

Window Maker Gets Support In Coverage Battle At 7th Circ.

Law 360

Nonprofit policyholder advocacy group United Policyholders on Tuesday asked the Seventh Circuit to order two insurers to cover window maker Kolbe & Kolbe Millwork Co. Inc.'s costs to defend a class action over defective windows, arguing that the lower court's ruling is contrary to Wisconsin law and would improperly curtail the insureds' coverage.

Kolbe had sought coverage from United States Fire Insurance Co. and Fireman's Fund Insurance Co. for a now-settled underlying action alleging that the company's window frames contained a defect that caused them to prematurely rot.

U.S. District Judge Barbara Crabb held in an August decision that the insurers had no duty to defend Kolbe because the purported defects in the windows didn't cause damage to "other property" beyond Kolbe's own product. Applying a recent Wisconsin Supreme Court ruling in a case known as *Pharmacal*, the judge found that the allegedly shoddy windows were part of an "integrated system" encompassing the houses as a whole, such that any damage to the houses constituted damage to Kolbe's work.

United Policyholders argued in a friend-of-the-court brief that Judge Crabb misconstrued *Pharmacal*, which involved different facts than the class action complaint against Kolbe. If allowed to stand, the district court's ruling would unfairly curb construction industry policyholders' access to coverage for potentially costly risks, the nonprofit said.

"The district court's opinion, if not reversed, will deprive policyholders and consumers of coverage to remedy construction-related property damage and effectively leave contractors, manufacturers, and material suppliers with no way to protect themselves from the most likely liabilities arising out of their work," United Policyholders contended.

U.S. Fire and Fireman's Fund had intervened in the homeowners' suit in late 2014, seeking declarations that they did not have to foot the bill for Kolbe's defense costs. Judge Crabb initially denied the insurers' motions for summary judgment in November 2015. After Judge Crabb axed the class and individual claims against the window maker, though, she reversed course and issued a decision in August freeing the insurers from covering Kolbe's defense.

The district judge found that the Wisconsin Supreme Court's *Pharmaceutical* decision, which was issued in March, represented an intervening change in the law compelling her to rule in favor of the insurers.

In *Pharmaceutical*, the Wisconsin justices held that two insurers don't have to cover claims that their policyholders provided an improper ingredient for a health supplement that resulted in a shipment of tablets having to be destroyed. The inclusion of the defective ingredient in the tablets was not property damage under the policies, the court said.

Judge Crabb applied the reasoning in *Pharmaceutical* to the claims against Kolbe, determining that there was no covered damage to property other than Kolbe's own work because the windows and other components of the houses were all part of one integrated system.

In its brief supporting Kolbe's appeal, United Policyholders said that the logic of *Pharmaceutical* doesn't apply to the suit against the window maker. Unlike the improper ingredients at issue in *Pharmaceutical*, Kolbe's windows could be removed from the whole product — the house — after completion, the nonprofit said.

The very fact that the windows can be removed and replaced defeats the insurers' argument that the houses were integrated systems, United Policyholders argued.

"If the home was an integrated product, then the replacement of the window would have necessarily meant that the entire home would need to have been destroyed and rebuilt. This is preposterous."

United Policyholders is represented by Gregory L. Dillion, Alan H. Packer, Graham C. Mills and Jacquelyn M. Mohr of Newmeyer & Dillon LLP.

Kolbe & Kolbe is represented by Susan Schellinger, James Braza and Aaron Hall of Davis & Kuelthau SC.

Fireman's Fund is represented by Jeffrey Goldwater and Beth Berger Zerman of Lewis Brisbois Bisgaard &

Smith LLP.

United States Fire Insurance is represented by Riley Mendoza and David Schoenfeld of Shook Hardy & Bacon LLP.

The case is Haley et al. v. Kolbe & Kolbe Millwork Co. Inc. et al., case number 16-3563, in the U.S. Court of Appeals for the Seventh Circuit.

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