IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: CERTAINTEED FIBER CEMENT SIDING LITIGATION	:	**MDL DOCKET NO. 2270**
This Memorandum relates to:	:	
ALL CASES	:	

MEMORANDUM OF CERTAINTEED CORPORATION IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

After nearly three years of litigation that included significant discovery and extensive settlement negotiations, the parties have agreed upon a proposed settlement ("the Settlement").

This Litigation involves fiber cement siding ("Siding"), a product CertainTeed Corporation ("CertainTeed") has manufactured and sold since 1999. The Siding is an attractive, durable alternative to wood or vinyl siding, and is sold through distributors around the United States. CertainTeed gives building owners a limited warranty ("Limited Warranty") for the Siding. In the first two years after installation, should the Siding have a manufacturing defect, CertainTeed provides labor and replacement Siding to resolve the claim. Once the Siding has been installed for two years, the Limited Warranty provides for replacement Siding only and not for labor cost. CertainTeed has resolved claims by building owners under this Limited Warranty for many years. In essence, the Settlement improves on the Limited Warranty by providing for cash payments that include a component of labor costs to owners of homes and other buildings who can show that the Siding has manifested a defect.

CertainTeed requests that this Court (1) conditionally certify this case as a class action for settlement purposes only; (2) grant preliminary approval of the Settlement and set a date for a Final Approval Hearing; and (3) direct the parties to give notice of the Settlement to the Settlement Class Members.

II. FACTUAL BACKGROUND

CertainTeed provides this factual background to show the strength of its defenses to the claims asserted, and, therefore, why the Settlement is in the interest of the proposed Class.

A. CertainTeed's Warranty And Claims Handling

Homeowners represented by Class Counsel assert that the Siding is defective, and point to shrinkage and cracking of the Siding as evidence of a defect. Any cement-based product (or wood siding) will shrink by a small amount, and therefore CertainTeed does not warrant that the Siding will never shrink or crack. Rather, CertainTeed's Limited Warranty provides for replacement boards in the event of a "manufacturing defect." The Limited Warranty provides an exclusive remedy and therefore limits CertainTeed's potential liability.[1]

CertainTeed has a Consumer Services Department that handles warranty claims under the Limited Warranty. The usual course is for the property owner to complete a claim form and to submit photos of the problem. Of the claims submitted to CertainTeed, many are for shrinkage and cracking. CertainTeed generally accepts a claim where a gap develops between the butt ends of boards that is greater than 3/16". All cementitious products are subject to shrinkage based on moisture reduction or the drying process. CertainTeed therefore developed its standard to account for some initial shrinkage of the Siding. It is only when the boards shrink to create a gap greater than 3/16" that cracking and other problems might occur. (The parties adopted this 3/16" standard in the Settlement).

[1]Courts have held such provisions to be enforceable. *See, e.g., Powers v. Lycoming Engines*, 272 F.R.D. 414, 429 (E.D. Pa. 2011) ("Except for Mississippi and Louisiana, every state and the District of Columbia allow a seller to limit the remedies to repair or replacement . . . ."); *J & E Constr., Inc. v. Bobcat Enters., Inc.*, No. 07-235-JBT, 2008 U.S. Dist. LEXIS 65375, at *14-15 (E.D. Ky. 2008) (holding that U.C.C. § 2-719 "expressly allows parties to an agreement to limit the buyer's remedies to repair and replacement of nonconforming goods"); *Advanced Tubular Prods. v. Solar Atmospheres, Inc.*, 149 F. App'x 81, 85 (3d Cir. 2005) ("Pennsylvania courts have routinely upheld limited liability clauses as codified in [U.C.C. § 2-719]. . . . [L]imitations on liability are a fact of everyday business and commercial life." (quotation marks and citations omitted)).

B. The Siding Undergoes Extensive Testing Prior to Distribution

The Siding meets all ASTM and industry standards.[2] CertainTeed tests each lot of boards for modulus of rupture, thickness, density, water absorption, and moisture movement; it also conducts freeze/thaw tests. Any board that does not perform to industry and CertainTeed's standards is not distributed commercially. In addition, external auditing companies visit each plant to check CertainTeed's own testing. CertainTeed gave Class Counsel copies of the audit reports. These auditing companies conduct over 15 tests per ASTM and International Code Council ("ICC") acceptance criteria, including accelerated weathering, heat/rain resistance, and frost resistance. The ICC publishes the International Building Code and provides acceptance criteria for any product to be recognized for the Code.

CertainTeed has also conducted other tests of the Siding to determine the extent to which it is likely to shrink over time when properly installed. For example, CertainTeed constructed outdoor exposure walls on which boards are installed for observation and testing.

