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PRODUCTS LIABILITY

Judicial Doctrine Trumps Plain Language of the Product Liability Act

BY JOSEPH GUMINA

On January 4 of this year, the New Jersey Supreme Court heard oral arguments in *Dean v. Burnett Homes, Inc.*, 200 N.J. 207 (2009), addressing whether a homeowner has a tort remedy against manufacturers of defective building components that cause physical damage to other parts of the home in which they are integrated. *Dean* centers upon the interaction between, on the one hand a judicial construct known as the “economic loss doctrine” which bars the tort recovery of “purely economic loss” and, on the other, the New Jersey Product Liability Act, which prescribes a statutory remedy for “harm caused by the product.” Recently, the Third Circuit Court of Appeals had occasion to address that interaction in *Travelers Indem. Co. v. Dammann & Co., Inc.*, WL 395915 (3d. Cir. 2010). Although, factually, *Travelers* arose in a context that is distinguishable from *Dean* (the former involved a commercial sale

Gumina is a member of Stark & Stark’s construction litigation group in the firm’s Lawrenceville office. Gumina, along with Stark & Stark attorney Randy Sawyer, represented amicus curiae, Homeowners Against Deficient Dwellings (HADD), in the Dean v. Barnett case.

of defective goods, the latter a consumer protection in residential realty), the Third Circuit’s decision on Feb. 5, predicting how the New Jersey Supreme Court will approach the interplay of judicial policy and legislative enactment, has profound implications for legislative protection of both consumers and commercial interests alike. In that respect, the decision is deeply troubling.

It is well-settled that the drafting of statutory language to carry out prevailing policy preferences is a legislative, not a judicial, function. Yet, in *Travelers*, the Third Circuit effectively substituted the judicial policy pronouncements embodied in the “economic loss doctrine” for the plain language used by the New Jersey Legislature. At issue was whether a commercial purchaser of a defective product could sue under the NJPLA for “physical damage to property, other than to the product itself,” N.J.S.A. 2A:58C-1(b)(2), when the “other property” damage was a reasonably foreseeable result of a contractual breach at the time of the original contracting. While acknowledging that “the NJPLA clearly permits a plaintiff to pursue a tort remedy in the event of harm to ‘other property,’” the Third Circuit nevertheless predicted that the New Jersey Supreme Court would apply the common-law construct of the economic loss doctrine to preclude such a

recovery.

The economic loss doctrine, concisely stated, attempts to “define the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort, particularly in strict liability and negligence cases.” In the seminal case of *Alloway v. General Marine Industries*, 149 N.J. 620 (1997), the New Jersey Supreme Court credited the doctrine’s underlying premise that “tort principles are better suited to resolve claims for personal injuries or damage to other property while contract principles more readily respond to claims for economic loss caused by damage to the product itself.” However, “[a]fter surveying the law in other jurisdictions,” the Third Circuit, in *Travelers*, “predict[ed] that the New Jersey Supreme Court would interpret the doctrine to bar tort claims where a plaintiff seeks economic damages for foreseeable losses for which the plaintiff could have contractually allocated risk[,] . . . without reference to whether the loss stems from damage to ‘the product itself’ or ‘other property.’”

Applying this test to the facts before it, the court concluded that the sale of mercury-tainted vanilla beans to International Flavors & Fragrances Inc. (IFF), a manufacturer of vanilla extract, did not give rise to a cognizable tort claim against

the bean supplier, Dammann & Co., Inc., even though the adulterated beans allegedly caused damage to the other ingredients in the manufacturer's flavoring extract and the equipment used in the extraction process. The manufacturer's losses were "purely economic," in the court's assessment, because they "[were] within the contemplation of sophisticated business entities with equal bargaining power and . . . could have been the subject of their negotiations." As support for precluding IFF's tort recovery, the court invoked the policy objective of "encourage[ing] parties to consider the possibility that the product will not perform properly and either assign risk or negotiate the price accordingly."

The Third Circuit's holding achieves a result that the New Jersey Supreme Court has time and again admonished courts to avoid — the judicial rewriting of a plainly worded statute. The NJPLA, by its plain terms, encompasses "any claim or action brought by a claimant for harm caused by a product." N.J.S.A. 2A:58C-1, including "physical damage to property other than to the product itself." N.J.S.A. 2A:58C-1(b)(2). It prescribes a single, statutorily defined theory of recovery for any such claim, adopting, generally, the methods of proof recognized for strict liability in tort. "The language chosen by the Legislature in enacting [the statute] was both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products." *In re Lead Paint Litigation*, 191 N.J. 405, 436-37 (2007). As the New Jersey Supreme Court recently observed in *Rowe v. Hoffmann-La Roche, Inc.*, 189 N.J. 615 (2007), the NJPLA "was intended 'to establish clear rules with respect to specific matters as to which the decisions of the courts in New Jersey have created uncertainty.'"

