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# Wyoming Extends Warranty of Habitability to Minor Construction Defects

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sent to the cards' issuances. Beard also alleged that the reporting of the balances due on the cards to CBI, a credit reporting company, caused his credit rating to suffer substantially. These claims are referred to as Beard I.

Additionally, Beard, together with another consumer, brought a second suit against several of the stores involved in Beard I. Beard alleged that, because the companies had failed to register as retail creditors, they had not complied with the District of Columbia Consumer Retail Credit Regulations, 16 D.C. Mun. Regs. 102.1 (1987). This claim is referred to as Beard II. The two cases were consolidated on appeal.

### No Evidence of Negligence

The trial court, the Superior Court of the District of Columbia, granted the merchants' summary judgment motion in Beard I. Beard appealed, claiming negligence on the part of the companies in accepting fraudulent credit applications and reporting detrimental credit information pertaining to the balances owed on the accounts.

Beard claimed that the merchants' negligence was proven by their failure to exercise due care in verifying the application information. He argued that if the merchants had exercised proper due care, the credit cards would not have been issued and, therefore, the injury to his credit rating would have been avoided. He also claimed the merchants were negligent in failing to adhere to their own application review process.

In the appellate court, the merchants again filed a motion for summary judgment on the basis that there was no evidence of negligence. Relying on affidavits describing their processing procedures, the merchants argued that their guidelines had been followed in Beard's case, and therefore, due care had been exercised. Several of the merchants claimed that their credit application review procedures were standard in the retail industry.

Beard submitted an investigator's affidavit stating the merchants had failed to contact Beard's employer to verify the ap-

plication information. However, Beard failed to submit any expert affidavits demonstrating the standard of care applicable to the merchants, nor did he define such a standard by any other method.

The appellate court held that while the affidavits submitted by the merchants were relevant to proving due care, a mere showing that their procedures conformed with industry custom was not enough to support a summary judgment motion. Rather, the court held that summary judgment must be granted due to Beard's failure to submit expert testimony demonstrating the merchants' negligence.

The court held that, in general, where the subject matter is beyond the knowledge and understanding of the average person, expert testimony is necessary in order for plaintiffs to prove negligence. The court then explained that the general public is not aware of the available methods for detecting application fraud, nor how much the adoption of such methods would ultimately cost the merchants' customers. Therefore, the court held that the proper standard of care to be used by merchants in the processing of retail credit card applications was beyond the knowledge of the average juror, and Beard needed expert testimony to establish negligence.

Beard's allegation that the merchants failed to adhere to their own procedures for processing applications was also rejected. Beard had submitted affidavits and exhibits showing the inaccuracies of some of the information on the applications, such as incorrect social security numbers, salary figures, and address listings. The court found, however, that such inaccuracies could not be detected from the face of the applications and that Beard failed to prove a duty of further inquiry. Consequently, the court held that Beard had failed to present any issue of fact for trial regarding evidence of the merchants' negligence.

### Consumer Regulations Do Not Apply

In Beard II, the Superior Court of the District of Columbia granted

summary judgment in favor of the merchants. Beard appealed on the grounds that several of the merchants failed to comply with 16 D.C. Mun. Regs. 102.1 (1984), which requires all retail sellers to register with the Office of Consumer Protection. Beard claimed that as a result of their failure to register, the merchants must return all money paid to them for goods purchased during the non-registration period.

The appellate court rejected Beard's registration argument for two reasons. First, the regulation provided several means of enforcement, none of which allow for a private party to bring a civil action. The court held that the regulation was intended to be enforced by public officials or through privately instigated administrative proceedings.

Further, the appellate court did not recognize the remedies Beard demanded. The regulation intended relatively small penal sanctions, such as fines of up to \$300 or imprisonment for no more than 10 days. The court rejected the argument that the regulation had intended to allow for drastic forfeitures. Due to its penal nature, the law was to be strictly construed and could not support such forfeiture by implication.

Beard admitted to having suffered no injury as a direct result of the merchants' failure to register according to 16 D.C. Mun. Regs. 102.1. The legislation from which the regulation stemmed only provided protection and relief to consumers who had suffered actual injury. The court held that injury was a condition precedent to suit under the regulation and thus barred Beard's claim. The court upheld the grant of summary judgment.

Gwen M. Geraghty

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## Wyoming Extends Warranty Of Habitability To Minor Construction Defects

In *Deisch v. Jay*, 790 P.2d 1273 (Wyo. 1990), the Supreme Court of  
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## Warranty of Habitability

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Wyoming held that an implied warranty of habitability and fitness is breached not only by major defects rendering a house uninhabitable, but also by minor construction defects resulting in temporary injury to the property.

