

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: HardiePlank Fiber) MDL No. 12-MD-2359 (MJD)
Cement Siding Litigation)
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) Minneapolis, Minnesota
) March 21, 2013
) 9:50 a.m.
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BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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1 Deutsch for the plaintiffs.

2 THE COURT: Good morning.

3 MS. FISHER: Good morning, Your Honor. Heidi
4 Fisher, Oppenheimer, Wolff & Donnelly, on behalf of the
5 defendant.

6 THE COURT: Good morning.

7 MR. MURPHY: Good morning, Your Honor. Chris
8 Murphy on behalf of the defendant.

9 THE COURT: Good morning.

10 MR. FRAKES: Good morning, Your Honor. Aron
11 Frakes on behalf of the defendant.

12 THE COURT: Good morning.

13 All right. Have you figured out the schedule and
14 time periods and everything so I don't have to be a referee
15 on this? I'm assuming that you have.

16 How much time did you give them? Two hours?

17 THE CLERK: An hour and a half, but --

18 THE COURT: An hour and a half. All right. Let's
19 proceed.

20 MR. MURPHY: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. MURPHY: This is a 15-count consolidated
23 complaint with 11 plaintiffs --

24 THE COURT: There's a button right in the middle
25 of the podium so you can raise it or lower it so you can be

1 comfortable.

2 MR. MURPHY: I'm fine.

3 THE COURT: Okay.

4 MR. MURPHY: -- with 11 plaintiffs under eight
5 state laws. I'm going to address Counts I through IV of the
6 complaint, which are the claims by all plaintiffs on behalf
7 of a national class and their common law claims. My
8 partner, Aron Frakes, is going to address each of the
9 statutory claims because they are all a bunch of individual
10 claims brought by a particular plaintiff on behalf of a
11 statewide class. So I think it will be easier to follow
12 that way, if we split it up. And I understand the time
13 constraints. I will split my time accordingly too.

14 First of all, on choice of law issues, fortunately
15 there's no dispute here. The plaintiffs don't dispute that
16 for statute of limitations purposes this Court applies the
17 procedural laws and the statutes of limitations of the
18 transferor court, the court that sent the case to this MDL
19 court. And for substantive law it's the place of injury,
20 which in this case is the place of each homeowner's
21 residence. So that makes things a lot easier.

22 So we will focus on each state's laws and I think
23 it's easier to go claim by claim so that we can talk about
24 any variations, to the extent they exist, in a particular
25 state law.

1 So first of all I'm going to start with the breach
2 of express warranty claim. Now, the plaintiffs have two
3 theories of breach of express warranty:

4 The formal warranty, which is the limited
5 manufacturer's warranty that no one disputes runs with the
6 product. It's made available to all people who buy James
7 Hardie's siding. It's on their website and it's also
8 available through retailers, through wholesalers,
9 lumberyards, builders, all different sources. The
10 plaintiffs refer to this as the formal warranty.

11 We attached to our motion to dismiss each of the
12 formal warranties that were in place throughout this
13 proposed class period so they're all there, but we're only
14 going to raise the warranty to the extent the terms are
15 consistent across those warranties. There won't be any
16 arguments that, at the motion to dismiss stage, depend on
17 the particular language of a particular warranty which apply
18 to a particular plaintiff. So that won't be an issue.

19 Then they also argue there's a breach of an
20 informal warranty in this case. The informal warranty is
21 just advertisements that have been made. Who knows --
22 brochures, TV, we don't know. They just list statements
23 from advertisements throughout their complaint and all the
24 plaintiffs collectively allege that all of these
25 advertisements became an informal warranty for each of them.

1 So the first argument that we make is that none of
2 these informal warranties apply because they were disclaimed
3 by language in the formal limited warranty, and the UCC
4 recognizes for a breach of warranty claim that a
5 manufacturer can disclaim implied warranties and other
6 warranties outside the formal warranty as long as the
7 disclaimer is conspicuous.

8 And our language says, (As read) "The statements
9 in this warranty constitute the only warranty extended by
10 defendant for the product. Defendant disclaims all other
11 warranties, express or implied, including the implied
12 warranties of merchantability and fitness for a particular
13 purpose." It goes on to say, "No other warranty will be
14 made on or behalf" -- "by or on behalf of the manufacturer."

15 So the limited warranty expressly excludes all
16 these other warranties from forming and there's no dispute
17 by the plaintiffs that that warranty is conspicuous. It's
18 in all caps. It has all the appropriate language. There's
19 not a dispute there.

20 Instead the plaintiffs say the disclaimer doesn't
21 apply here for two reasons, and I want to address each of
22 those reasons. They say, number one, they didn't see this
23 disclaimer and, number two, it's unconscionable. So let me
24 take each of those arguments separately.

25 First of all, on the we didn't see the disclaimer,

1 therefore we're not bound by it, what they're saying is --
2 in Count I they're moving to enforce this formal limited
3 warranty which contains the disclaimer, but at the same time
4 they're arguing that the disclaimer itself is unenforceable
5 because they never saw the warranty. So this is sort of the
6 contradiction that we're trying to deal with here.

7 In other words, what they're saying is that the
8 warranty itself, the formal warranty, is enforceable even
9 though they never saw it, but the disclaimer that's
10 contained in that actual written warranty is not enforceable
11 because they never saw the warranty.

12 So our position is you can't have it both ways.
13 You can either enforce the warranty and you get the
14 disclaimer with it. If you are going to enforce the
15 contract, you get all the terms of the contract. And we
16 agree that it's enforceable even though they didn't see it.
17 But they can't then say but the disclaimer itself is
18 unenforceable because we never saw the warranty. Now, we
19 don't know why they say they never saw the warranty, but
20 that's what they pled.

21 Now, the good news for us is this is a rare set of
22 facts, where someone argues to enforce the warranty, but
23 then says but don't enforce part of the warranty. In the
24 Kowalsky case, which is a Northern District of California
25 case that we cited, this exact argument was addressed and

1 discussed in detail.

2 And in that case it said the consumer must
3 typically be knowledgeable of the disclaimer or be
4 chargeable with notice of the disclaimer, but because the
5 limited warranty was on the defendant's website and
6 available to be read by the consumer at any time after it
7 purchased the product, it was bound by the disclaimer.

8 And the court explained that if the plaintiff is
9 allowed to enforce the warranty even though they didn't see
10 it, then it's only fair to also enforce that disclaimer
11 inside that warranty.

12 You can't have it both ways. You can't enforce
13 the warranty, but then take part of it out because you
14 didn't see it, even though you didn't see the warranty
15 itself.

16 So to us it's irrelevant whether they saw the
17 disclaimer or read it or not because they're trying to
18 enforce the warranty that contains the disclaimer. The
19 issue is was that disclaimer available to them for their
20 review, and here the answer is no dispute it was available.
21 They're seeking to enforce the warranty. So they either
22 knew about it, saw it, or didn't see it, but if they're
23 going to enforce it, they're bound by the disclaimer as
24 well. So that's our position on the disclaimer issue.

25 The other argument they make is on conscionability

1 and our position here is there's just no facts as to why
2 this particular standard type language, UCC type language
3 disclaimer is unenforceable here.

4 First of all, all the cases that we cited that
5 enforce the disclaimer of implied warranties, none of the
6 courts found that in those cases the disclaimer was
7 unconscionable.

8 In fact, in Your Honor's case, in the Daigle case
9 where you enforced a disclaimer of an implied warranty, that
10 was a case involving a class action by consumers against
11 Ford and arguably there was unequal bargaining power there,
12 but that didn't make the disclaimer in that case
13 unconscionable.

14 And here plaintiffs don't allege any facts as to
15 why this would be unconscionable. They say either the
16 disclaimers were not made known or the warranty was
17 concealed, but that's just -- you know, that's an argument,
18 but the fact is no one disputes it was on the website and,
19 again, they're trying to enforce it.

20 The reason the warranty is on a website is because
21 we don't sell to consumers. James Hardie sells its siding
22 in bulk to lumberyards. Builders then go to lumberyards,
23 buy the siding, and then consumers hire a builder to build
24 their home. The builder goes out and buys all the materials
25 and puts it on their home. They are buyers of homes.

1 They're not buyers from us.

2 We can't make that warranty directly available to
3 consumers because we don't know who buys our product. So we
4 make it available to the people we sell to, the lumberyards,
5 who then make it available downstream. And we put it on our
6 website so any consumer who wants to enforce it has the
7 warranty available. So it's not like we concealed anything.
8 This is just how the business -- the industry works.

9 Plaintiffs argue also that they weren't able to
10 negotiate or have any meaningful input to challenge the
11 terms of the disclaimer. We don't deny that, but, again,
12 that misses the point. They didn't buy the siding.

13 The lumberyards bought the siding. There's no
14 argument that they didn't have bargaining power or could
15 have negotiated. They're the buyer of the product. They
16 buy it in bulk. And there's no allegation that the
17 lumberyards were in some sort of unequal bargaining
18 position.

19 And lastly, our main position is that if unequal
20 bargaining power alone were sufficient to render a contract
21 unconscionable, then every consumer contract would be by
22 definition unconscionable as long as they bought from a big
23 manufacturer.

24 They both can't seek, again, to enforce the
25 warranty and argue that the disclaimer is unconscionable,

1 because either the whole thing is unconscionable, it wasn't
2 a valid warranty and therefore not a valid disclaimer, or
3 the whole thing is enforceable.

4 And so this unconscionability argument doesn't
5 really work because either the whole thing goes away, which
6 they're not pleading, or the whole thing is enforceable; and
7 that's obviously for Your Honor to decide.

8 So we think that the disclaimer should be
9 enforced and that the implied warranty claims and the
10 breach of other informal express warranties should also be
11 dismissed.

12 Now, the second argument we have is even if for
13 some reason this disclaimer is not enforceable, the
14 plaintiffs cannot rely and bring a claim for breach of
15 express warranty based on these advertisements if there's no
16 facts that those advertisements became the basis of the
17 bargain. And I think this is an area, including in your
18 Daigle decision, where there's some lack of clarity across
19 the jurisdiction, so I want to talk about that a little bit.

