

Products Liability Law Daily Wrap Up, TOP STORY—SETTLEMENT AGREEMENTS—7th Cir.: Settlement agreement in case involving allegedly defective Pella windows rejected as “scandalous”, (Jun. 3, 2014)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

Characterizing as “scandalous” a settlement agreement between purchasers of casement windows and the company that manufactured the windows, the U.S. Court of Appeals for the Seventh Circuit rejected the settlement and ordered that both the class representatives and the class counsel be replaced (*Eubank v. Pella Corp.* (Appeals of Ron Pickering and Michael J. Schulz), June 2, 2014, Posner, R.).

Background. During the summer of 2006, a putative class action was filed on behalf of purchasers of Pella Corporation’s “ProLine Series” casement windows manufactured and sold between 1991 and 2006. The complaint, which stated claims for products liability and violations of state consumer protection laws, alleged that these windows had a design defect which allowed water to enter behind the window’s exterior aluminum cladding and cause damage to the window’s wooden frame and to the house itself. The district judge certified two separate classes: one for customers who had already replaced or repaired their defective windows, the other for those who had not. The latter class sought only declaratory relief and was nationwide, but the former sought damages and was limited to customers in six states, with a separate subclass for each state. Additionally, only one person was initially named class representative—Leonard E. Saltzman, whose son-in-law served as class counsel. Class counsel negotiated a settlement of the class action in the fall of 2011 and the district judge gave the settlement final approval in 2013. Eventually, four more class representatives were named; however these representatives were replaced because they did not support the settlement agreement.

Terms of the settlement. Although the settlement agreement directed Pella to pay \$11 million in attorneys’ fees to class counsel (based on the class representatives’ claim that the settlement was worth \$90 million to the class), it did not specify an amount of money to be received by the class members. Instead the settlement agreement specified a procedure by which class members could claim damages. In addition to the attorneys’ fee provision, the settlement agreement provided that any reduction in this fee would revert to Pella rather than be added to the compensation of the class members. The agreement did include incentive awards for the class representatives but limited the award to those representatives who supported the settlement. Finally, the settlement agreement ignored the certification of the two classes, purporting to bind a single nationwide class consisting of all owners of Pella ProLine windows containing the defect, regardless of whether the owners had already replaced or repaired the windows.

The Seventh Circuit also pointed out that the district court approved the settlement agreement before the deadline for filing claims, making no attempt to estimate how many claims were likely to be filed.

Conflict of interest. In rejecting the settlement, the Seventh Circuit stated that the district court should have disapproved it on multiple grounds beginning with the fact that it was improper for the lead class representative’s son-in-law to serve as lead class counsel. Class representatives are fiduciaries of the class members, and fiduciaries are not allowed to have conflicts of interest without the informed consent of their beneficiaries, which was not sought in this case. This relationship created a grave conflict of interest for the larger the fee award to class counsel, the better off the class representative’s daughter and son-in-law would be financially. Furthermore, the class counsel was embroiled in a disciplinary proceeding, which was in progress when the settlement agreement was negotiated, and it was in his interest—as opposed to the interest of the class—to get the settlement signed and approved before the disciplinary proceeding culminated in a sanction that might abrogate his right to share in the attorneys’ fee award. The Seventh Circuit cited another suspicious feature

of the settlement, which was a \$2 million advance of attorneys' fees to the lead counsel before notice of the settlement was sent to class members. Based on these factors, the Seventh Circuit concluded that the class counsel was unfit to represent the class.

Inadequacy of settlement terms. The court next attacked the terms of the settlement agreement finding that it was “stacked against the class” for a number of reasons. First, the value of the settlement was modest, being estimated at only \$22.5 million, which the Seventh Circuit described as an overestimate. Second, the settlement posed a number of obstacles to any owner of a defective window. Class members could choose only one of two options: (1) file a claim with Pella or (2) file a claim to submit to arbitration with Pella. Each method was subject to maximum damages per “structure” and some claimants were entitled only to coupons for discounts on future purchases—a warning sign of a questionable settlement. Furthermore, Pella was allowed to assert ten categories of defenses, including “natural weathering” and window purchasers’ failure to mitigate damages.

In addition to obstacles posed by the claims procedures, the claims forms were long and complex, requiring each claimant to submit a slew of arcane data. The notice sent to the class members was also complex, leading few class members even to attempt to file claims.

As a result of the complexity of the claims process and the restrictions that Pella was allowed to place on the settlement, the Seventh Circuit estimated that the class members’ recovery of their losses would be enormously reduced so that the class could not expect to receive more than \$8.5 million total from the settlement, which the Seventh Circuit also believed was too high an estimate.

The Seventh Circuit went on to outline the discrepancies in the value of the settlement and to observe that the notice of the settlement itself was incomplete and misleading before concluding that almost every danger sign in a class action settlement that district court judges should be on the lookout for was present in this case. In the Seventh Circuit’s opinion, the “settlement flunked the ‘fairness’ standard by the one-sidedness of its terms and the fatal conflicts of interest on the part of [the class representative] and [the class counsel].

The case numbers are [13-2091](#), [-2133](#), [-2126](#), [-2202](#).

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Companies: Pella Corp.; Pella Windows and Doors, Inc.

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