### Background

Mr. and Mrs. Jay and Mr. and Mrs. Himes ("Homeowners") lived in townhouses built by Regency Construction Company ("Builder"). The Jays were the original purchasers and the Himes were the second purchasers of their townhouses. Both Homeowners experienced excessive humidity and dampness in their basements that led to the development of mold, mildew, and an offensive odor. Neither family was forced to abandon their homes, but some personal property stored in the basements was damaged by mold and rust. As a result, the Homeowners were reluctant to finish the basements as living areas unless the excessive humidity problems were corrected.

Consequently, the Homeowners brought this action against the Builder alleging negligent construction and breach of an implied warranty of habitability. To remedy the problems, the Homeowners asked that the Builder either: correct the defects; or pay monetary damages for the cost of removing and replacing the basement floors, the decrease in the value of their homes, or the loss of the use of the basements.

### The District Court's Opinion

At trial, both parties introduced evidence as to the possible causes of the defects, the appropriate repairs, and the associated costs. Based on this evidence, the District Court, Laramie County, found that the excessive dampness was probably due to pooled water in the ground under the basements, which could easily be remedied by installing a mechanism to allow the water to drain out from underneath the homes. As a result, the trial court found in favor of the Homeowners on their theory of

breach of an implied warranty of habitability but not on their theory of negligent construction. Each homeowner was awarded \$1,980 for the decreased value of their homes. In addition, the Jays were awarded \$765 for personal property damages, and the Himes were awarded \$87.04 for repair bills. The Builder appealed to the Supreme Court of Wyoming, and the Homeowners cross-appealed, claiming that the damage awards were inadequate.

### Implied Warranty of Habitability Applies

On appeal, the Builder first claimed that an implied warranty of habitability is breached only by major defects which render a house unfit for habitation. Therefore, the Builder argued, the award of damages here was improper because the Homeowners failed to show either the existence of major defects or that the townhouses were uninhabitable. The Builder relied on the court's ruling in a prior case that the sale of a new home carries with it an implied warranty that the residence is reasonably constructed and fit for habitation. This rule was later extended to subsequent purchasers as well. Therefore, the Builder argued, because the trial court found that the Homeowners' residences were habitable and not negligently constructed, the implied warranty of habitability had not been breached.

The Wyoming Supreme Court rejected the Builder's argument and held that the implied warranty of habitability applies to both major and minor defects. Although builders are not obligated to deliver perfect houses, they must either correct minor defects or pay monetary damages for repairs. Alternatively, major defects which render a house uninhabitable entitle the homeowner to rescind the construction contract.

The court reiterated the rationale that the purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work. Therefore, consumer protection demands that home buyers be able to rely on the skill of the builders and know that

houses are constructed so as to be reasonably fit for their intended uses. The court concluded that the implied warranty of habitability and fitness is breached if a homeowner proves both the existence of a minor construction defect and a resulting temporary injury to the property. Therefore, the court upheld the trial court's finding that the implied warranty of habitability had been breached when excessive moisture in the basements damaged personal property and prevented the Homeowners from using the basements as living areas.

Additionally, the court noted that the word habitability is somewhat misleading because it seems to base a breach of implied warranty on the condition that the house be uninhabitable. The court felt that "merchantability" or "fitness for a particular purpose" would more accurately convey the meaning of the warranty. When viewed in this context, the court added, the warranty assures a buyer that a house is reasonably suited for its intended use.

### No Duty to Mitigate Damages

The Builder also claimed that the Jays had failed to mitigate their personal property damages. The Builder based this claim on evidence showing that Mr. Jay detected the dampness when he first moved into the home but nevertheless continued to store personal property in the basement. In response to this claim, the court explained that once an injury has occurred, a homeowner's duty is to take reasonable measures to protect the property from additional damage. Here, however, the evidence showed that the Builder led the Jays to believe that no problem existed. Furthermore, Mr. Jay had attempted to eliminate the dampness and excessive humidity. Therefore, the court upheld the lower court's decision that the Jays had discharged their duty to mitigate damages.

### Damage Awards Were Adequate

On cross-appeal, both Homeowners claimed that their damage awards were inadequate. The court held that although the evidence presented at trial was in conflict as

to the appropriate remedy and associated costs, the record was sufficient to justify the trial court's judgment on the issue of damages. Thus, the Wyoming Supreme Court affirmed the damage awards.

