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South Carolina Recognizes Two Exceptions to the Economic Loss Rule

The South Carolina Supreme Court has modified the economic loss rule in that state to allow consumers to recover damages in tort for products that are defective but have not caused any injury to persons or property. Under the new interpretation of the doctrine, manufacturers may be held liable for the cost of repairing or replacing a defective product if the product violates accepted industry standards or poses a serious risk of physical injury. *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 2008 WL 5433193 (Aug. 25, 2008).

The opinion answered questions certified by a federal district court in a case filed by a private school against the manufacturer of lumber treated with a fire retardant. The school alleged that the treated wood in the school's roof deteriorated prematurely, forcing the school to replace the roof. The school sought to recover the cost of replacement, asserting claims for negligence and violation of the state's Unfair Trade Practices Act (UTPA). *Id.* at *1.

Under the traditional economic loss rule, where a product defect results in damage to only the product itself, the purchaser's remedy lies in contract, not in tort. Under the traditional rule, a manufacturer is liable only in tort for damages to persons or property.

In creating the new exceptions, the court rejected the majority view of the economic loss doctrine, stating that view "employs a legal framework that focuses on consequence, not action." *Id.* at *3. The South Carolina Supreme Court in 1989 had recognized exceptions to the economic loss rule in the residential homebuilding context. In *Kennedy v. Columbia Lumber & Mfg. Co.*, South Carolina recognized tort liability for builders who "place defective and inferior construction into the stream of commerce" if the construction violates industry standards or poses a serious risk of physical injury. *Id.* at *4.

In *Colleton*, the court went further, holding that those exceptions were applicable to all manufacturers. The court justified the expansion as follows:

[I]n *Kennedy*, we expressed our approval of the legal maxim *caveat venditor* and recognized a new framework for analysis that focused on the actor's actions, not consequences. In our view, the analytical framework is universal.

Id. at *4.

Discussing the significance of industry standards, the court held that a violation

is relevant for determining whether a duty already owed has been breached. A violation of industry standards does not, however, create an independent duty. *Id.* Rather, it serves as evidence that a duty, if one is owed, has been breached. *Id.*

The court explained its reasoning behind the second exception as follows:

Extending the serious threat of physical (bodily) harm exception generally is consistent with our policy of providing a remedy where a duty outside the contract is breached. Manufacturers have a duty, separate and apart from contractual duties, to create safe products, and they are

liable for poorly made products used in a foreseeable manner.

Id. at *5. The court added that other jurisdictions already recognize a “serious risk of physical injury” exception to the economic loss rule, among them Maryland, New York and Pennsylvania. *Id.*

To define a “serious” threat, the *Colleton* court adopted Maryland’s balancing test, which requires courts to consider “the nature of the damage threatened and the probability that the damage would occur...to determine whether there is a clear, serious and unreasonable risk of death or personal injury.” *Id.* at *6 (quoting *Morris v. Osmose Wood Pres.*, 667 A.2d 624

(Md. 1994) and explaining that “if the possible injury is extraordinarily severe...we do not require the probability of the injury occurring to be as high as we would require if the injury threatened were less severe...”). If a product defect poses a risk of serious injury, a plaintiff may recover the cost of repairing or removing the dangerous product. *Colleton*, at *6.

Colleton represents a significant erosion of the protection afforded by the economic loss rule in products liability law. The rule enunciated in this case allows plaintiffs to recover under a tort theory for *potential* injury without having to make the showing required to recover under contract theories.

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