20 No one debates the UCC requires an affirmation of
21 fact and that affirmation of fact must be the basis of the
22 bargain. Some states, as we cited, and they agree,
23 California, Illinois, Nevada, for example, specifically
24 require reliance on the advertisement to become the basis of
25 the bargain. So at least as to those states, those claims

1 should be dismissed. And plaintiffs in their Footnote 2
2 concede that those states require reliance.

3 Other states don't require reliance, but they
4 still say it must be the basis of the bargain. And how do
5 they explain that? If it's not reliance, what does that
6 mean? What it means is there has to be a nexus between the
7 statement that you're trying to call as a warranty, the ad,
8 for example, here, and the transaction, the purchase of the
9 siding.

10 And here there are no facts making any nexus
11 between a bunch of advertisements that were made at
12 different points of time throughout the class period and any
13 plaintiff's purchase of siding.

14 So let me give you, using the plaintiffs' own
15 cases, the explanation of how this works. If reliance,
16 again, is required, then their claims are dismissed. But
17 for the other states, let's take the Daughtrey case,
18 D-a-u-g-h-t-r-e-y, in Virginia. I think it's a pretty good
19 example. They cited this case saying reliance isn't
20 required by Virginia. I agree. We didn't argue reliance.
21 We argued basis of the bargain, which in some states is
22 reliance, some states is a nexus.

23 In that case what happened was a consumer
24 purchased a diamond from a jeweler and the jeweler
25 represented in an appraisal that it was a VVS or some

1 quality of diamond and the plaintiff then later sued because
2 it wasn't a VVS quality diamond. The defendant said, well,
3 you didn't rely on that appraisal. You bought the diamond
4 based on our discussions, our meeting. You didn't use the
5 appraisal, you didn't rely on that.

6 And the court said, no, they didn't rely on it,
7 but you don't need reliance, but because the appraisal was
8 an integral part of the transaction, the sale, even if they
9 didn't rely on that appraisal document in making the
10 decision to purchase, it still became part of the sale, it
11 was part of the transaction. That's the nexus and therefore
12 that representation in the appraisal actually became a
13 warranty.

14 Other cases they cite, the Weinstat case, the
15 Felley case and others, all involve the situation where the
16 representation is made, but it was in connection with the
17 product, but not directly relied on again.

18 Perfect example, someone bought a product that the
19 warranty was in the directions that came with the product.
20 So they bought it over the Internet, bought it some other
21 way through a dealer. They didn't see the representation at
22 the time they bought the product, but the warranty came with
23 the product.

24 Defendant made a ridiculous argument that, well,
25 the warranty doesn't bind them or doesn't apply because they

1 didn't rely on it, they already bought the product when we
2 mailed them the instructions or the manual that contained
3 the warranty. The court said, no, again, the warranty that
4 they're relying on was made in connection with the sale and
5 distribution of the product.

6 Here that's the big difference. There's no nexus
7 at all. There's a bunch of advertisements out here and
8 there are plaintiffs who purchased homes and there's no
9 allegation of how anything we ever said in any way related
10 to the purchase of their siding.

11 We give the example of Bethel, the Ohio plaintiff,
12 who bought the house 10 years after the siding was installed
13 by some prior owner before Bethel did. There's no way any
14 representation made by our company had anything to do with
15 the sale of the siding because the sale of the siding was to
16 some other owner 10 years before Bethel bought their house.

17 And so what we're alleging here is we don't even
18 know when these ads ran. If the ads ran years after they
19 purchased their siding, there's no nexus. So at least they
20 have to allege some facts as to how any of these ads became
21 the basis of their transaction in order for an ad to become
22 a warranty.

23 Now, in your Daigle case Your Honor addressed this
24 conundrum of what does basis of the bargain mean and what
25 you said was, quote, if reliance isn't required, because it

1 wasn't clear in the Eighth Circuit, it must be at least a
2 representation that caused an express warranty to form. And
3 that's exactly what we agree with.

4 There has to be not just a representation is
5 automatically a warranty. Every ad we ever made, according
6 to the plaintiffs, is automatically a warranty. If you made
7 the statement, it's a warranty. And what we're saying is,
8 no, it has to tie to the transaction to become a warranty
9 for that product.

10 And so therefore we think the implied warranties
11 were either disclaimed or at the very least they didn't
12 become the basis of the bargain without further pleading of
13 some facts that tie a particular advertisement or
14 advertisements to any of these plaintiffs' purchases.

15 So now going back to both the formal and informal
16 warranties, we have an additional argument that there was
17 lack of presuit notice, that they had to put the defendant
18 on notice that they were going to sue them for breach of any
19 of the express warranties. And we only made this argument
20 for two states, Illinois and Minnesota.

21 For Illinois I think this is real straightforward.
22 Illinois is crystal clear you need presuit notice before you
23 can sue someone for breach of an express warranty. This
24 applies to the two Illinois plaintiffs that did not provide
25 presuit notice. One of them did, but two of them didn't,

1 Treece and Kostos, so we're only talking about those two
2 plaintiffs.

3 In response as to those two plaintiffs, the
4 plaintiffs argue that there is an exception in Illinois when
5 the defendant had actual knowledge of the defect, citing the
6 Stella case and the Connick case. Both those cases said
7 that. We don't dispute that's a valid exception if the
8 defendant had actual knowledge. However, the Connick case
9 is crystal clear -- it's the Illinois Supreme Court -- in
10 what actual knowledge means to create an exception to
11 presuit notice.

12 And the Connick case, in that case, which is
13 directly on point to our issue here, "It is
14 uncontroverted" -- this is a quote -- "uncontroverted that
15 Suzuki was aware of the safety concerns regarding the
16 Samurai." In other words, the defendant knew that its car
17 had complaints about defects. The court said that is not
18 enough. That's what plaintiffs are alleging here, we had
19 knowledge that there were complaints or defects with our
20 siding.

21 In Connick the court held, quote, "The notice of
22 the breach required is not of the facts, which the seller
23 presumably knows quite as well as, if not better than, the
24 buyer, but of buyer's claim that they constitute a breach.
25 Thus, even if a manufacturer is aware of problems with a

1 particular product line, the notice requirement is satisfied
2 only where the manufacturer is somehow apprised of the
3 trouble with the particular product purchased by a
4 particular plaintiff."

5 So exactly what the plaintiffs are alleging here,
6 is we had some knowledge of defects in our siding. The
7 Illinois Supreme Court has unequivocally stated that is not
8 enough.

9 Now, they do cite the Stella case, the only case
10 they cite that seems to imply that general knowledge is
11 enough, but Stella relied on the Connick case and the
12 Connick case says exactly the opposite.

13 So it's pretty clear, I think, at least on
14 Illinois, what they've alleged here is not even close to
15 being sufficient presuit notice as to those two plaintiffs
16 from Illinois that didn't provide presuit notice.

17 And in Minnesota they don't dispute that presuit
18 notice is required for the claim of Bowers. They say that
19 he did sufficiently provide -- or they did sufficiently
20 allege presuit notice because they said that Bowers reported
21 his concerns with the siding to Hardie. And this is a
22 closer call. This is one where the question is is that
23 sufficient.

24 And defendant's position is that just calling up
25 someone and saying, hey, I don't like your product or your

1 product is having these problems is what I think this Court
2 in Daigle in the District of Minnesota and the Drobnak vs.
3 Andersen Windows case said just isn't enough.

4 It's not notice that there's a problem. It's
5 notice that the problem constitutes a breach. In other
6 words, you are putting the defendant on notice that they've
7 got to work this out and try and negotiate a resolution.

8 So in our case any plaintiff that made a warranty
9 claim, we don't argue that that's not sufficient presuit
10 notice because they are putting us on notice not only of a
11 problem, but that they expect to be compensated for that
12 problem and it gives us the opportunity to try to resolve
13 this before they sue.

14 But just someone calling up on a hotline and
15 saying, oh, you know, we have some problems with your
16 product isn't the same thing as what presuit notice is and
17 so we think that the Minnesota claim of Bowers lacks presuit
18 notice as well.

19 And then finally, just real briefly on the formal
20 limited warranty itself. We only make one argument to
21 dismiss the formal limited warranty and that's just to
22 Bethel, the Ohio plaintiff, again, because that plaintiff
23 purchased the home 10 years after the siding was installed.

24 And our warranty on its express terms, if they are
25 going to enforce that particular formal limited warranty, it

1 only applies to the purchaser of the siding, the first owner
2 of the home -- the purchaser of the siding meaning the
3 lumberyard or the builder, whoever -- the first owner of the
4 home, the person who gets the siding on their home, and the
5 first transferee of the home.

6 They just haven't alleged compliance with the
7 warranty. They haven't alleged that they're a party to that
8 contract. They have to allege some facts. If they allege
9 it, if it's true, if they are the first transferee, the
10 first buyer from that original builder, we don't have a
11 claim to dismiss it, but they haven't alleged any facts and
12 we don't know and they should at least plead the existence
13 of a valid contract.

14 So let's go to the implied warranties. Now we are
15 going to go pretty quickly, the rest of the arguments I
16 have. The plaintiffs concede for all of the plaintiffs that
17 we move to dismiss on the implied warranty that there's no
18 privity.

19 We explain that in all the states except Minnesota
20 and Nevada privy is a strict requirement for breach of
21 implied warranty. They don't dispute that there's no
22 privity between the consumer and the manufacturer here --
23 there's many buyers in between -- of the siding and they
24 make no response to that also. They've conceded that
25 argument.

1 As to the disclaimer argument, we have already
2 talked about that. That applies to the express warranties
3 and the implied warranties.

4 Presuit notice as to Bowers, Treece, and Kostos,
5 same argument again. Presuit notice is required both for
6 express and implied warranties. So we either win that
7 argument for those three plaintiffs or we don't.

8 But there's a couple other arguments on implied
9 warranties that I will just run by quickly, the statute of
10 limitations and the statute of repose on the implied
11 warranties.

12 For Fenwick in Nevada and Dillingham in
13 California, they both filed in California federal court.
14 The statute of limitations is four years. There is no
15 discovery rule, that's not disputed here, for claims of
16 breach of implied warranty and that the statute of
17 limitations runs from the date of delivery. So their claims
18 would be expired.

19 And the plaintiffs argue that's an affirmative
20 defense statute of limitations, citing the Joyce case.
21 Well, the Joyce case from the Eighth Circuit said that the
22 complaint did not allege facts to determine when the cause
23 of action accrued.

