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

stated that the Stowers duty does not arise for an excess insurer until the primary carrier has tendered its limits. *Keck v. Nat'l Union Fire Ins. Co.,* 20 S.W.3d 692 (Tex 2000). In *Westchester*, this court concluded that an excess insurer was not entitled to equitable subrogation against a primary insurer from breach of its Stowers duty when the initial settlement demand exceeded the limits of the primary policy. *Westchester Fire Ins. Co. v. American Contractors Ins. Co. Risk Retention Group*, 1 S.W.3d 874 (Tex. App. Houston 1st Dist. 1999).

In reviewing the claim against Southern, this court stated the settlement offer did not state a release of claims against the Plaintiffs under a particular policy and the settlement demand was a sum that exceeded Southern policy's limits and was an aggregation of multiple policies. *See Mid-Continent Ins. Co.*, 236 S.W.3d at 776. Thus, the trial court correctly granted summary judgment in favor of Southern. In reviewing the claim against Acceptance, the court stated that the primary carrier never tendered its policy limits and the trial court also correctly granted summary judgment in favor of Acceptance in accordance to the rulings in *Keck* and *Westchester*. So, the court concluded that the settlement demands by the personal injury plaintiffs never triggered the insurers' Stowers duties. The settlement terms required funding from multiple insurers, and no single insurer could fund the settlement within the limits that applied under its particular policy.

TEXAS STANDARD HOMEOWNER'S POLICY COVERS MOLD DAMAGE TO PERSONAL PROPERTY BUT NOT DWELLING

State Farm Lloyds and Erin Strachan v. Wanda M. Page, 315 S.W.3d 525 (Tex. 2010).

FACTS: Page ("Homeowner") discovered damage to her home and personal property from mold and water damage. Homeowner then proceeded to file a claim with State Farm ("insurer") as directed by her homeowner's policy, the Texas Standard Homeowner's Policy-Form B ("HO-B"). Testing was performed by the insurer, and it was revealed that the mold came from a plumbing leak. Insurer covered homeowner's cost to remediate and repair the structure, and an amount to cover personal property remediation and three months of living expenses while work was performed. Homeowner then requested an additional amount to repair her damaged carpet. Insurer refused, arguing that the HO-B policy expressly excludes mold damage coverage. The trial court granted insurer's motion for summary judgment. The court of appeals reversed, holding that homeowner's HO-B policy covered both the dwelling and its contents.
HOLDING: Affirmed in part, reversed in part, and remanded.
REASONING: In their opinion, the court looks at its prior rulings regarding their interpretation of the HO-B policy to determine whether the 1(f) rust, rot, mold, or other fungi exclusion applies to dwellings under Coverage A or personal property under Coverage B. In determining the meaning of the provision, the court read the contract in its entirety, instead of isolating each individual section. This allows a fuller understanding of the parties' intent. Coverage A of the HO-B policy provides dwelling insurance against all risks of physical loss unless the loss is excluded under Section I Exclusions. Coverage B(9) of the HO-B policy provides personal property insurance against accidental discharge, leaking or overflow of water or steam from within a plumbing. The "exclusion repeal provision" listed under this coverage provides an exception for exclusions that do not apply to loss caused by Coverage B(9).

The court determined the policy meaning by reading the exclusion repeal provision in conjunction with the coverage provisions. There appeared to be no ambiguity when the provisions were read together. The court in *Fiess* took a liberal interpretation of the same policy to exclude all damages that result from mold contamination of dwellings. The court at that time did not rule on whether 1(f) applied to personal property. The exclusion repeals provision states that "Exclusions 1.a. through 1.h. under Section I Exclusions do not apply to loss caused by this peril." The only reasonable interpretation would be to limit the exclusion repeal provision to personal property. The plain language of the Section I Exclusions sates that the exclusions listed apply to both Coverage A (Dwelling) and Coverage B (Personal Property). If the exclusion repeal provision was intended to reinstate the mold exclusion (1.f) back into coverage under both Coverage A and Coverage B, this would make the entire mold exclusion useless. The only way to make sense of the provision would be to limit the mold exclusion to personal property. Since the exclusion repeal provision falls under the "Accidental Discharge, Leaking or Overflow of Water or Steam from within a plumbing, heating or air conditioning system or household appliance" peril, the mold exclusion would reinstate mold coverage for plumbing leaks that damage personal property. The court held that the HO-B policy covered mold damage from a plumbing leak to personal property, but it did not cover mold damage to the dwelling.

In their opinion, the court looks at its prior rulings regarding their interpretation of the HO-B policy to determine whether the 1(f) rust, rot, mold, or other fungi exclusion applies to dwellings under Coverage A or personal property under Coverage B.