

IN THE CIRCUIT COURT OF CHOCTAW COUNTY, ALABAMA

THOMAS A. FOSTER and LINDA E.
FOSTER, et al.,

Plaintiffs,

v.

ABTco, INC., ABT BUILDING PRODUCTS
CORP., ABITIBI-PRICE, INC. and ABITIBI-
PRICE CORP.,

Defendants.

Civil Action No. CV95-151-M

ORDER AND JUDGMENT FINALLY
APPROVING SETTLEMENT

The Court granted preliminary approval of the national class action settlement in this case on May 25, 2000. Plaintiffs and Defendants now jointly move this Court, pursuant to Rule 23(e) of the Alabama Rules of Civil Procedure, for final approval of the class action settlement. The motion came on regularly for hearing before the Court on September 21, 2000, with all parties represented by counsel (the "Fairness Hearing"). The Court has reviewed the papers filed in connection with the motion, considered the evidence and argument of counsel presented at the Fairness Hearing, and reviewed and heard arguments from all objectors to the settlement. In addition, the Court previously has appointed Frank Wilson as Special Master to review the terms of the settlement and any related papers, meet with the parties as necessary, and report to the Court as to whether the settlement meets the requirements for approval.

This Final Approval Order and Judgment incorporates by reference the definitions in the proposed Settlement Agreement, a copy of which is attached as Exhibit A (referred to as the "Settlement Agreement" or "Settlement"). All capitalized terms used in this order that are defined in the Settlement Agreement shall have the same meanings as set forth in the Settlement Agreement.

NOW, THEREFORE, the Court having read and considered the preliminarily approved Settlement Agreement, the report submitted by Special Master Frank Wilson, the documents filed in connection with the motion, having heard the arguments of counsel and all objectors to the Settlement, and good cause appearing,

IT IS HEREBY ORDERED:

1. The Settlement Is Fair, Adequate And Reasonable

On the basis of the record before it, the Court finds that the Settlement is fair, adequate and reasonable and merits final approval pursuant to Alabama Rule of Civil Procedure 23(e) and *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995). The evidence in the record and presented at the Fairness Hearing satisfactorily answered the concerns expressed by objectors to the Settlement, and confirmed the findings and recommendations of Special Master Wilson in his report recommending preliminary approval of the Settlement. The Court now finds as follows:

(a) Settlement Terms. The settlement represents a fair compromise of disputed claims and, as the Special Master reported, provides Class Members with “a substantial portion of the damages that would be recovered if the case were successfully tried” (Special Master Report at 18). Class Members receive substantially more compensation under the Settlement than they are currently entitled to receive under the existing product warranty. Defendants estimate that under the warranty, ABT would pay claimants approximately \$11.4 million over the next 10 years, while the Settlement is projected to pay claimants at least \$31.8 million on claims made over the same period. (See Affidavit of Dr. Michael Sullivan ¶ 19) Special Master Wilson found that this number, offered in testimony by defendants’ economic expert, was “extremely conservative.” (Special Master Report at 18). Testimony submitted by class counsel supports that view and indicates that the value of the settlement to plaintiffs will be substantially higher. The proposed Settlement substantially fulfills the purposes and objectives of this action, and provides benefits to the Class, without the costs, risks, and delays of further litigation at the trial and appellate levels, and does not require a finding or admission of liability by Defendants;

(b) Likelihood of recovery/success. Class Members would face significant hurdles to recover any benefit in a litigation class. To recover, plaintiffs would need to prove each element of their pleaded claims. As Special Master Wilson found, “[d]efendants have substantial defenses.” (Special Master Report at 18) Evidence submitted by the defendants at the Fairness Hearing supports the proposition that ABT hardboard siding has demonstrated excellent product performance and that of the

approximately 2.2 million dwellings in the United States that have been built with ABT siding since 1970, over 95% have shown no sign of damage at all. (See Affidavit of Michael Sullivan ¶ 13) As noted by Special Master Wilson, defendants' evidence indicates that "during the entire thirty years that Defendants have been making hardboard siding, less than seven out of every 1,000 homes built with hardboard siding has resulted in a claim under the warranty." (Special Master Report at 18). Indeed, another Alabama court has found that ABT hardboard siding is not defective. (See Dec. 22, 1998 Order in *Oliver v. Watson Mobile Homes, Inc., et al.*, No. CV-96-0199 (Cir. Ct. Barbour Co., Ala., Clayton Div.));