24 Your Honor in a situation in the Streambend
25 Properties vs. Sexton Lofts case said when the facts on the

1 complaint do allege when the time accrued, the claim is time
2 barred, which is exactly what happened here.

3 Fenwick purchased his home, on the face of the
4 complaint, paragraph 65, six years before he sued in 2012,
5 while Dillingham's siding was installed seven years before
6 he sued in 2012. Both of them had a tender of delivery more
7 than four years and their claims are time barred.

8 Same thing applies to Kavianpour except it's
9 slightly different. That arises not under the statute of
10 limitations for breach of implied warranties, but a statute
11 of repose for all construction type cases.

12 And we cite the Cape Henry case out of Virginia,
13 which held specifically that a claim was time barred against
14 a manufacturer of siding more than five years after delivery
15 of the siding. It's a directly equivalent case. It's a
16 statute of repose, so there is no issue of tolling at all.

17 Nevertheless, the plaintiffs make an argument,
18 without citing any authority to support it, that because
19 Kavianpour filed a warranty claim, that that somehow tolled
20 the statute of limitations. And there's two problems with
21 that, or three problems.

22 One, there is no tolling for a statute of repose.
23 That's what a statute of repose is. But number two, the
24 filing of a warranty claim didn't toll anything. They could
25 have simply filed their lawsuit.

1 The statute that they cite that applies to
2 statutes of limitations and tolling of statutes of
3 limitations says if the defendant obstructs the filing of a
4 lawsuit, then the statute might be tolled. I don't have any
5 problem with that, but the fact that the plaintiff filed a
6 warranty claim and then we started working on it or
7 responding to it in no way tolls the filing of a lawsuit.

8 And, in fact, we gave the example of one of the
9 plaintiffs who actually filed their lawsuit just days after
10 filing their warranty claim. They obviously didn't believe
11 that somehow the filing of a warranty claim tolled it. They
12 went ahead and filed both, the warranty claim and the
13 lawsuit.

14 Let's turn to negligence. Negligence, again, real
15 short. We cited a string of cases why all these claims are
16 barred by the economic loss doctrine. We made this argument
17 for all plaintiffs except Bethel because Ohio has a very
18 unique economic loss doctrine and we did not think there was
19 a good-faith basis to argue the economic loss doctrine
20 applies in Ohio.

21 But as to all the others -- and the plaintiffs
22 don't dispute this at all. They didn't raise any argument
23 at all that the economic loss doctrine does not apply and so
24 they have conceded that and that gets rid of the negligence
25 claim.

1 So let's turn to declaratory or injunctive relief,
2 the last argument I will cover, and then I will turn it over
3 to my client -- or my co-counsel here. Pretty short here.
4 Our argument simply on the declaratory judgment claim, which
5 is Count IV, is its redundant.

6 In the Lancaster case out of Minnesota and the
7 Thunander case, both cases dismissed declaratory judgment
8 claims because they were simply redundant as an independent
9 claim of all the substantive claims.

10 And here it's directly redundant. The
11 declarations that they seek in Count IV are all specifically
12 copied out of other substantive allegations. For example,
13 paragraph 149(a), the first declaration they seek, whether
14 the siding is inherently defective, that's the core of every
15 other substantive claim. 149(b), the second declaration
16 they seek, whether defendant knew or had reason to know that
17 the siding was defective, again, the plaintiff alleges that
18 the defendant knew or should have known that its siding was
19 defective in every single one of its claims other than the
20 two warranty claims; and then as to those claims, the third
21 declaration, whether limitations in defendant's proposed
22 limited warranty are unconscionable or unenforceable, is
23 verbatim copied out of the breach of express warranty claim
24 and the breach of implied warranty claim. So every
25 declaration they seek is actually part of one of their other

1 counts, so it's completely redundant.

2 They argue that it's premature. They don't deny
3 that it's redundant. They just say it's premature to
4 dismiss at this stage because they may seek certification of
5 an injunctive or a declaratory relief claim. Well, that's
6 putting the cart before the horse. You've got to have a
7 valid claim in order to get a class certified on that claim.
8 So whether they seek certification of injunctive or
9 declaratory relief at another time will depend on what
10 claims they have.

11 As to injunctive relief, what's bizarre about that
12 part of the case is there is no request for injunctive
13 relief in Count IV. It's a bunch of declarations, whether
14 this should happen, whether this should happen. They don't
15 ask to enjoin anything, so we don't know what the injunction
16 is. So it should be dismissed for that reason alone.

17 We should be put on notice what are you trying to
18 enjoin, what are you trying to stop the defendant in the
19 future from doing. And the reason that's important is
20 because if the plaintiff isn't likely to be harmed in the
21 future, if their siding has already been damaged, they've
22 already replaced their siding, you shouldn't be getting
23 injunctive relief if they have already been taken care of.

24 And then finally we make the short classic
25 argument that you can't get any kind of equitable relief,

1 declaratory or injunctive relief, because they have a legal
2 remedy.

3 Each of these plaintiffs is suing us for damages
4 to replace -- the cost of replacing their siding and
5 installing new siding, and in that situation there's no need
6 for injunctive or declaratory relief because they will all
7 be made whole if they are given the money to pay for all
8 brand-new siding.

9 In fact, in the Thunander case this exact issue
10 came up about injunctive relief and declaratory relief for a
11 similar set of facts on another product and the court said
12 again your claim is about money damages, you don't need the
13 injunctive or declaratory relief, and dismissed it at the
14 pleading stage.

15 Aron -- well, let me stop there, unless Your Honor
16 had any questions at this stage.

17 THE COURT: Not at this stage. Thank you.

18 MR. MURPHY: Thank you.

19 MR. FRAKES: Good morning, Your Honor. Again, my
20 name is Aron Frakes. I'm going to be addressing, as
21 Mr. Murphy said, a number of different statutory claims that
22 the plaintiffs have asserted.

23 A couple of the arguments that I'm going to make
24 apply to multiple of the statutory claims, so my plan is to
25 start with those, and namely those are the lack of

1 particularity under Rule 9(b) and the fact that a consumer
2 fraud claim can't just be a disguised breach of contract
3 claim, it can't be based on the same allegations. My plan
4 would then be to after that go into the specific state
5 statutes that have additional arguments and go through each
6 of those. Obviously if Your Honor as I go wants me to do it
7 any differently, just let me know. I am happy to do it in
8 whatever order works best.

9 So turning to the first arguments that apply to
10 multiple of the statutory claims, there's a number of them,
11 so I thought I would start by just listing which ones it
12 applies to.

13 These arguments will apply to all of the
14 plaintiffs' claims under two different California statutes,
15 which are Counts V and VI of the consolidated complaint; to
16 Plaintiff Bowers' claims under the Minnesota Unlawful Trade
17 Practices Act and the Minnesota False Statement in
18 Advertising Act, which are Counts VII and VIII --

19 THE COURT: Right.

20 MR. FRAKES: -- to Plaintiffs Kostos, Treece, and
21 Brown, so those are the Illinois plaintiffs, under the
22 Illinois Consumer Fraud Act, which is Count IX; and to
23 Plaintiff Bethel's claims under the Ohio Consumer Sales
24 Practices Act and the Ohio Deceptive Trade Practices Act,
25 which are Counts XI and XII. So those are the counts that

1 these arguments will address.

2 Obviously there are differences between all of
3 those different state statutes, but two things at least are
4 consistent. One is that they all need to be pled with
5 particularity under Rule 9(b) and the second is you can't
6 turn a breach of contract claim into a consumer fraud claim
7 based on the same allegations.

8 All of the plaintiffs in this case have asserted
9 breach of warranty claims, as Mr. Murphy just went through,
10 and those claims are based both on the formal product
11 warranty and these advertisements that are out there. In
12 essence they say they were promised something by the
13 defendant and that that promise was breached.

14 The law is, as Your Honor may have seen from our
15 briefs, that you can't use those same breach of contract
16 allegations to then say that constitutes a fraud. Instead,
17 to state a consumer fraud claim under those different
18 statutes the plaintiff must allege something more, something
19 different than the breach of contract allegations. And our
20 argument is, based on the consolidated complaint, they have
21 not done that.

22 That leads us naturally into Rule 9(b), which
23 would explain how they would need to do that if they are
24 trying to claim something more and something different. If
25 a plaintiff is going to accuse a defendant of something as

1 serious as fraud, then they are required to state specific
2 particular facts demonstrating that fraud.

3 The consolidated complaint does not do that, but
4 here's what it does do. What it does do is it lists a
5 number of advertisements in their basic allegations and then
6 it's brought on behalf of 11 plaintiffs. That's it. Okay?

7 It does not say when the advertisements were made.
8 It does not say that any particular advertisement was in
9 existence at the time that any particular plaintiff's siding
10 was installed. It does not say that any particular one of
11 the 11 plaintiffs actually saw any particular advertisement
12 that's listed in the general allegations. It does not
13 allege what particular misrepresentations that each
14 plaintiff is claiming were made to them that impacted their
15 purchasing decision. Well, those are exactly the when, the
16 to whom, and the how that Rule 9(b) specifically requires.

17 I thought a couple of examples might help
18 illustrate my point on this and I will use the Illinois
19 Plaintiffs Treece and Kostos and the Ohio Plaintiff Bethel
20 as my examples.

21 And on Plaintiff Treece's home the siding was
22 installed in West Frankfort, Illinois, in late 2004.
23 Kostos' home in Yorkville, Illinois, the siding was
24 installed in 2006.

25 Now we compare that to Bethel, who is in Ohio.

1 And as Mr. Murphy walked through, the siding on his home was
2 installed back in 2001 when he did not own the home. He
3 didn't buy the house with the siding already installed on it
4 until 2011. Okay?

5 So we have Treece in 2004, we have Kostos several
6 years later in 2006 in a different part of the state of
7 Illinois -- those two towns I mentioned are about 300 miles
8 apart -- and then we have Bethel in a different state buying
9 a house seven years after Treece's siding was installed in
10 2004.