C. Problems with the Siding are Attributable to Poor Storage and Installation

The shrinking and cracking observed by some property owners are likely attributable to poor installation, for which CertainTeed has no responsibility. The Limited Warranty provides that CertainTeed warrants that the product will be free from manufacturing defect "when subject to normal and proper handling and use, and proper installation." It does not provide protection against any failure or damage caused by "improper transportation, handling, or storage," or "[i]mproper installation or installation not in accordance with CertainTeed's written instructions." The installation instructions state that "[f]ailure to comply with

[2] CertainTeed Siding is tested pursuant to the following ASTM standards: ASTM C1185 Standard Test Methods for Sampling and Testing Non-Asbestos Fiber-Cement Flat Sheet and ASTM C1186-Standard Specification for Flat Fiber-Cement Sheets. It also meets ICC Acceptance Criteria. ICC AC90 provides requirements for fiber cement testing to be recognized in ICC evaluation reports for the International Building Code.

CertainTeed installation instructions and/or applicable building codes may affect product performance and void product warranty." Almost all cases of undue shrinkage and related cracking can be attributed to the installation of wet boards – for example, boards stored without the protective cover on properly or boards left on the ground at the jobsite. In addition, several other installation problems cause shrinking and cracking, such as overdriven nails, face nailing, and improper board placement.

There is no discernible pattern in the warranty claims received by CertainTeed for the Siding. CertainTeed has examined the claims by plant, by year of installation, by product formula, and by state. (CertainTeed provided the data to Class Counsel). Many states have a low rate of claims, strongly supporting CertainTeed's position that there is no product defect.

Plaintiffs claim to have a theory of defect that applies to all class members, but CertainTeed is aware of no theory that can explain how all of the Siding made by CertainTeed at three separate plants over a twelve-year period has some common defect that manifests itself in several different ways but at substantially different rates in different states.

III. THE LITIGATION AND PROPOSED SETTLEMENT

A. The Status of the Litigation

This Litigation comprises twenty-four federal actions, all filed in or transferred to the Eastern District of Pennsylvania. Plaintiffs contend that the Siding is defective as manufactured and that CertainTeed has breached implied and express warranties by marketing and selling its Siding as free from defects. Plaintiffs also allege that CertainTeed was negligent in designing, manufacturing and selling defective Siding. As explained above, CertainTeed denies these allegations and asserts that the vast majority of the Siding is free of any defect. In addition, most problems with the Siding can be attributed to improper installation and storage.

Litigation against CertainTeed relating to the Siding has been largely confined to federal court, and the Judicial Panel on Multidistrict Litigation has transferred all such actions to MDL No. 2270. There are a few Siding cases pending in state court, but such cases have involved very little discovery. Most building-owners with a complaint about their Siding have either resolved their claims with CertainTeed or are hoping to participate in the program set forth in the Settlement Agreement.

B. Proposed Settlement

The proposed Settlement would resolve the claims of "all individuals and entities that own as of September 30, 2013 [the end of the class period] homes, residences, buildings, or other structures located in the United States, on which the Siding was installed on or before September 30, 2013." There is no ascertainability problem, because class members can be identified based on photographs of the installed Siding, inspection of their homes, or proof of purchase.

Settlement Class Members who have Eligible Claims will receive a payment in an amount to be determined based on the factors listed in the Settlement Agreement. The amount to be paid per claimant depends upon a number of factors such as (1) the extent of Qualifying Damage and (2) the date of the Siding's installation. The value of the Siding with Qualifying Damage for which the Settlement Class Member is entitled to compensation will be calculated pursuant to RS Means, the leading supplier of construction cost information in North America. Claimants will receive an initial payment of 50% of the value of their claim, and potentially a second payment at the conclusion of the Claims Submission Period.

The Settlement has significant advantages to Settlement Class Members. For example, the Settlement Class Member will receive money to cover (in part) labor costs for removing and installing siding, and paint. Under the Limited Warranty, for installations over

two years old, claimants had the right to receive a prorated amount of replacement boards, but no compensation for labor or painting costs.

IV. LEGAL ARGUMENT

A. Standards Applicable to Preliminary Approval

When a court evaluates whether a proposed settlement should receive preliminary approval, "the Court is required to determine only whether 'the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.'" *Mehling* v. *New York Life Ins. Co.,* 246 F.R.D. 467, 472 (E.D. Pa. 2007) (quoting *Thomas v. NCO Fin. Sys.,* No. 00-5118, 2002 U.S. Dist. LEXIS 14157, at *14 (E.D. Pa. July 31, 2002)).

At the preliminary approval stage, the Court '"need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute.'" *Id.* (quoting *Thomas*, 2002 U.S. Dist. LEXIS 14157, at *14). Instead, the "common inquiry is whether the proposed settlement is the result of 'arms-length negotiations.'" *Id.; Thomas,* 2002 U.S. Dist. LEXIS 14157, at *15; *Tenuto v. Transworld Sys., Inc.,* No. 99-4228, 2001 U.S. Dist. LEXIS 17694, at *3, (E.D. Pa. Oct. 31, 2001).

