorate

In the last decade, many builders used fire retardant plywood ("FRT plywood") in new construction to meet building codes. FRT plywood is treated with chemicals intended to retard the spread of flames in a fire. However, in 1986 it was discovered that FRT plywood may deteriorate prematurely when the fire retardant chemicals become active at 130 to 140 degrees Fahrenheit, instead of the targeted 180 degrees. Roofs routinely reach temperatures around 130 degrees Fahrenheit without fire when outdoor temperatures and humidity levels are high, which is common in the southern, southeastern, and eastern portions of the United States.

Deteriorating plywood may darken in color and produce a white dust on its surface. This change is usually apparent from inside the attic. This is the chemical reaction that is intended to retard the spread of fire when exposed to intense heat.

The National Association of Home Builders estimates that up to one million homes have been affected in the eastern United States. The New York Times reported that as of November 6, 1994, it would cost approximately 48 million dollars to repair an estimated 34,000 affected roofs.

Since the problem was first discovered, builders and homeowners have filed thousands of lawsuits. Developers have spent millions of dollars replacing defective roofs, and courts have attempted to allocate responsibility. Many observers compare the legal furor surrounding FRT plywood to the seemingly unending stream of asbestos litigation.

Maryland courts deny recovery

The plaintiffs in Maryland initiated a class action suit against the FRT plywood manufacturers as a class action. All of the plaintiffs' townhomes included roofs constructed of FRT plywood. The plaintiffs alleged that the premature deterioration of the FRT plywood made their roofs "unsafe and dangerous." The plaintiff class claimed that the deteriorated plywood could collapse under any weight, even a heavy snowfall.

The circuit court dismissed all five counts brought by the plaintiff class. The counts included (1) strict liability; (2) negligence; (3) breach of implied warranties; (4) negligent misrepresentation; and (5) violations of the Maryland Consumer Protection Act ("Act") § 13-101-13-411. The Court of Special Appeals affirmed the dismissal of all but one of the counts. The appellate court reversed the dismissal of the breach of implied warranty count because two of the plaintiffs' class members fell within the statute of limitations period and provided sufficient facts to toll the statute of limitations based on fraudulent concealment.

Court found no risk of serious physical injury

The Maryland Court of Appeals began its examination of the class action by reviewing the bias of recovery for purely economic loss in warranty actions. In Maryland, economic loss recovery in products liability cases is limited to situations where both an examination of the nature of possible damage and the probability of damage occurring are serious. The court used a sliding scale analysis to make this determi-

nation; for example, if the probability of injury is extremely severe, the possibility of injury need not be as high. Maryland courts allow recovery for economic loss in instances meeting both criteria in order to encourage the correction of physically dangerous conditions.

This plaintiff class did not allege any physical injuries resulting from the deteriorating FRT plywood. None of the plaintiffs' roofs collapsed due to heavy snow or any other weather conditions. Therefore, the Maryland Court of Special Appeals held that the possibility of injury did not establish an "existence of a clear danger of death or serious personal injury" in this case.

The appellate court then examined the plaintiffs' claims under the Act. The Act defines "consumer goods" as those "which are primarily for personal, household, family, or agricultural purposes." The plaintiffs argued that the Maryland Act's definition is more general than the UCC's definition of "consumer goods" and that the Maryland Act's definition provides for recovery because the manufacturers sold the plywood to builders intending that the FRT plywood would be used in residential townhomes. In addition, the plaintiffs argued that the broad language in the Act permitts recovery even though the home buyers did not specifically rely on statements made by the manufacturers when the plywood was sold to the home builders.

However, the defendant manufacturers argued that the plaintiffs did not rely on statements made by the manufacturers; thus, the alleged unfair practices were not related to any sale of consumer goods to the home buyers. The appellate court agreed, holding that the deceptive practices alleged by the plaintiffs occurred during the marketing of the plywood to the builders, not to the home buyers. The court reasoned that any effect on consumers from representations made to the builders was tenuous and not sufficient to hold the manufacturers liable to the home buyers.

The plaintiffs also proved unsuccessful in their claim under Maryland's version of the UCC. The plaintiffs alleged that the statute of limitations tolled because the manufacturers fraudulently concealed information about the probability that FRT plywood would prematurely deteriorate. However, the appellate court disagreed because the homeowners did not fall within the definition of "buyers." Therefore, the court could not determine whether the statute of limitations had run because the dates of the plywood sales were not included in the record. The record only included the dates when the homeowners bought the townhomes.