11 So which specific misrepresentations is Treece
12 claiming were made to him in 2004? Which specific
13 misrepresentations is Kostos claiming were made to him two
14 years later? Were any specific misrepresentations alleged
15 by Bethel to be made to him by James Hardie when he bought a
16 house in 2011 that had decade old siding on it? Well, we
17 don't know and we don't know because none of those facts are
18 alleged in the consolidated complaint, as we believe they
19 are required to be under Rule 9(b).

20 What we do know, however, for absolute certainty
21 is that not all of the named plaintiffs in this case saw and
22 were deceived by the advertisements that are referenced in
23 the consolidated complaint at the time of their transaction.

24 How do we know that? And the answer is because
25 Plaintiff Picht from Minnesota filed her suit first and we

1 had an opportunity to depose her and Ms. Picht testified
2 that other than seeing that the siding carried a 50-year
3 warranty, she did not read any of the advertisements alleged
4 in the consolidated complaint prior to her selection of the
5 siding on her home; and that's on page 68 of her deposition
6 transcript.

7 So ultimately what we have is we have 11 named
8 plaintiffs in this MDL proceeding and each of those 11
9 people must state a viable claim for relief on their own
10 behalf.

11 They cannot create some sort of a super plaintiff
12 by listing all of the plaintiffs over here and listing all
13 of the supposed representations over here without tying the
14 two together.

15 They are required to detail which allegedly
16 deceptive statements were made to which particular
17 plaintiff, when, in what manner, all of the things that
18 Rule 9(b) requires.

19 Before I move on to the specific state statutes,
20 one final comment on this issue. And I think for reasons
21 that are probably pretty telling about the plaintiffs'
22 affirmative misrepresentation claim, I anticipate that Your
23 Honor may hear today from plaintiffs' counsel that this is
24 really more of a fraudulent omissions case rather than an
25 affirmative fraud case.

1 And first of all, that's not what was pled in the
2 consolidated complaint, but in any event, that argument, if
3 it's made, just leads to dismissal for another reason and
4 that other reason is that a party cannot be held liable for
5 an omission unless it had a duty to speak and a duty to
6 speak only arises in limited circumstances, such as a
7 relationship of confidence. And none of those limited
8 circumstances are alleged in the complaint here.

9 There's a December 2012 decision that we cited in
10 our reply brief, Your Honor -- it came out basically the day
11 we filed our original motion -- called the Andersen Windows
12 case and this is from a district court in Ohio, so specific
13 to Bethel, it's from the proper jurisdiction.

14 And in that case the court nicely explains why
15 this avenue does not work for the plaintiffs if they choose
16 to go down it. It rejected precisely this argument, which
17 was actually made by some of the same attorneys that are
18 representing the plaintiffs in this case, on basically the
19 exact same allegations.

20 And what the court held with respect to the
21 plaintiff's fraudulent concealment or fraudulent omissions
22 claim is that, quote, (As read) "Plaintiff does not,
23 however, allege the requisite relationship between her and
24 Andersen that would have given rise to a duty to speak.
25 Accordingly, to the extent Allen relies solely on acts of

1 concealment by Andersen as the basis for her claim, the
2 claim is dismissed for plaintiff's failure to state a valid
3 claim for relief." That's square on with that argument in
4 this case, Your Honor.

5 So either way you end up at dismissal. It's
6 either that plaintiffs have not alleged proper affirmative
7 misrepresentations under Rule 9(b) or, if it's on the
8 fraudulent omissions side, there's no properly alleged duty
9 to speak, so no claim has been stated there either.

10 Next, Your Honor, I want to talk about Plaintiff
11 Bethel specifically. He's the plaintiff from Ohio and --

12 THE COURT: Right.

13 MR. FRAKES: -- he has asserted claims under three
14 different Ohio state statutes, the Ohio Product Liability
15 Act, the Ohio Consumer Sales Practices Act, and the Ohio
16 Deceptive Trade Practices Act. Each of those claims need to
17 be, in our view, dismissed for a number of reasons and I
18 thought I would just take them one by one if that meets with
19 Your Honor's approval.

20 THE COURT: Please.

21 MR. FRAKES: Count X, the Ohio Product Liability
22 Act, we asserted two separate reasons in addition to the one
23 I just went through about why that claim should be
24 dismissed.

25 The first is it does not apply because the

1 plaintiffs have not alleged -- that plaintiff has not
2 alleged damage to other property. And the second reason is
3 that the statute of repose in the Ohio Product Liability Act
4 applies to bar that claim.

5 So, first, the OPLA specifically defines what
6 constitutes a product liability claim and what it says --
7 and this is Section 2307.71. It lists a number of ways
8 where the Product Liability Act would apply.

9 And the only one that's potentially applicable
10 here is if there's an allegation of physical injury to
11 property other than the product in question. So specific to
12 our case, physical injury to property other than the siding
13 itself.

14 And there's no such allegation by Bethel in the
15 consolidated complaint. What Bethel argues and the response
16 brief confirmed is only that there could be injury to other
17 property besides the siding. And I think by saying it
18 "could be," that tacitly concedes that there has not been.

19 So the issue is is that good enough. And we cited
20 a number of cases on page 6 of our opening brief and page 8
21 of our reply brief confirming that the risk of future damage
22 is insufficient. Plaintiffs neither distinguish that case
23 law nor cite any cases to the contrary establishing that it
24 is sufficient.

25 So to sum that up, because there is no allegation

1 in the consolidated complaint of currently existing damage
2 to property other than the siding itself, Mr. Bethel has no
3 claim under the OPLA.

4 The second argument under the OPLA is even if it
5 were to apply, which we don't believe it does for the
6 reasons I just mentioned, the claim is filed too late. The
7 OPLA contains a 10-year statute of repose. That statute
8 begins to run on, quote, "the date that the product was
9 delivered to its first purchaser."

10 And here Bethel's own allegation is that the
11 siding was installed in 2001. So by that statute no claim
12 could have accrued against James Hardie more than 10 years
13 after that. So now we are looking at 2011. Bethel did not
14 sue until 2012, more than 10 years after delivery, so that
15 claim is time barred.

16 Bethel doesn't dispute any of that. Instead what
17 the plaintiffs argue is that that shouldn't apply because of
18 equitable estoppel and fraudulent concealment. And just
19 real quickly on both of those issues, I think they can be
20 quickly disposed of.

21 As to equitable estoppel, the doctrine is simply
22 misapplied. What equitable estoppel, relating to the
23 statute of limitations, is is that the defendant must have
24 done something affirmatively to specifically induce the
25 plaintiff not to file the lawsuit, to forego filing a

1 lawsuit within the limitations period.

2 And there's no such allegation of that here.
3 There's no allegation by Bethel of any specific
4 misrepresentation by the defendant to him, let alone one
5 that somehow specifically induced him not to file a lawsuit
6 during that time period.

7 The only other thing that is argued by the
8 plaintiffs, which I want to address quickly, is that the
9 defendant should have known that its siding was defective
10 and then concealed that information.

11 This exact issue was raised in the Andersen
12 Windows case that I mentioned a few minutes ago and was
13 specifically rejected by that court as not being sufficient.
14 Basically the same allegations, the same argument, and I
15 would suggest that it should be the same result.

16 The mere assertion that a defendant did not
17 disclose a purported problem with the product is not
18 something that is specific to cause the plaintiff to forego
19 a lawsuit and therefore cannot establish equitable estoppel
20 for purposes of the statute of limitation -- or statute of
21 repose in this instance.

22 Second issue, fraudulent concealment. Two
23 fundamental problems with that argument, which I can hit
24 very quickly because we've already discussed them.

25 Essentially the first one is for there to be

1 fraudulent concealment, there needs to be a duty to speak.
2 And for the same reasons I mentioned earlier there's no
3 allegations establishing a duty to speak.

4 And the second issue is that the plaintiffs
5 concede that fraudulent concealment, too, must be pled with
6 particularity under Rule 9(b). So for the same reasons that
7 I mentioned earlier, we don't think they have established
8 that pleading standard here.

9 The next count by Plaintiff Bethel is the Ohio
10 Consumer Sales Practices Act. And in addition to the 9(b)
11 argument, this claim is also barred by the two-year statute
12 of limitations. There's no dispute that the discovery rule
13 does not apply with respect to the Ohio Consumer Sales
14 Practices Act. The statute begins to run on the tender of
15 delivery.

16 The Andersen Windows case was again on this point
17 and held that that's an absolute statute of limitations
18 that's not subject to the discovery rule. So as applied
19 here, the delivery as alleged by the plaintiffs was in 2001.
20 The lawsuit wasn't filed until 2012. So it's far beyond the
21 two-year statute of limitations.

22 Because Plaintiff Bethel's individual claim under
23 the OCSPA should be dismissed for Rule 9(b) and the statute
24 of limitations, the Court really doesn't have to go further
25 with respect to this claim.

1 However, in addition to that, even if Plaintiff
2 Bethel had an individual claim, the purported class action
3 should be dismissed, those allegations should be stricken
4 from the complaint.

5 And the reason is that, as we laid out in our
6 briefs, the Ohio statute requires that a consumer cannot
7 bring a class action under that Act unless the violation is
8 substantially similar to a practice that was previously
9 declared to be deceptive and that has to either be through a
10 prior court decision or through a decision from the Ohio
11 Attorney General.

12 And I won't belabor it, but the complaint alleges
13 none of that authority, which it was required to do, and the
14 only authority cited in the response brief was the Teeters
15 Construction case from an Ohio municipal court. We
16 explained in detail in the reply brief why that decision
17 does not do that.

18 But to sum that up, it was a case brought against
19 a different type of entity, a construction contractor versus
20 a product manufacturer. It involved different products,
21 James Hardie siding was not involved in any way in that
22 decision, and it involved completely different tactics by
23 the construction contractor. It essentially related to a
24 bait and switch context in which there was a representation
25 that there would be a warranty over the installation of the

1 work for as long as the person owned the home and then when
2 the claim was made the contractor said, no, it's just a
3 one-year warranty, so it didn't fulfill the promise.

4 Those allegations are obviously very different.
5 That municipal court case certainly could not have put every
6 building or every product manufacturer on notice that their
7 product was defective or that their warranty was somehow
8 deceptive.

9 Next statute by Plaintiff Bethel, Your Honor, is
10 the Ohio Deceptive Trade Practices Act. I think we can
11 handle this one pretty quickly. One additional ground on
12 that one, which is that the Act simply does not apply to
13 consumers and so Plaintiff Bethel does not have standing to
14 sue under that Act.

