DECEPTIVE TRADE PRACTICES AND WARRANTIES

CONSUMER FRAUD CLASS ACTION CERTIFIED

Pella Corp. v. Leonard E. Saltzman, 606 F.3d 391 (7th Cir. 2010).

FACTS: Over 18 years, Pella Corp., through its subsidiary, Pella Windows and Doors, Inc. (collectively "Pella"), sold more than six million "ProLine" aluminum-clad wood casement windows. In response to the number of windows needing replacement due to rotted, water-damaged wood, Pella created the Pella ProLine Customer Service Enhancement Program (the "Program") to compensate affected customers. Plaintiffs, owners of structures containing ProLine windows, brought suit against Pella, alleging that it committed consumer fraud by not publicly declaring the role that the window design defect played. Plaintiffs asserted that Pella attempted to modify its warranty through the program, but never informed end consumers of the program's existence or the defect. The U.S. District Court for the Northern District of Illinois certified two classes of consumers: a nationwide class under Federal Rule of Civil Procedure 23(b)(2) and a narrower group of six certified classes under Rule 23(b)(3). Pella filed a petition seeking permission to appeal the certification under Rule 23(f). To address the contention that consumer fraud claims are inappropriate for class treatment, the court granted the petition.
HOLDING: Affirmed.
REASONING: Pella argued that consumer fraud cases are not amenable to class treatment due to problems with causation, reliance, and calculating damages. It relied on Seventh Circuit decisions reversing grants of class certification in such cases to broadly conclude that they are inappropriate for class treatment. The court disagreed. Those cases did not hold that class certification was *never* appropriate in consumer fraud cases, but only in *those* cases. There is not and should never be a "rule" that consumer fraud cases can never be class certified.

The court acknowledged the risk of error in having complex issues decided by one trier of fact rather than a consensus from multiple trials. But this was not a case of such complex issues. Rather, the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) were met because the central questions were the same for all class members: whether the windows had an inherent defect; whether and when Pella knew of the defect; the scope of Pella's warranty; and the nature of the Program and whether it amended the warranty. Pella argued that there were too many variances among class members, because wood can rot for many reasons, such as improper installation. However, proximate cause, while an individual issue requiring individual proof, does not preclude class certification. Class members would still have had to prove individual issues of causation and damages, eliminating concerns that the class definitions were overbroad or could include people who suffered no injury. As to the manageability of the class, Pella did not demonstrate an abuse of discretion by the district court. Instead, the district court carefully considered how the case would proceed, explicitly finding that the consumer protection acts of the six states involved had nearly identical elements.

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The court concluded that while consumer fraud class actions present challenges that a district court must carefully consider, there are circumstances where certification is appropriate. The district court properly held that the common predominant issue of whether the windows suffer from a single, inherent design defect leading to wood rot was the essence of the dispute and would be better resolved by class treatment. The court granted Pella's Rule 23(f) petition for permission to appeal and affirmed the district court's decision to certify the classes.

INSURANCE

STOWERS DOCTRINE NOT TRIGGERED

AFTCO Enterprises, Inc. and ETSI, Inc. v. Acceptance Indem. Ins. Co., ____ S.W.3d ____ (Tex. App.—Houston 2010).

FACTS: Insured Plaintiffs, AFTCO Enterprises Inc. ("AFTCO") and ETSI Inc., brought a Stowers action against the Defendant insurers, Acceptance Indemnity Insurance Company ("Acceptance") and Southern County Mutual Insurance Company ("Southern"), stating that the Defendants failed to timely tender their policy limits in response to a settlement offer regarding four personal injury lawsuits. The trial court concluded that the settlement offer, as a matter of law, did not trigger a Stowers duty for the Defendants. The joint settlement demand made above the limits of individual Defendants' insurance policies, but within the combined limits of separate insurance policies that provided coverage for underlying claims, did not make the Defendants subject to a Stowers claim. The Plaintiffs appealed this decision.
HOLDING: Affirmed.
REASONING: This court explained that a settlement demand triggers an insurer's Stowers duty to respond if: (1) the claim against the insured is within the scope of coverage; (2) the demand is within policy limits; and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Phillips v. Bramlett*, 288 S.W.3d 879 (Tex. 2009). The court went on to apply the Stowers principles from the following three cases, *Mid-Continent*, *Keck*, and *Westchester* to the case at hand. In *Mid-Continent*, the Texas Supreme Court stated that in a claim involving multiple policies, a settlement demand does not activate ones primary insurer's Stowers duty unless the demand falls within the applicable limits available under that single policy. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co*., 236 S.W.3d 776 (Tex. 2007). In *Keck*, the Texas Supreme Court