

## [Products Liability Law Daily Wrap Up, EXPERT EVIDENCE—HOUSEHOLD PRODUCTS—7th Cir.: Homeowners can't sustain window-defect claims against Kolbe, \(Jul. 13, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Susan Engstrom

In a putative class action brought by homeowners alleging defects in windows they had purchased from Kolbe & Kolbe Millwork Co., the U.S. Court of Appeals for the Seventh Circuit found that Kolbe was entitled to partial summary judgment on the plaintiffs' claims for breach of express and implied warranties and negligent design and manufacturing. The appellate panel also upheld the lower court's exclusion of the plaintiffs' experts and denial of class certification, and found that the homeowners' individual claims could not survive without expert support (*Haley v. Kolbe & Kolbe Millwork Co.*, July 11, 2017, Flaum, J.).

All of the homeowners experienced one or more problems with their windows, including leaking, warping, rotting, or cracking or peeling paint. According to their complaint, Kolbe would not honor its written warranties. Since 1997, the company—which designs, manufactures, and sells windows—has issued at least seven different versions of a written window warranty. In addition, some of the homeowners' windows in this case were finished with an optional exterior paint known as the "K-Kron system" that came with its own warranty. In their putative class action, the homeowners asserted claims for breach of express warranties, including Kolbe's written warranties that the windows would remain free from defects; breach of implied warranty of merchantability and implied warranty that the windows were fit "for their intended use"; negligent misrepresentation; negligence; unjust enrichment; and violations of Wisconsin's Deceptive Trade Practices Act (WDTPA). All of the claims were premised on the allegation that Kolbe windows had common design defects that caused them to rot prematurely. The district court excluded the homeowners' two experts, denied class certification, and entered final judgment in favor of Kolbe. The homeowners appealed.

**Expert evidence.** The district court found that the homeowners' experts had not provided reliable or helpful opinions regarding the existence of defects in Kolbe's windows. Specifically, the district court determined that: (1) one of the experts had incorrectly assumed that Kolbe had designed its windows to have an unfinished lower sash; and (2) there was no reliable scientific basis for the other expert's conclusion that K-Kron was a defective exterior paint.

On appeal, the homeowners argued that the district court's finding of a factual mistake in the first expert's opinion was "plainly wrong" given evidence proving that the finishing of the sashes was irrelevant. They contended in the alternative that the district court erred in excluding the entirety of the expert's report instead of simply striking portions of it. Finally, they asserted that the district court's reading of the report was demonstrably incorrect because the expert never opined that all of the defects discussed in his report had to be present for the windows to deteriorate. According to the Seventh Circuit, however, the homeowners forfeited all of these challenges by failing to raise them in their response to Kolbe's *Daubert* motion.

The second expert had opined that K-Kron paint was defective because it cracked, allowed moisture into the wood frames and sashes, and delayed the drying of wet wood by weeks. The homeowners argued that the district court's criticisms of the expert's opinion ought to have gone toward his credibility or the weight to be given to his opinion—not its admissibility. In the appellate panel's view, however, the district court's evaluation of the expert's methods and analysis tracked Federal Evidence Rule 702's requirement that an expert's testimony be the product of reliable methods applied to the facts of the case as well as the *Daubert* factors concerning whether a theory has been tested, the standards controlling the technique's operations, and whether the

technique has achieved general acceptance in the relevant expert community. Thus, the district court acted appropriately as the gate-keeper for the expert's testimony and did not abuse its discretion in excluding it.

**Breach-of-warranty claims.** The homeowners also argued that genuine issues of material fact existed as to both the causation and defect aspects of their breach-of-express-warranty claims. They asserted that even without expert testimony, a reasonable jury could have inferred causation from evidence such as emails from Kolbe and Kolbe's distributors, photographs, and various service-request forms. However, the district court acted within its discretion in deeming the emails inadmissible. For instance, emails from Kolbe's distributors to Kolbe employees allegedly identifying design defects contained inadmissible hearsay. The emails also would have constituted inadmissible expert testimony.

The other evidence cited by the homeowners fell short of showing causation and, without expert evidence, might even fail to establish a design defect, the Seventh Circuit determined. Although internal emails, service-request forms, and photos of rotting or leaking windows could suggest problems with Kolbe's windows, this evidence failed to link such problems to an underlying design defect, as opposed to other, external factors such as construction flaws or climate issues. Thus, the homeowners' remaining individual claims for breach of express or implied warranty could not survive.

**Other claims.** The appellate court also rejected the homeowners' WDTPA claims, finding that they failed to establish causation—i.e., that Kolbe's alleged misrepresentations somehow caused them loss. Finally, the homeowners were not deprived of due process. Accordingly, the district court's judgment in favor of the window maker was affirmed.

The case is No. [16-3192](#).

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Companies: Kolbe & Kolbe Millwork Co., Inc.

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