15 This is not a blank slate, as the plaintiffs'
16 response brief seems to suggest. Rather the Ohio Court of
17 Appeals in 2006 specifically addressed this exact issue and
18 held in Dawson vs. Blockbuster, which is 2006 Ohio Appellate
19 Court 1138, that the statute does not apply to consumers.

20 Not surprisingly, federal district courts sitting
21 in diversity after that time have followed Dawson because
22 it's the highest Ohio court to speak to the issue and have
23 dismissed claims based on this lack of standing argument.

24 A couple of recent examples from within the last
25 year is the Porsche case from 2012, that's 2012 U.S.

1 District, Lexis 100180, and then again the Andersen Windows
2 case from last December that I have mentioned previously.

3 And just while I'm on that topic, the Porsche case
4 actually provides a really good road map in this case
5 generally. It involves many of the same claims that are
6 brought by the plaintiffs in this case and it actually
7 involves many of the same states as well, and the court goes
8 through a detailed analysis of the different state laws and
9 applies them to the claims that are at issue in this case
10 and were at issue in that case as well.

11 To summarize how this precedent has played out,
12 the plaintiffs cite a case from the federal district courts
13 in Ohio from 2004, which is called Bowers, in which that
14 court said, well, I think that the ODTPA can apply to
15 consumers. Two years later the Ohio intermediate appellate
16 court in 2006 in Dawson comes to the opposite conclusion.

17 And since that time at least one other Ohio state
18 court and at least three Ohio federal courts have all
19 declined to follow the 2004 Bowers decision that the
20 plaintiffs cite and have instead, I think for obvious
21 precedential reasons, followed the Dawson case from the Ohio
22 courts in 2006; and we cited each of those decisions in our
23 briefs.

24 Okay. So that takes care of the statutory claims
25 of Plaintiff Bethel. Moving quickly on to Plaintiff Bowers

1 from Minnesota, two statutory claims under two different
2 Minnesota acts that I mentioned at the outset.

3 Both of those claims are barred by the six-year
4 statute of limitations that applies. There's no dispute
5 that that six-year statute applies and there's no dispute
6 that the discovery rule does not apply to that statute.

7 Therefore, the clock began to run as of the date
8 of the sale. Per the plaintiffs' own complaint, that date
9 was in 2003 and the lawsuit was not filed until 2012, so
10 nine years later and after the expiration of the statute.

11 The only argument in response was the same
12 equitable estoppel and fraudulent concealment arguments
13 that I addressed previously. I won't repeat myself here,
14 but for the same reasons we think that those arguments
15 do not hold up.

16 Next plaintiff is Plaintiff Kavianpour. This
17 relates to Virginia law. And Kavianpour, who is a Virginia
18 resident, seeks to state causes of action under the Virginia
19 Consumer Protection Act. That is Count XIII and Count XIV
20 of the consolidated complaint. Both of those counts have
21 the same two fundamental problems.

22 The first is, again, a two-year statute of
23 limitations. The complaint alleges in this instance that
24 Plaintiff Kavianpour submitted a warranty claim to defendant
25 on April 15, 2010. It was obviously filed more than two

1 years later.

2 Our argument is by filing the warranty claim, that
3 certainly states that by that time at the latest he had
4 discovered the alleged defects in the product and he didn't
5 file timely.

6 Mr. Murphy addressed the only argument in response
7 to that, which is an alleged tolling of the statute by the
8 submission of the warranty claim, which we don't think is
9 supported by any legal authority.

10 The second argument as to the Consumer Protection
11 Act is that class relief is not allowed for the Virginia
12 Consumer Protection Act, and we cited a number of cases in
13 our brief holding as much.

14 What Kavianpour argues in response is that Federal
15 Rule 23 trumps the Virginia rule that class actions can't be
16 applied to the Consumer Protection Act and they cite the
17 Supreme Court's decision in Shady Grove vs. Allstate.

18 We address this in some detail on page 19 of our
19 reply brief, but I think I can maybe simplify it a little
20 bit further even than that. I don't think it's as
21 complicated as it seems at first blush.

22 In Justice Stevens' concurring opinion, which was
23 the crucial fifth vote in the Shady Grove case, he teaches
24 us that when a state rule is sufficiently interwoven with a
25 substantive right or remedy, then Rule 23 must give way and

1 it must give way under the Rules Enabling Act, 28 U.S.C.
2 Section 2072. And that rule or that enabling act says that
3 if the federal procedure would abridge, enlarge, or modify
4 the state's substantive rights or remedies, then it has to
5 give way.

6 And that's exactly what would be going on here.
7 The Virginia legislature has made a policy decision to not
8 give its residents the right to pursue class-wide relief. A
9 more strong substantive ruling is hard to conceive of. And
10 because Rule 23 would necessarily enlarge or modify that
11 substantive decision, it has to give way under the Rules
12 Enabling Act.

13 And on that point we cited a couple of cases, the
14 Whirlpool case and the Bearden case, which are subsequent to
15 Shady Grove, which draw that exact distinction not with
16 respect to the Virginia Consumer Protection Act
17 specifically, but addressing other arguments under other
18 states' laws, finding that those rules were substantive
19 rather than procedural and therefore Shady Grove did not
20 prevent application of the state rule.

21 Next one with Plaintiff Kavianpour -- and I think
22 I am very close to being done as to that plaintiff --
23 Count XV of the consolidated complaint was brought by
24 Plaintiff Kavianpour, but actually under the Florida
25 Deceptive and Unfair Trade Practices Act. We move to

1 dismiss that.

2 The plaintiffs in their response said that was a
3 clerical mistake, it was supposed to be brought by another
4 plaintiff. In my view the appropriate resolution of that is
5 either a dismissal, so there's a clear record of what was
6 actually brought, or a withdrawal of that claim.

7 I don't think just substituting in the other
8 plaintiff for this plaintiff would work for the same reasons
9 that I mentioned at the beginning, which is the lack of
10 particularity under Rule 9(b) and the fact that Florida,
11 like all the other states we've mentioned, prohibits
12 dressing a breach of contract claim up as a consumer fraud
13 claim.

14 Last acts, Your Honor, are the California acts.
15 There's two of them. All plaintiffs have tried to assert
16 claims under the California statutes and that is even though
17 only one of them, who is Dillingham, is actually a
18 California resident.

19 In addition to the 9(b) argument, there's two
20 other reasons why the claims of the nonresidents fail and
21 the first is that those non-Californian residents lack
22 standing under the California acts.

23 Not everyone in the nation gets to sue under these
24 California statutes. We explained in our brief that the
25 siding was installed in their home states, the transactions

1 occurred in their home states, not in California, and so
2 therefore those nonresident plaintiffs don't have standing.

3 The only argument that we received in response is
4 that the Court need not resolve choice of law issues
5 regarding these claims at this stage of the proceeding. I
6 think that argument just misses the point.

7 We're not talking about choice of law. We're
8 talking about standing. We're not talking about choice of
9 law with respect to putative class members, which is what
10 their cases deal with. We're talking about named plaintiffs
11 who have brought claims under this act and the question is
12 can they, and the answer to that question is they cannot for
13 the reasons that we explained in our brief.

14 The second reason that these statutory claims need
15 to be dismissed, and actually this only applies to one of
16 the statutes, the CLRA, is that the CLRA requires presuit
17 notice and an affidavit submitted with the complaint showing
18 that the action was filed in the proper forum.

19 The presuit notice argument, just so we're clear
20 on what it applies to and what it doesn't apply to, applies
21 to all of the plaintiffs except Plaintiff Swiencki because
22 that plaintiff did actually provide presuit notice.

23 The venue affidavit argument applies to all of the
24 plaintiffs, including Swiencki, because none of them
25 submitted that affidavit.

1 The plaintiffs concede that they did not comply
2 with the statutory requirements. There's no dispute about
3 what notice was or wasn't given. They concede that part of
4 it and instead what they argue is that those are just
5 procedural matters and they're not substantive and therefore
6 they don't apply to this federal court.

7 And in support of that argument they cite to a
8 single footnote from a single outlier case in Pennsylvania.
9 And I guess preliminarily the one case that they do cite
10 only relates to the venue affidavit, so they've cited no
11 case law with respect to the presuit notice argument.

12 And the numerous federal decisions that we've
13 cited belie the plaintiffs' argument. I'll give you just a
14 couple or few examples. There's the In re: Apple and AT&T
15 iPad case from the Northern District of California. That
16 was in 2011 and related to the venue affidavit. The In re:
17 Sony case from the Southern District of California is a 2010
18 case relating to the venue affidavit. The Laster case from
19 the Southern District of California, a presuit notice case.

20 Well, if these rules are just state procedural
21 rules, then it wouldn't make any sense for these federal
22 courts to be dismissing pursuant to those rules. They
23 wouldn't apply to those federal district courts either. But
24 they did.

25 And we urge that this Court should come to the

1 same resolution because the truth is that these requirements
2 are integrated parts of the statute and what they do is they
3 define preconditions and the circumstances in which a person
4 does or does not have a right to bring a claim.

5 I don't think the Court has to go any further than
6 the language of the CLRA itself. California Civil Code
7 Section 1782(b), for example, discusses the presuit notice
8 requirement and it provides that, quote, "no action for
9 damages may be maintained," and then it continues on, if
10 within the 30-day period the prospective defendant indicates
11 that it will make the appropriate correction that's asked
12 for by the presuit notice.

13 That's not a procedural rule. That's a
14 substantive existence or nonexistence of a right. The
15 California legislature has determined that for these
16 particular claims, CLRA claims, those prerequisites were
17 necessary for a right of action to exist.

18 Last issue, Your Honor. The only other argument
19 that plaintiffs make on that argument -- or on that issue is
20 that their failure to provide presuit notice should result
21 in a dismissal without prejudice rather than a dismissal
22 with prejudice. Not so under the case law.

23 The sole authority that they cite is a case called
24 Morgan vs. AT&T Wireless, but Morgan was addressing a
25 different situation. Morgan was addressing the situation in

1 which the plaintiff filed a complaint with injunctive relief
2 sought only and the CLRA does not require presuit notice for
3 that type of claim. Subsequent to that initial filing they
4 sought to amend the complaint, which they're allowed to do,
5 to add a claim for damages after they give presuit notice.