In *Travelers*, the Third Circuit gave short shrift to this legislative prerogative. While acknowledging the NJPLA's remedial purpose of "establish[ing] clear rules" with respect to product liability claims, the court found the Legislature's efforts wanting in that regard. "The statute," the court opined, "obscures more than it elucidates, especially when juxtaposed with other elements of New Jersey law." Yet, the only "juxtaposition" presented in the court's opinion is to extra-jurisdictional case law qualifying, or abrogating, the "other prop-

erty" exception to the general rule of non-recovery for purely economic loss. The court readily acknowledged that "[n]o New Jersey court has delineated the contours of 'the product itself' and 'other property'" and that "[n]either the Supreme Court of New Jersey nor any other New Jersey court has directly clarified the interaction between the NJPLA and the economic loss doctrine."

Addressing the "apparent tension" between its formulation of the doctrine and the plain language of the NJPLA, the court stated:

It might be argued, of course, that a court is more at liberty to work around a judicially-created doctrine than a legislative act, which a court must do its utmost to respect and enforce. Whatever the merit of that argument, it is not relevant here, as we are not ignoring the NJPLA's "other property" exception. Instead, we seek to reconcile two seemingly conflicting strains of New Jersey law to the best of our ability given all available, relevant data.

In view of the acknowledged absence of New Jersey precedent directly on point, it is not entirely clear what "seemingly conflicting strains of New Jersey law" informed the court's construction in this case. However, the effect of that construction is unmistakable; it imposes additional requirements on a statutory remedy where they are not plainly expressed.

The court, evidently, saw "no principled reason. . . why a legislatively-created 'other property' exception should be interpreted any differently from its judicially-created counterpart." An examination of the statute, however, discloses at least two reasons. First, the presumed "exception" for "other property" is found nowhere in the provisions of the act. Rather, the act exempts "damage to the product itself" from the general rule that "physical damage to property" caused by a product is "harm" actionable in strict liability. N.J.S.A. 2A:58C-1(b)(2). Second, if the Legislature intended to incorporate the judicial construct of the economic loss doctrine, it easily could have done so by including a provision that explicitly forecloses the recovery of purely

"economic loss." A number of state legislatures have done just that in their product liability statutes. See, e.g., R.C. Wa. 7.72.010(6); La. R.S. 9:2800.53(5). The New Jersey Legislature, advisedly, did not.

The Third Circuit's use of the economic-loss doctrine as a policy-construction tool led it to conclude that "harm" under the NJPLA does not mean what the statute plainly says, but rather is code for the prevailing common-law view of tort damages. New Jersey law, however, presumes that Legislative enactments are written in plain English, not code. Recognizing the consequences of unbridled judicial forays into the legislative sphere, the New Jersey Supreme Court has cautioned courts to "enforce the legislative will as written and not according to some unexpressed intention," *Dacunzo v. Edgely*, 19 N.J. 443, 451 (1955), and, further, to avoid "extending judicial doctrines that might dislocate the legislative structure." *Spring Motors Distributors, Inc. v. Ford Motor Company*, 98 N.J. 555, 557 (1985).

Travelers represents not only a judicial abrogation of a statutory remedy but also a troubling extension of one of the most "quickly and confoundingly expanding legal doctrine[s.]" Paul J. Schwiep, "The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts," *Fla. B.J.*, Nov. 1995, at 34. As one jurist colorfully put it:

Like the ever-expanding, all-consuming alien life form portrayed in the 1958 B-movie classic *The Blob*, the economic loss doctrine seems to be a swelling globule on the legal landscape of this state.

Previously well-established remedies under the common law have already succumbed to this rapidly expanding doctrine, as demonstrated most recently by the New Jersey Appellate Division's decision in *Marrone v. Greer & Polman Constr. Inc.*, 405 N.J. Super. 288 (App. Div. 2009) (barring homebuyers' tort remedies against manufacturer of allegedly defective siding for consequential physical injury to the home) and *Dean v. Barrett Homes, Inc.*, 406 N.J. Super. 453, 202 (2009). It now appears that even the plainly worded enactments of the Legislature are not immune. ■