### The Dissenting Opinion

The dissent argued that the majority held the Builder liable even in the absence of negligence. This strict liability theory, based on the Wyoming Uniform Commercial Code, was incorrect because the code does not apply to real property. The dissent also argued that under the strict liability theory, all builders would be forced to insure the construction of the houses they built. Such a standard would require builders to attend to and repair even the slightest defects and would result in increased costs to consumers. Finally, the dissent argued, the majority's approach was unnecessary because the remedies developed in the Wyoming Supreme Court's prior cases were sufficient to protect homeowners.

Richard B. Vaughn

## New Jersey Supreme Court Finds Tooth Discoloration Strict Liability Claim Not Preempted By FDA Regulation

In *Feldman v. Lederle Laboratories*, 592 A. 2d 1176 (N.J. 1990), the Supreme Court of New Jersey held that federal law did not require prior approval from the Food and Drug Administration ("FDA") before a drug manufacturer could warn of a known or knowable danger in its products. Consequently, the court found that federal law did not preempt a strict liability claim brought under New Jersey state tort law against a drug manufacturer for failure to warn that one of its products could cause tooth discoloration.

### Background

This case involved tetracyclines, a group of antibiotics first produced in 1948, which are primarily

used to treat bacterial infections. In 1959, Lederle Laboratories ("Lederle") introduced a new form of tetracycline, demethylchlortetracycline, marketed under the trade name Declomycin.

Dr. Harold Feldman had treated his daughter, Carol Ann Feldman ("Feldman"), with Declomycin two or three times a year between 1960 and 1963. Feldman's baby teeth were discolored gray-brown. When her permanent teeth emerged in 1965, they too were discolored. Prior to 1963, Declomycin contained no warning of tooth discoloration as a potential side effect.

Lederle had a long history of correspondence with the FDA regarding the potential side effects of various tetracyclines. In November, 1962, Dr. Swanzey, an employee of Lederle, wrote a letter to the FDA notifying the administration of the possible correlation between tooth discoloration and tetracycline use. In this letter, Dr. Swanzey proposed adding a warning of the potential side effects to the labels of all Lederle tetracycline products.

The FDA responded that it had not yet reached any conclusions, but would contact Dr. Swanzey once it made a final determination. In January, 1963, Dr. Swanzey wrote the FDA with additional information regarding the side effects of tetracycline use, one of which was tooth discoloration. In February, 1963, the FDA informed Lederle of its conclusion that tetracycline use had an effect on the bones and teeth. Furthermore, the FDA proposed that a warning be placed on Tetracycline, Chlortetracycline, and Oxytetracycline. At this time, the FDA had no specific clinical evidence that Declomycin caused tooth discoloration, but confirmed that it would remain alert for the possibility of such correlation.

Through Dr. Swanzey, Lederle continued to correspond with the FDA regarding the possibility that Declomycin caused tooth staining. In July, 1963, the FDA stated that it required factual evidence of adverse reactions to substantiate any official regulatory change in warnings. Because Lederle could only

speculate as to the connection between Declomycin and tooth discoloration, the FDA had chosen not to change its official stance regarding the warning.

Finally, on November 11, 1963, after negotiations with the FDA, a Lederle official wrote the Administration that the company would include a warning statement on its Declomycin label. The FDA accepted the proposed warning, which was incorporated into the packaging of Declomycin in December, 1963.

Subsequently, in 1978, Feldman, through her father as guardian ad litem, sued Lederle in New Jersey state court to recover damages for her tooth discoloration under theories of negligence, gross negligence, breach of express and implied warranties, and strict products liability.

### Lower Court Proceedings

The trial court entered judgment on a jury verdict in favor of Lederle, and Feldman appealed. The Superior Court, Appellate Division, affirmed. The New Jersey Supreme Court granted Feldman's petition for certification and remanded the case back to the appellate division for reconsideration. The appellate division affirmed its original position. This time the supreme court reversed and remanded for a new trial. At the second trial, the jury returned a verdict for Feldman on the sole count of strict liability for failure to warn under state tort law. The appellate division reversed and remanded for entry of judgment in favor of Lederle. From this ruling, the New Jersey Supreme Court again granted Feldman's certification petition.

### Supreme Court Opinion

The New Jersey Supreme Court first addressed Lederle's argument that Feldman's cause of action based on state law failure to warn was preempted because of an actual conflict with federal laws and regulations. The court made clear that Lederle first had to overcome a presumption against preemption, since state power is not to be superseded by federal acts unless it

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