6 That's not the situation we have here. The
7 situation we have here is there was no preexisting initial
8 lawsuit seeking injunctive relief. They just jumped out and
9 sued for damages without giving any presuit notice.

10 So the question Your Honor may be asking is does
11 that distinction make any difference, and the answer is it
12 absolutely does. And this is exactly the distinction that
13 the court drew in 2011 in a case called Waller vs.
14 Hewlett-Packard, which we cited, and it discussed Morgan, it
15 distinguished Morgan on exactly that ground, and it
16 dismissed the claim with prejudice.

17 And the court explained the rationale for that,
18 which is to say that the sue first, give notice, and amend
19 later model that's being advanced by the plaintiffs in this
20 case would completely undermine the utility of having a
21 presuit notice requirement in the first place, which is to
22 allow the parties to see if they can resolve the claim
23 before any litigation is needed.

24 So for those reasons, Your Honor, we ask that the
25 California statutes be dismissed as well.

1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 Should we take a 10-minute break? Let's take a
4 10-minute break. All rise for the Court.

5 (Recess taken at 10:54 a.m.)

6 * * * * *

7 (11:05 a.m.)

8 **IN OPEN COURT**

9 **(JURY PRESENT)**

10 THE COURT: Let's continue. Good morning.

11 MR. SHELQUIST: Good morning, Your Honor. This
12 case concerns a man-made siding product that is the public
13 face of what is probably the most important investment most
14 people make, their homes. This product is failing in not
15 holding its color. It's also failing in not holding its
16 shape. It cracks. It gaps. It warps. In short, it looks
17 bad to the public.

18 Why is this case so important to these plaintiffs
19 and these class members? It's because this man-made product
20 was sold as a premium product at a premium price, because
21 what they were selling against was aluminum, steel, vinyl,
22 the various woods, redwood, cedar, pine, and even other
23 fiberboard products. And the frustration that's being
24 expressed by these plaintiffs is typified by the very
25 arguments that this Court read about and has now heard about

1 all morning.

2 What is undisputed is that in every single
3 advertisement, in all of the marketing materials, and even
4 in the very warranties that James Hardie has now tried to
5 put into the record, what is touted is a 50-year life of
6 this product.

7 We know that this product doesn't last 50 years.
8 We believe they never tested it to determine whether or not
9 it would last 50 years. And now what we hear is a bunch of
10 legal arguments telling these people that 50 years is not
11 50 years.

12 Even in the formal warranties there's no
13 disclaimer saying 50 years is irrelevant because if there's
14 a statute of repose in your state, 50 years is actually 10,
15 12, 15. There's no disclaimer, even in the formal warranty
16 that the people were supposed to pick off the Internet, that
17 a statute of limitations may make 50 years as short as one
18 year or two years. What you've heard this morning is even
19 when they make a warranty claim, the erosion of that 50-year
20 warranty doesn't cease.

21 I don't want to belabor the facts, so up front I
22 am going to just outline two sets of facts that I am going
23 to refer to. One set of facts, the basis of the bargain
24 sale representations. The other set of facts are the
25 California facts.

1 With regard to the basis of the bargain facts,
2 representations were made in written materials and they were
3 repeated to people when they were choosing which siding
4 product to put on their homes or to purchase, such as
5 engineered just for fill in the blank for the various types
6 of weather conditions, designed and engineered to defend
7 against rain, hail, fluctuations in humidity, hurricanes,
8 low maintenance, resist damage from snow and ice, resist
9 damage from freezing temperatures, and to prove it most of
10 our products come with a 50-year transferable warranty.

11 This was not simply sales puffery, Your Honor. It
12 was meant to ensure the builders and contractors and the
13 homeowners that they were purchasing a premium product at a
14 premium price.

15 Now, we hadn't brought facts in with regard to
16 Heidi Picht, who defense counsel correctly noted had gone
17 through some discovery, but even though she went to the
18 lumberyard and didn't see exactly every ad, the record will
19 show that she asked questions and it was repeated to her
20 living in northern Minnesota, oh, yes, this will withstand
21 our weather, the snow, ice that you experience in the
22 winter, and the extreme humidities that we experience in the
23 summer.

24 With regard to the California facts, defendant
25 correctly notes that they've moved their headquarters to

1 Illinois recently. During the heart of this class period
2 their headquarters were located in southern California. The
3 company address listed in the various materials that they've
4 put in the record is California.

5 The warranty claim address even through today is
6 California. And as of two years ago, when we were able to
7 go through some discovery, the warranty claims were still
8 being handled in southern California, where they were
9 directed to.

10 We believe that ads and other materials were
11 directed from southern California and, if we're bringing in
12 prior discovery, some of the agreements between James Hardie
13 and the distributors had California choice of law provisions
14 attached to them.

15 To give you a little bit of a scorecard
16 procedurally as I wade into some of these arguments, this is
17 a partial motion to dismiss. As we counted, the formal
18 express warranty claims had not been contravened for
19 California, Florida, Georgia, Nevada, and Virginia. The
20 defendants are arguing that formal warranty claims in the
21 other states, Minnesota, Illinois, and Ohio, are being
22 challenged and they're challenging *in toto* all of the
23 informal warranty claims, as that phrase has been used this
24 morning.

25 They are correct that the breach of implied

1 warranty Count II claims are not being contravened, so those
2 are no longer at issue. And the negligence Count III claims
3 are not being contravened, so those are no longer at issue.
4 As to the remaining claims, which is a hodgepodge of
5 consumer statutes, obviously they're challenging those on
6 multiple grounds.

7 The statement was made this morning that we're not
8 challenging choice of law. In fact, that's not true. In
9 plaintiffs' brief on pages 22 through 24 we challenge the
10 choice of law that's undertaken by the defendants.

11 We believe that it is a nuance test that changes
12 from state to state, looking at governmental interests in
13 some states, location of where the injury occurs in other
14 states, and a variety of factors that are mixed and matched
15 in all of the states that requires some sort of record.

16 And although defendants have provided a very
17 cursory analysis of a single line in a single case saying
18 that this is where the house was located, this is the choice
19 of law that governs because this is where the case was
20 filed, they never go through and explain why Minnesota law
21 as opposed to California law should apply or Illinois law as
22 opposed to California law should apply.

23 And as I get into my arguments we're going to
24 explain why they take so many swings at those California
25 statutes, because there is extraterritorial application of

1 those statutes in certain instances and those statutes are
2 going to be in play when we get to a choice of law analysis
3 that's fully briefed.

4 First, with regard to the breach of express
5 warranties, they are correct that we've got both formal and
6 informal breach claims.

7 Plaintiffs on the basis of the bargain facts have
8 gone through and pled what was said, who it was directed to,
9 and that it made a difference. We have gone through whether
10 you want to analyze it in terms of Daigle and the 50-year
11 term and some of the other resistance to weather conditions
12 becomes part of the basis of the bargain or whether what has
13 been told and said to these people becomes the bargain in
14 and of itself, that that is intention -- those statements
15 were intentionally directed to builders, contractors, and
16 homeowners, and that they did have their intended effect
17 upon an ordinary consumer who saw and heard those.

18 Now, we've touched briefly -- or I have touched
19 briefly on the disclaimer issue. The disclaimer is an
20 affirmative defense which they bear the burden of proving.
21 The complaint does not allege that the disclaimers were
22 shown to the plaintiffs prior to or during sale.

23 And, in fact, if I heard argument correctly this
24 morning, they admitted that in most cases, if not all the
25 cases, that's the truth because these homeowners weren't the

1 people that they were selling to. Instead I guess they're
2 saying that the disclaimers and the warranty were given to
3 the plaintiffs and class members because it's posted on the
4 Internet.

5 Well, this is a relatively long class period, Your
6 Honor, and the prevalence of the Internet isn't what it was
7 today. So putting it on the Internet may or may not have
8 provided notice.

9 That being said, it's ironic that posting
10 something on the Internet is supposed to be definitive
11 notice to these plaintiffs at the same time while the
12 company is disavowing having any notice of the problems with
13 its products, with the problems with its claims handling
14 procedures and everything else that was alleged when those
15 are posted on the Internet in blogs and other complaint
16 forums.

17 Plaintiffs believe that there also is an
18 unconscionability argument here. They never had an
19 opportunity to see, much less negotiate, these terms and
20 conditions.

21 And, again, if I understand the argument
22 correctly, the argument was that the first purchaser, the
23 lumberyard, the builder, whomever that may be, was supposed
24 to negotiate the terms of the warranty that was being passed
25 on via the Internet to the ultimate homeowner or user of

1 these products. There is no law in any jurisdiction that
2 supports that third-party beneficiary first seller duty to
3 negotiate on behalf of all downstream users.

4 In fact, we've cited cases that touch upon the
5 unconscionability issue, what the elements are. And, again,
6 when that issue is fully briefed on a full factual record,
7 we believe we're going to be able to show that the
8 disclaimers themselves are unconscionable. Again, 50 years
9 is not 50 years according to the contract, but nowhere does
10 it say statutes of limitations and statutes of repose are
11 going to shorten that time period.

12 The next issue that was raised by defendants is
13 the reliance issue. We have pled facts that are more
14 detailed than what survived in this case -- in the Daigle
15 case. In that case the representations were sufficient to
16 establish the basis of the bargain additive to or part of
17 the express warranty itself.

18 Minnesota and all jurisdictions follow the UCC and
19 the UCC explicitly states that reliance is not a part of a
20 breach of warranty claim. In the reply brief, when they
21 were taking extra words, the defendants in a footnote
22 mentioned that, while attacking Ohio law, the law is the
23 same in all jurisdictions. We agree with them that the law
24 is the same. We disagree with them that their attempt to
25 rewrite the UCC to include a reliance element is proper.

1 There are actually three attacks on presuit
2 notice. The two specific to the warranty are Minnesota and
3 Illinois. I'll address the attack on California when I get
4 to the consumer fraud CLRA portion that second counsel for
5 defendants mentioned.

6 With regard to Minnesota, they admit that the
7 complaint alleges that Mr. Bowers called James Hardie. He
8 told them he had a problem, he told them what the problem
9 was, and they told him in response that there's nothing
10 wrong and the product does not shrink.

