

Blog Entry: Human v. Mouse

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What conceivable correlation exists between class actions and pests?

No, it's not that. At least not for Jeanne Steigerwald.

Hers was a story that started, she claimed, when she noticed "mice droppings in her pantry, kitchen, and garage." That propelled her to Walmart, where she dropped around \$25 for a three-pack of "Ultrasonic Pest Repellers."

The device's packaging label claimed that it would "repel mice, ants, spiders, and other pests by electromagnetic/ultrasonic power using wiring within the walls to emit a signal." But after using it as directed, Ms. Steigerwald determined that it didn't work. "The mice problem was unabated."

And so she sued, in the Northern District of Ohio, the entities that manufactured, marketed and distributed the device, asserting several causes of action, including fraud and breach of express warranty. She also sought to certify a plaintiff class consisting of "all persons who purchased one or more ultrasonic pest repellers manufactured and/or marketed by Defendants during the putative class period ... from April 16, 2011 to April 16, 2015."

The court granted her motion, finding the class ascertainable and that plaintiff satisfied Rule 23's numerosity, commonality, typicality, predominance and superiority requirements (the court's discussion of Sixth Circuit ascertainability law is particularly noteworthy). *A win for the humans.*

But only short-lived. On November 29, 2016, the court granted defendants' motions to exclude the testimony of her proffered expert (one Richard Kaae) and for summary judgment, and dismissed her case. The court's opinion methodically deconstructed her expert's opinions and in so doing, provided a textbook illustration of how to cross-examine an expert in a pest control case. For example, the court noted that Dr. Kaae had opined "that ultrasonic pest repellers are generally unable to repel cockroaches, ants, spiders and small vertebrates such as mice in any manner" and that, contrary to their labelling, are unable to "repel ants in field situations," or "repel randomly foraging ants seeking a food source," or "affect the activity of trail following ants," or "affect [the] long-term feeding activity of ants." But Dr. Kaae's anticipated testimony, the court found, could not withstand *Daubert*.

While his resume shows that Kaae has a PhD in pest management-entomology and has worked as a professor of pest management, he admitted at deposition that he had no prior experience with Bell+Howell Ultrasonic Pest Repellers or any other type of ultrasonic insect or rodent repellent devices. He never tested any such devices and when asked if any of the courses he taught involved the devices, he testified that "I am sure we talked about them." He testified that he has never been involved in the design of any repellent, been hired to test an ultrasonic repellent device, or written

about such a device. In sum, he admitted to having no experience with any ultrasonic insect or rodent repellent prior to this case.

And although Dr. Kaae's expert report claimed that his opinions were based, in part, on five scientific publications, he testified when deposed that he had read only one of them, and that none of the five dealt with the device at issue in this lawsuit - nor could he identify the devices the publications actually did study. And in a comment laden with philosophical profundities, the court observed that "Plaintiff's argument fails to directly address whether Kaae's methodology of relying on publications he did not read in reaching his opinion is accepted in the scientific community." Consider that for a moment. *"Relying on publications he did not read."* Sort of like pondering the concept of infinity....

All told, the court found that "Kaae's stated conclusion [was] not based upon sufficient data or the product of reliable principles." And to make matters worse, upon performing "field tests" for the purpose of preparing his report, he only tested the device on Argentine ants. He did not, as defendants pointed out, "test any other species of ant or mice, rats, cockroaches, or spiders."

So there we have it. In the ongoing struggle between humans and mice, mice won this round. But don't get complacent, rodents. We'll be back.

The case is *Steigerwald v. BHH, LLC*, United States District Court, Northern District of Ohio, case no. 1:15 CV 741.