(c) Future expense and likely duration of litigation. The Special Master found, and the Court agrees, that "further litigation of these issues would no doubt be complex, expensive and require many years to complete. Even if Plaintiffs were successful in getting a litigation class certified on the common issues (a considerable task, for, as the Defendants suggest, in a litigation context Defendants would raise the individual issues of causation involved in each class member's house), the Court would need to devise an acceptable method to handle individual issues of causation. One possibility would likely be some type of damage phase trial on an individual basis. Such a process could require extended litigation even if class members were grouped according to the defect on their home. (Special Master's Report at 18-19) The Special Master noted "most courts who have considered the issue in similar cases have declined to certify a class action" for the litigation, as opposed to the settlement, of claims by homeowners of defective siding (*id.* at 25 n.7). Thus, if these claims were litigated on an individual or classwide basis, "there would be tremendous expense to prepare the case and try it. Moreover, if litigated, attorneys' fees and expenses would reduce the payments to class members whereas under the settlement attorneys' fees are to be borne by the defendant(s)" as well as the administrative costs of the settlement (*id.* at 19). In contrast, the Settlement "provides the opportunity for members of the class with damaged siding to receive substantial cash payments (Special Master Recommendation No. 3) . . . without any proof that that siding was defective, that it was properly installed and maintained, or that they have a legal right to proceed against defendants" (Special Master Report at 13-

14). A settlement, on the other hand, obviates the management and logistical issues outlined;

(d) Presence of good faith/absence of collusion in settlement process.

The settlement negotiations were thorough and took place at arm's length. The parties negotiated the Settlement over a three year period, met numerous times and for many hours and even days, and exchanged several drafts before finalizing the Settlement. (See Affidavit of Stephen Grant ¶¶ 3-4) The parties have engaged in extensive discovery and have adequately developed the record to enable the Court to analyze intelligently the contested questions of fact in reviewing the Settlement for final approval. The Special Master investigated this issue thoroughly by reviewing the record and by meeting with counsel for several hours. He reported that "[i]t appears that virtually every word of every clause of the agreement was the result of hard fought negotiations. There is no evidence of any kind that this settlement is the product of collusion or improper conduct by counsel." (Special Master Report at 20). The evidence submitted by the parties at the Fairness Hearing confirms those conclusions and the Court hereby adopts them. No party or objector asserts any collusion;

The Special Master noted two specific examples to illustrate the adversarial intensity of the settlement negotiations, both of which are instructive. First, because defendants contend that virtually every type of damage observed on their products results from improper design, construction, installation or maintenance (and not an inherent product defect), they argued for several additional damage exclusions in the settlement agreement to cover these additional causation factors. In the end, however, to reach settlement defendants agreed to the four which are in the agreement (three of which are generally recognized as building code violations). Second, because they believe their siding performs well, defendants originally demanded that any cash payment under the Settlement be conditioned on proof that the homeowner had actually repaired the siding. That position, too, was compromised in the form of the existing provision that requires class members to provide proof of repair if they have requested an independent inspection before receiving the final 20% of their payment;

(e) Amount of discovery.

The parties engaged in extensive discovery, including site inspections, voluminous document productions, depositions of class representatives, defense representatives and expert witnesses, extensive field work and analysis. There is no question from the record that counsel were in a position to reach an informed compromise about the relative merits of their case;

(f) Recommendation and experience of counsel.