11 In Daigle vs. Ford this Court recognized that
12 there is a low bar for determining whether or not sufficient
13 notice has been given to the defendant that the transaction
14 is troublesome.

15 The fact of the matter is it was reported to them
16 and whether or not they treated it as just somebody calling
17 the hotline or treated it as a warranty claim, discovery
18 will demonstrate how that line was drawn is irrelevant to
19 the fact that the notice provision is there to give the
20 defendant an opportunity to try to rectify the problem.

21 And in this case they blew him off. They didn't
22 rectify the problem then. They haven't rectified the
23 problem now. And that attitude by the warranty department
24 is part of the claims that are in the consolidated complaint
25 and that I will explain related to the consumer fraud

1 allegations when I get to those sections.

2 I think the other issue with regard to the
3 Minnesota Bowers claim is that Ms. Picht filed an original
4 complaint and then an amended complaint. That was the first
5 filed case in this court.

6 And following the amended complaint there was no
7 motion made on the pleadings. They didn't challenge the
8 sufficiency of her allegations. They didn't challenge
9 whether or not she had given adequate presuit notice or any
10 of that. They were able to move to summary judgment.

11 With regard to the overarching theme of this
12 morning's argument and defendant's briefing that they do not
13 have notice of what the claims are against them, much less
14 how to defend against them, is not true. It's belied by the
15 procedural history of this case, starting with Ms. Picht.

16 In Illinois counsel recognized that there's a
17 split of authority. We've cited the Stella case, the
18 564 F.2d 853 Northern District of Illinois case, which talks
19 about being put on notice that there is a problem with these
20 products.

21 Counsel today now wants to take that in a
22 different direction and say it's got to be about this
23 household, it has to be about this product. But, again,
24 that's intention with them saying something posted on the
25 Internet is good enough for the plaintiffs, but it's not

1 good enough for us. We believe that even under Illinois law
2 the requisite notice was given presuit and that this case
3 with regard to that plaintiff should proceed.

4 They've also raised an issue regarding the first
5 transferee. It was an affirmative defense raised against
6 Mr. Bethel in Ohio. They said that they can't conclude from
7 the pleadings that he's a first transferee. Well, the
8 pleadings don't say that he isn't.

9 We're somewhat betwixted by this because we're not
10 sure why they believe he isn't the first transferee. We've
11 looked at the records. It appears to us that he purchased
12 from the builder. He told us he purchased. We don't think
13 that this is going to be an issue. So to the extent it is
14 an issue, we don't think it should be resolved at the
15 pleadings stage, but it can be resolved during the course of
16 discovery.

17 As I mentioned to the Court, Counts II and III are
18 not being contested, so I am going to move to Count IV, the
19 declaratory and injunctive relief count. This is not
20 totally duplicative under the law of all the states that are
21 at issue here. It is a stand-alone count.

22 What the arguments here today and in the briefs of
23 defendants assume is that there is an adequate remedy at
24 law. We don't yet know that, Your Honor, because all of the
25 claims -- or many of the claims are being challenged here

1 today and I'm certain they're going to be challenged
2 throughout the course of this litigation.

3 We have an opportunity to keep the declaratory and
4 injunctive relief claims alive and make a choice at a time
5 when it's clear whether or not there is an adequate remedy
6 at law. And if there is, then we're going to have to
7 possibly pivot in one direction or the other, depending upon
8 what this Court does with the choice of law analysis.

9 Defendants say there can be no injunctive relief
10 without irreparable harm, which even if it's true doesn't
11 diminish the entitlement to the declaratory relief regarding
12 the rights of these plaintiffs under a warranty and the
13 obligations of the defendants to properly handle those
14 claims, adjust those claims, and pay on the claims without
15 adding any additional terms even to the formal warranty that
16 they want to enforce.

17 As an aside, they cite the Thunander case in this
18 jurisdiction, which was decided under Rule 9(b) standards
19 for the most part and did not address the declaratory and
20 injunctive relief available under any other law other than
21 Minnesota and Indiana and that was only in passing after the
22 complaint was dismissed for a lack of detail.

23 That brings me to the statutory consumer
24 protection claims, Counts V through XV. I am going to try
25 to group together the issues as best I can, but as you've

1 seen this morning, it's going to take a little bit of work
2 to unpack.

3 First, the general observations. We have stated
4 in our brief and the defendants have not contravened that
5 the purpose of consumer protection statutes is broad and
6 remedial. They are in place to protect consumers. They are
7 in place to make sure that consumers have a separate cause
8 of action that does not have to meet all of the standards,
9 some of the standards, and in some states any of the
10 standards to plead a common law fraud or misrepresentation
11 claim.

12 Second, the allegations that have been made under
13 the various statutes can be grouped into three broad
14 categories, fraud, fraudulent omissions, and the unfair
15 practices. It's been defined in states a little bit
16 differently as to what constitutes an unfair practice, but
17 it is a separate entity.

18 The arguments that we heard today and in the
19 briefs have dealt largely with the fraud and fraudulent
20 omissions. And although we disagree with their position, as
21 I will set out here again, the unfair practices prong really
22 has not been attacked by the defendants even in their
23 argument this morning.

24 Plaintiffs have provided all of the information at
25 their disposal as to what happened and why this product

1 warranty, formal or informal, or the promises that were made
2 have been substandard. The balance of the information is in
3 the defendant's hands.

4 And the case law from all of these states
5 recognized that even applying a Rule 9 standard, that
6 there's a limit to what the plaintiffs can do. And in many
7 respects we feel like we've exceeded those limits by
8 pleading facts in this case and yet we're still standing
9 here being told that it's not enough.

10 The facts that we've included in this complaint
11 are more than any of the facts that have been set forth in
12 just about every case that either the defendants or the
13 plaintiffs have cited to this Court. It's detailed. It's
14 factual.

15 Discovery is going forward with regard to the
16 individual plaintiffs. Most of the discovery responses were
17 served previously. They have that information in their
18 hands to the extent anything more is needed for them to
19 defend these claims now.

20 With regard to the California protection laws,
21 defendants say that California law cannot be applied to
22 nonresidents. It's a flat misstatement of the law. The
23 leading case is a case called Mazza, M-a-z-z-a, from the
24 Ninth Circuit, 666 F.3d 581, and on page 590 the court held
25 that California law may be applied extraterritorially if the

1 interests of other states are not found to outweigh
2 California's interest in having its law applied.

3 James Hardie has acknowledged that the California
4 choice of law itself is a governmental interest test. We
5 believe there's California facts to show that California
6 interests are being implicated here.

7 And, again, if we're able to prove those facts
8 with deposition testimony and the documentary evidence, some
9 of which this Court has seen from James Hardie's own
10 filings, that we're going to be able to have an argument
11 that California law applies to each and every single one of
12 these plaintiffs and may supersede the law of their states.

13 With regard to the statutes of limitations and
14 repose, I've touched upon those arguments. The fact that
15 it's out there is an affirmative representation. The fact
16 that they were not going to honor the 50 years because of
17 statutes of limitations and statutes of repose is an
18 omission.

19 As well as we have made allegations that at
20 certain points in time James Hardie tried to fix these
21 problems and continued to sell the product without telling
22 its contractors, builders, or ultimate customers that
23 something was wrong.

24 Instead they provided, as we've alleged, different
25 instructions on how this should be installed to contractors

1 in an attempt to either slow down or I guess, if we're going
2 to be very pointed about it, make sure that the failure
3 doesn't occur until the statutes of limitations or statutes
4 of repose had run. Under no circumstances have we alleged
5 that these products were going to last 50 years, and they
6 don't.

7 On the record before this Court the motion to
8 dismiss on statutes of limitations and statutes of repose
9 should be denied.

10 Specific to the Virginia plaintiff, Kavianpour,
11 plaintiffs for -- excuse me -- counsel for the defendants
12 correctly noted he filed a warranty claim. Whether or not
13 the law that we believe applies, that the person doesn't
14 have to immediately file a warranty claim and then turn
15 around and file a lawsuit applies, or whether their
16 bright-line rule you knew, you knew, you need to double
17 file, you can't rely on us applies we'll leave to the Court.
18 I think we have adequately briefed why we think that even as
19 to the Virginia plaintiff that claim survives the statute of
20 limitations attack.

21 There are the notice and class waiver provisions
22 under California and Virginia law that have been mentioned
23 today. We, in our brief, have gone through and demonstrated
24 why we think that these laws don't apply under the Erie
25 doctrine and specifically under the Shady Grove decision

1 that counsel argued this morning.

2 The cases that they cite in California,
3 specifically Sony, don't even mention the Erie doctrine and
4 we believe that Shady Grove should govern, that if there is
5 a procedural device within the statute itself that's not a
6 substantive part of the claim, which we don't believe it is
7 in either one of these states, that Rule 23 should govern
8 and those barriers should not be put up or countenanced by
9 this Court to maintain the actions going forward.

10 With regard to the Virginia class action
11 prohibition, defendants do not cite an actual Virginia
12 statute prohibiting class actions. We've looked. As far as
13 we know, there isn't one.

14 Instead defendants cite three cases, the Bearden
15 case, which on our reading doesn't even address Virginia
16 law; the In re Whirlpool case, which again on our reading
17 does not address Virginia law; and the Wade case, which does
18 not even address the Virginia consumer statute. Absent a
19 statute saying that there is a prohibition against class
20 actions, we don't even think you need to reach the Shady
21 Grove decision in Virginia.

22 In California and Illinois the argument has been
23 made in the briefs and again today that the identity of the
24 consumer fraud in warranty claims is perfect and it's just a
25 repackaging of a breach of warranty and breach of contract

1 claim. In fact, that is not the case.

2 We have further alleged that James Hardie
3 continued to sell the product knowing it was defective and
4 withheld information regarding those defects and took
5 affirmative measures to delay either the injury itself or
6 recognition of the injury by the ultimate homeowner or user.

7 We also allege that they concealed the warranty
8 terms and then sought to enforce them. And we've also
9 alleged the warranty process itself has unfairly denied
10 homeowners relief on their claims and, even when relief is
11 given, requires them to sign away rights that are not set
12 forth in any informal warranty and aren't even found in the
13 formal warranty that they want to enforce.