Following this analysis, the appellate court also held that the plaintiffs lacked vertical privity under Maryland's version of the UCC. Vertical privity is still required for claims brought by non-buyers under Maryland's UCC. However, the homeowners never "bought" plywood. Under § 2-105, "goods" must be movable at the time of sale. Again, the court held that the sale of goods occurred when the builders bought the FRT plywood, not when the home buyers purchased the townhomes. Once the builders used the FRT plywood for the townhomes, the "goods" became permanently attached to the townhomes and no longer "movable." This precluded the plaintiffs' ability to recover under Maryland's UCC.

Finally, the appellate court held that the plaintiffs could not recover from the manufacturers under an implied warranty theory for new home sales because only builders and real estate brokers may give new home warranties. The court concluded that manufacturers may not give these warranties. Thus, the appellate court affirmed the dismissal of the UCC warranty claims.

Dissent would allow recovery under Maryland's Consumer Protection Act

According to Justice Elridge, with whom two other justices agreed, the appellate court departed from Maryland's precedent by failing to view the plaintiffs' assertions in a light most favorable to them. The dissent argued that precedent showed that no actual injury needed to occur to have a sufficient cause of action.

The dissent explained that homeowners or their agents occasionally need to walk on their roofs for maintenance reasons, which may have resulted in physical injury if the plaintiffs' assertions about the FRT plywood were viewed favorably. The dissent argued that the majority held that if no one had been injured from the alleged faulty product, the probability of future injury would be slight. The dissent believed that the majority's standard altered the test for economic loss.

New Jersey provides money to homeowners for repairs

New Jersey took an alternative approach to the FRT plywood controversy by helping to finance roof repairs for affected homeowners. In 1991, the New Jersey General Assembly responded to public complaints and created a $54 million New Home Warranty Security Fund by imposing fees on builders in the state. Builders are now required to insure all new homes for ten years by enrolling in warranty plans financed through the new fee. In addition to FRT plywood claims, the Home Warranty Security Fund will cover all repairs to newly constructed homes within the ten year time period.

Manufacturer's design of bakery equipment not unreasonably dangerous

by Joanne T. Hannaway

In ***Ferguson v. F.R. Winkler GMBH & Co. KG*, 79 F.3d 1221 (D.C. Cir. 1996)**, the United States Court of Appeals for the District of Columbia Circuit reversed the United States District Court for the District of Columbia, holding that a corporate manufacturer is not strictly liable for injuries caused by its machinery where the machine was not sold in an unreasonably dangerous condition and included warnings alerting persons to the dangers of misuse.

Bakery modifies machinery

In 1975, Ottenburg Bakery ("the bakery") purchased a string-line proofer ("proofer") from appellant Winkler GMBH & Co. KG ("Winkler"), a corporate manufacturer of bakery line equipment. A proofer transports dough through the bakery production line. This piece of equipment features a removable panel providing limited access for maintenance purposes. Because the proofer's moving parts create a risk of danger, Winkler provided warnings in both the instruction manual and on the machine itself, cautioning users to refrain from reaching inside the machinery while in motion.

The bakery discovered that, from time to time, dough became clogged in the machine. However, the bakery discouraged its employees from shutting down the production line. Subsequently, the bakery replaced one of the proofer's exterior panels with a hinged, plexiglass door. This hinged door allowed, and arguably, encouraged employees to reach into the machine to clear clogged dough while the machine remained in motion. Appellee Bernie Ferguson ("Ferguson") became permanently disabled while reaching into the proofer to remove dough. Ferguson brought suit against Winkler, alleging that the proofer was unreasonably dangerous because of a design defect and that Winkler failed to warn of such danger. The district court found for Ferguson, and Winkler appealed.

Winkler's proofer not defective in design

In order to determine whether Winkler was strictly liable for Ferguson's injury, the court applied the test adopted in *Warner v. Fruehauf Trailer Co. v. Boston*, 654 A.2d 1272, 1276 (D.C. Cir. 1995) which held that a manufacturer is strictly liable for a design defect if the product is sold in a defective condition which is unreasonably dangerous to the user. *Id.* Thus, the court held that Winkler was not liable to Ferguson.

The court determined that the proofer did not create a foreseeable likelihood that employees would reach into the machine at the time the proofer left Winkler's control. Although the court opined that a safety device may have reduced the risk of injury to those who reach inside the proofer, it held that the proofer's design did not intend for operators to reach inside the machine. Hence, an unreasonable risk that workers engaged in standard operation would reach into the moving proofer did not exist. The court noted the presence of a warning reminding users to turn the machine off before cleaning, etc. In addition, the court found that Winkler could not have foreseen the misuse of the proofer of the nature