Counsel for each side are experienced class action counsel in construction product class action litigation. The Special Master noted that "Co-lead counsel recommending approval of this settlement include attorneys with extensive experience in the litigation, certification, settlement and trial of complex class actions and particularly construction materials cases." (Special Master Report at 2). The Court has no reservation that each party was well represented;

(g) Number of objectors and nature of objections. The Court has received a total of five objections so far, and has considered all of them, including those from objectors who lack standing because they are not owners of the product. The objections do not undermine this Court's finding that this Settlement is fair, adequate and reasonable. The objections received by the Court principally challenge the adequacy of the notice program and the determination of replacement costs under the Settlement (other objections are made to finer points of the settlement which the Court and Special Master find to be fair and the result of legitimate compromise on both sides). The Court finds that neither objection is persuasive. First, as discussed below, the Notice in this case easily satisfies Rule 23 since over 90% of Abitibi and ABTco owners were estimated to be reached by the media and direct mail campaign in this case. (See Affidavit of Jeanne Finegan ¶ 3.2) Second, the replacement cost figure is accurate and fair. R.S. Means is a leading publisher of construction cost information in the United States. (See Affidavit of Phillip R. Waier ¶ 5) The replacement cost figures under the Settlement are calculated by averaging the replacement costs by state for the cost of material costs, labor costs, equipment costs and contractors' mark-ups. (See *id.* at ¶¶ 10-11) Included in the estimates are the costs for removal and reinstallation of exterior accessories and fixtures, removal of existing siding and trim, clean-up and disposal of removed materials,

installation of new siding and trim, caulking, painting, and other equipment needed to remove and replace damaged siding. (*See id.* at ¶ 18) Under the Settlement, the figures from R.S. Means will be adjusted annually. (*See* Settlement at § 1.48). In addition, the Court has granted the request of objectors Lillis, Royer and Evans to intervene for the purpose of seeking discovery and appearing to state their objections at the fairness hearing in this matter. To the extent the discovery requested by the objectors was reasonable and appropriate, the Court has granted the request and finds that Defendants and Class Counsel have provided the objectors with all of the requested information;"

(h) Given the extended discovery and arm's length negotiations in reaching this Settlement, the Court finds the presence of good faith and the absence of collusion. There are no grounds to doubt the fairness nor are there other obvious deficiencies in the Settlement, such as unduly preferential treatment of Class Representatives or of segments of the class, or excessive compensation for attorneys, and the Settlement is well within the range of final approval. "Considering the likelihood of success on the merits at trial, the available defenses and the cost and complexity of further litigation, the settlement falls well within a range of recovery that is fair, adequate and reasonable to all parties" (Special Master Recommendation No. 2).

2. The Settlement Meets The Requirements Of Alabama Rule Of Civil

Procedure 23

(a) The Settlement Class meets the numerosity requirement of Rule 23 because it consists of thousands of owners of structures with ABT Siding who could not practicably be joined in this or any other proceeding;

(b) The Settlement Class meets the commonality requirement of Rule 23 because all Class Members have common interest in recovery for potential or actual damage to their siding, that common issue is addressed by the Settlement, and divergent uncommon questions that arise in the litigation context no longer exist because the Settlement eliminates the need to determine fact-specific questions of entitlement and causation;

(c) The Settlement Class meets the typicality requirement of Rule 23 because each Class Member's claim will be determined by the application of an objective

methodology for reimbursement set forth by the Settlement. As the Special Master reported, "the payments to members of the settlement class making claims are based on objective definitions of damages and are computed using cost figures determined by a nationally recognized construction cost estimating firm which include all anticipated labor and materials charges associated with replacement" (Special Master Recommendation No. 4);

(d) The Settlement Class meets the adequacy requirement of Rule 23 because Class Counsel has vigorously prosecuted this action on behalf of the Class as evidence by the fundamental fairness of the Settlement, and there is no conflict between the named parties and the class they seek to represent since all Class Members allegedly suffer the same kind of injury and possess the same interests. Class counsel have been retained by and represent individual class members in numerous states with differing laws covering a wide geographic area, and those differences in laws are reflected in the various subclasses in the Second Amended Complaint. Further, the individual interests of Class Members who own site-built and mobile homes are adequately represented through the use of subclasses with separate representatives for each. In this connection, Class Counsel included a Special Counsel for the mobile home subclass;