14 We think each and every one of these allegations
15 provides an independent basis for the consumer claims to go
16 forward in California and Illinois.

17 The next attack is on the CLRA, the Consumer Law
18 Remedy Act, in California, Civil Code 1750. And counsel
19 this morning read from that statute and it said if damages
20 are sought, then notice needs to be given. Well, even in
21 the consolidated complaint, paragraph 172 is seeking
22 injunctive and declaratory relief. It's not seeking
23 damages.

24 Second, James Hardie in its argument today
25 acknowledged that notice was given by one of the California

1 filers. There's nothing, no statute, no case law that
2 suggests that once, in a class action case, a notice has
3 been given, that each and every other class member or even
4 remaining plaintiffs need to give notice.

5 Third, if this Court disagrees that notice needed
6 to be given by all or even that the statute is applicable,
7 dismissal without prejudice is proper. We've cited the
8 Morgan vs. AT&T case, 99 Cal. Rptr. 3d 768. We believe
9 that's still good law.

10 The bottom line is nothing is going to change with
11 regard to California. The notice didn't cause James Hardie
12 to change its actions. The subsequent filing of the lawsuit
13 hasn't changed the actions of James Hardie. And there's
14 nothing to show that further notice by further plaintiffs or
15 all the class members is going to do anything to encourage
16 the defendants to correct the conduct.

17 The next item is the Illinois consumer fraud,
18 whether or not the deception has been properly pled. Again,
19 counsel recognized that there is a split of authority on
20 this.

21 We believe that we have alleged a uniform practice
22 and that it was defendant's intent for our plaintiffs and
23 other people in the chain to rely upon their statements and
24 conduct. There is a potential to deceive consumers. We
25 have alleged what was put out there, when, what was

1 understood.

2 And we believe that this reliance is a misreading
3 of the Illinois statute, which discusses as a result of
4 being the link between the conduct and the damage. Again,
5 the information was out there on the Internet, the very
6 Internet that supposedly presents the warranty terms to all
7 users. That should be a double-edged sword, Your Honor, and
8 the Illinois claims should survive on that as well.

9 Defendants under the Illinois Consumer Fraud Act
10 have also contravened the unfair conduct pleadings. There
11 is two prongs, deceptive practice, which I don't think is
12 being contravened in the papers and it didn't sound like it
13 was being contravened today, and then the unfair practice
14 prong of the Illinois statutes, which they very much put at
15 issue.

16 The elements for the unfair practice claim are
17 that it offends public policy and that it was immoral,
18 unethical, oppressive, or unscrupulous conduct which causes
19 substantial injury to consumers.

20 We have provided multiple allegations in our
21 complaint, starting with the fact that they never intended
22 to honor a 50-year representation of the product's life, all
23 the way through the warranty process and covering up the
24 changes that were being made to products. We believe that
25 under that definition of unfair practices, that our

1 allegations stand.

2 With regard to Florida, counsel is correct, there
3 was a clerical error in the heading. The allegations
4 recognized the Buchanan Trust as the Florida plaintiff. The
5 prior complaint, which included that, was filed by Buchanan
6 Trust. We apologize to the Court for not having caught that
7 in the heading.

8 We do not believe dismissal is the proper course
9 of action. We should be allowed to substitute the name
10 Buchanan Trust in the heading itself as it doesn't change
11 any of the substantive allegations.

12 The Ohio statute they've challenged on economic
13 loss grounds. Again, all reasonable inferences from the
14 pleadings need to be given to Mr. Bethel. We have alleged
15 that there is damage to something other than the product.
16 There is shrinking and gapping that was alleged.

17 And what happens is when that gapping takes place,
18 underlayment is exposed to UV light. It starts a
19 degradation process. When that gapping occurs, moisture is
20 allowed to seep in and you've got rain starting a
21 degradation process. You've also got the opportunity in
22 Ohio for the snow/ice melt issue. We believe that expert
23 testimony is going to be able to show that that is damage to
24 the other property.

25 We have pled what the issue is, what's happening.

1 We believe that that's enough at this stage of the
2 litigation and we should be allowed to move forward with
3 testimony from the plaintiff and, more importantly,
4 testimony from the expert as to what that damage is.

5 Defendants also attack the Ohio Consumer Sales
6 Practices Act, saying that their conduct was not previously
7 said to be deceptive by an attorney general.

8 We cited the Teeters case, which they're trying to
9 distinguish because it was a builder rather than a
10 manufacturer or something else. The case involved siding
11 where a person put siding on a structure that did not
12 perform as advertised. That's on all fours with this case.
13 To the extent that there was any doubt that that was the
14 law, that case ends the argument.

15 The only other argument they have is that that
16 declaration was not made prior to some of the sales in this
17 case. And, again, on this record we believe that that
18 should not be addressed without further briefing and the
19 opportunity to present evidence on that point.

20 To us it is not unremarkable that that was the law
21 at all times. It just might not have been stated for a
22 building product that's a siding product in this -- like it
23 was in this case.

24 Finally, Your Honor, under the Ohio Trade
25 Practices Act there's a lack of standing argument that was

1 made. Defendants simply cite arguments that assume that the
2 Ohio Trade Practices Act is identical to the Lanham Act, and
3 if you follow the line of cases you can see where that came
4 about.

5 Similar to the statute in Minnesota, when the
6 statutes were first passed and there was no state law on the
7 subject, there are footnotes dropped that you could look to
8 Lanham Act claims to fill in the jurisprudence, if you will,
9 interpreting the words and phrases of those statutes.

10 However, what hadn't been briefed in those cases
11 is the fact that the Lanham Act specifically requires
12 competition between the parties and the Ohio statute does
13 not. And, in fact, the Ohio revised code itself plainly
14 states that a plaintiff need not prove competition between
15 the parties.

16 James Hardie has not challenged that statutory
17 reading in its reply brief. They've done a lot of things
18 when they got extra words in their reply brief and have
19 changed their arguments. That's one argument that hasn't
20 changed.

21 Your Honor, we're standing before you again asking
22 you to uphold all of the claims that are still at issue here
23 and to enforce this 50-year promise and not allow legal
24 maneuvers or fine reading of cases to deprive these people
25 of a remedy when their product has failed woefully prior to

1 the 50-year promise.

2 Unless the Court has any questions, thank you,
3 Your Honor.

4 THE COURT: Thank you.

5 Briefly.

6 MR. MURPHY: Your Honor, I'll be extremely brief
7 because I know you have been listening a long time. I am
8 not going to debate all these various legal issues on
9 various state statutes at this juncture.

10 THE COURT: (Indicating.)

11 MR. MURPHY: I think that's covered by both
12 parties in that big stack.

13 THE COURT: (Indicating.)

14 MR. MURPHY: So let me just hit three highlights
15 real quick.

16 Number one, they make a big point how we are
17 trying to get away from our 50-year warranty using statutes
18 of limitations to cut short what we promised. That's
19 completely false.

20 We did not move to dismiss the breach of express
21 warranty claim in any way based on the statutes of
22 limitations. What we said was the statute of limitations
23 applies to some of the other claims, such as implied
24 warranties, which we did not make, or consumer fraud based
25 on advertisements outside our warranty. So this idea that

1 we're trying to screw the consumer out of their 50-year
2 warranty based on statute of limitations is completely
3 wrong.

4 Number two, they talk about how, you know, we're
5 arguing that the warranty is made on the Internet. And the
6 point I was making is simple. Whether they got it from the
7 Internet, whether they got it from their home builder, the
8 warranties are out there. They're made available to
9 consumers.

10 And in this case, in the situation where they're
11 trying to enforce that warranty, claiming that warranty is
12 valid and that we somehow breached it, they can't rely on
13 that warranty and the terms of that warranty to sue us, but
14 then at the same time say but don't read that little
15 language in the warranty that's in caps that disclaims other
16 warranties. So all we're saying is to the extent it's out
17 there, however they got it, they can't rely on it but then
18 throw out the disclaimer.

19 And then the last point I will just make is that
20 the -- I heard, and I wrote this down in quotes,
21 Mr. Shelquist say that the ads had the intended effect on
22 those who saw or heard them.

23 Well, our exact point is whether it's under a
24 consumer fraud claim that requires deception or reliance or
25 whether it's the basis of the bargain, we should be entitled

1 at the pleadings stage to know who those people are, which
2 of these plaintiffs claim they saw or heard one of these
3 ads.

4 Because we already went through this whole process
5 with Ms. Picht and took her deposition and went through all
6 the different statements that are the same ones here and she
7 said I didn't see, hear, or rely on any of them. So we've
8 got to go all the way through discovery to move for summary
9 judgment to knock those claims out.

10 It's a very simple issue to ask their clients tell
11 us -- if you're going to sue under the Illinois Consumer
12 Fraud Act, which requires deception, without a question the
13 law is settled on that, that an Illinois plaintiff should
14 say which ads purportedly deceived them, what was the basis
15 of their consumer fraud claim.

16 They bring all these claims separately by separate
17 plaintiffs and each plaintiff should identify which is the
18 misrepresentations that they claim were made to them, not
19 here's a bunch of claims, here's a bunch of representations,
20 here's a bunch of plaintiffs.

21 We just say there has to be something at the
22 pleading stage more and we shouldn't be forced to go through
23 depositions to find out they didn't see any of these ads and
24 these ads have nothing to do with anything.

25 And just as a closing matter, the Picht summary

1 judgment motion was based on the statute of limitations. We
2 didn't address that in the motions to dismiss, all these
3 other arguments, because we'll rest on that summary judgment
4 brief we previously filed.

5 THE COURT: Thank you.

6 MR. MURPHY: Thank you, Your Honor.

7 THE COURT: Anything further? If not, I'll take
8 everything under advisement. When is spring going to show
9 up here?

10 (Laughter.)

11 THE COURT: All right. If there's nothing
12 further, have a good weekend. It's March Madness, so enjoy
13 the games.

14 COUNSEL: Thank you, Your Honor.

15 (Court adjourned at 11:46 a.m.)

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19
20 I, Lori A. Simpson, certify that the foregoing is a
21 correct transcript from the record of proceedings in the
22 above-entitled matter.

23
24 Certified by: s/ Lori A. Simpson

25 Lori A. Simpson, RMR-CRR