(e) The Settlement Class meets the predominance requirement of Rule 23 because the Settlement resolves any divergent issues, and transforms the myriad contested, individual questions into straightforward questions common to all Class members: whether their ABT siding suffers damage, and the extent to which plaintiffs with damaged siding are compensated. Those common questions predominate over all the individual issues because Class Members proceed to the same claims process and are subject to the same compensation calculation, and any individual defenses specific to each Class Member are now waived;

(f) The Settlement Class meets the superiority requirement of Rule 23 because the burden of adjudicating thousands of claims and the expense of protracted litigation is replaced by a simple claims process at no expense to the Class Members or the court system;

(g) The Court finds that the Notice Program conducted by the Parties provided individual notice to all known Class Members and all Class Members who could be identified through reasonable efforts and constitutes the best notice practicable under the circumstances of this Action, meeting or exceeding all applicable requirements of Federal Rule of Civil Procedure 23, the United States Constitution (including the Due Process Clause), the Alabama Constitution, Alabama Rule of Civil Procedure 23, and any other applicable law. This finding is based on the overwhelming evidence of the adequacy of the notice program. The direct mail program involved mailing of over 28,000 claimant mailing packages. (*See Finegan Aff.* ¶ 8.1) The media campaign involved broad national notice through television and print media, regional and local newspapers, and the internet. (*See id.* at ¶¶ 9-11) The result: over 90 percent of Abitibi and ABTco owners are estimated to have been reached by the direct media and direct mail campaign. (*See id.* at ¶ 3.2) Further proof of the adequacy of the notice in this case is that ABTco received inquiries for long-form notices from every state in the union. (*See id.* at ¶ 2.1) Additionally, the ABTco toll-free 800 call in center has received over 23,000 inquiries for more information on the Settlement. (*See id.* at ¶ 2.2) The notice program in this case far exceeds all Rule 23 requirements.

3. The Court Therefore Grants Final Approval To The Settlement

(a) The Settlement Class is certified and the representative plaintiffs are approved as representatives of the Settlement Class;

(b) The Court finds that the Settlement is fair, adequate and reasonable, and satisfies each of the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Alabama Rules Of Civil Procedure, the Alabama Constitution, and any other applicable rules, and grants final approval to the Settlement. For the purpose of barring cross-complaints for implied indemnity or equitable contribution, the Court finds that this Settlement was reached in good faith;

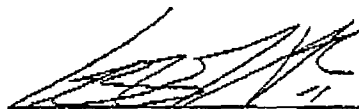
(c) The Court finds that the payment of \$7 million in attorneys fees and \$486,000 in costs (the latter subject to satisfactory substantiation to defendants' counsel) to Class Counsel does not in any way undermine the fairness of the Settlement. Attorneys' fees were not discussed by Class Counsel and counsel for ABT until after the

terms of the Settlement had been agreed to. (See Zovickian Aff. ¶ 11) Given Class Counsel's vigorous prosecution of this matter on behalf of the Class, the years of litigation, the hard-fought settlement, and the significant benefits to the class of the Settlement, the award of fees and costs is reasonable. Fees and expenses shall be paid within seven days after the Settlement Date in such manner as Plaintiffs' Co-Lead Counsel direct. Plaintiffs' Co-Lead Counsel shall allocate said fees and expenses to and among Plaintiffs' Class Counsel;

(d) This Final Approval Order and Judgment includes and applies to all members of the Settlement Class, and all such persons shall be bound by the Settlement and by all of the orders in this Action concerning the Settlement, whether favorable or unfavorable. The Court retains jurisdiction to consider all further applications arising out of or connected with the Settlement and to implement and enforce the Settlement. This Final Approval Order and Judgment in this case shall be entitled to full faith and credit under the United States Constitution in the courts of all the States and the United States.

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: September 21st, 2000.



J. Lee McPhearson
Circuit Judge

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