Preliminary approval is the first of a two-stage process where the court determines whether the settlement appears to fall within the range of reasonableness and whether the proposed notice plan meets the requirements of due process. *See Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008); Manual for Complex Litigation, § 21.632 (4th ed. 2006). If a class has not yet been certified, the court must find that it can conditionally certify the settlement class. *See* Manual for Complex Litigation, § 21.632.

The decision to approve a proposed settlement is committed to the Court's sound discretion. "[A] presumption of fairness exists where a settlement has been negotiated at arm's length, discovery is sufficient, the settlement proponents are experienced in similar matters, and there are few objectors." *In re Philips/Magnavox TV Litig.*, No. 09-3072, 2012 U.S. Dist. LEXIS 67287, at *22-23, *30 (D.N.J. May 14, 2012) (noting that when a settlement is reached after meaningful discovery, arm's length negotiations, and an all-day mediation, "the maturity and correctness of the settlement become all the more apparent" (quoting *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 400 (D.N.J. 2006)); *Grier v. Chase Manhattan Auto. Fin. Co.*, No. 99-180, 2000 U.S. Dist. LEXIS 1339, at *11-12 (E.D. Pa. Feb. 16, 2000).

B. The Settlement Is Well Within the Range of Reasonableness

The parties exchanged information through formal and informal discovery, which included a large number of documents relating to the manufacture and testing of the Siding, and the auditing of the plants where the Siding is made. In addition, CertainTeed provided data on the claims submitted to it under its warranty program. Class Counsel also took depositions of two CertainTeed employees: Melissa Orr, the Quality Control Manager at the White City Plant, and Donald Cole, the Warranty Service Manager for Consumer Services.

The Settlement resulted from a two-day mediation with Judge Melinson, and subsequent discussions between the parties. These were arms-length negotiations between Plaintiffs' counsel and CertainTeed's counsel, and occasionally included CertainTeed's key executives in charge of the Siding business. As explained in the Factual Background, CertainTeed has very strong defenses to the Litigation and the Settlement provides significant benefits to Settlement Class Members. Therefore, the proposed Settlement is well within the range of reasonableness.

C. The Proposed Class Meets The Requirements For Conditional Certification

Settlement classes must meet the same requirements under Rule 23 as litigation classes, but courts must apply a "heightened standard" when certifying settlement classes to "ensure that class counsel has demonstrated sustained advocacy throughout the course of the proceedings and has protected the interests of all class members." *Alexander v. Wash. Mut. Inc.*, No. 07-4426, 2012 U.S. Dist. LEXIS 171606, at *8-9 (E.D. Pa. Dec. 4, 2012) (citing *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349-50 (3d Cir. 2010)).

CertainTeed presents here information showing that Class Counsel can meet the requirements of Rule 23, thereby allowing the Court to certify the class conditionally, subject to a final hearing at which the Court must apply a rigorous analysis. *See Alexander*, 2012 U.S. Dist. LEXIS 171606, at *7-8.[3]

1. Rule 23(a)

The Rule 23(a)(l) requirement of numerosity is plainly satisfied. CertainTeed does not know the exact number of buildings on which its Siding was installed, but a reasonable estimate is about 300,000 buildings. *See Alexander*, 2012 U.S. Dist. LEXIS 171606, at *10 ("While there is no precise number of putative class members that will ensure the numerosity requirement is met, a potential class exceeding forty members is generally considered sufficient.").

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. That is their claims must depend upon a common contention. . . . That common contention, moreover must be capable of classwide resolution . . . ." *Alexander*, 2012

[3] As set forth in the Settlement Agreement, CertainTeed reserves its position on class certification in the event the Settlement is not approved or is terminated for any reason.

U.S. Dist. LEXIS 171606, at *11 (internal citation and quotation marks omitted). Plaintiffs' theory is that the Siding suffers from a common defect that causes premature failure such as shrinkage and cracking, and that CertainTeed provided warranty protection so limited that it was inadequate to compensate the purchaser for the premature failure of the Siding.

"Typicality" requires that the Court evaluate whether the interests of the named plaintiffs are sufficiently aligned with those of the proposed class members. '"[F]actual differences will not render a claim atypical if the claim arises from the same . . . practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.'" *Beck v. Maximus, Inc.,* 457 F.3d 291, 296 (3d Cir. 2006) (quoting *Baby Neal v. Casey,* 43 F.3d 48, 58 (3d Cir. 1994)). Here, the named plaintiffs are homeowners who had the Siding installed on their homes in various states and at various times. In discovery, Class Counsel produced to CertainTeed the records of named plaintiffs (or CertainTeed had a claims file), and CertainTeed took the deposition of three named plaintiffs (Monique Orieux, and Mr. and Mrs. Hardig).

The requirement for adequacy of representation "encompasses two distinct inquiries designed to protect the interests of absentee class members: 'it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class.'"[4] *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.,* 418 F.3d 277, 303 (3d Cir. 2005) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 800 (3d Cir. 1995)). Even though some class representatives may have claims different from other class

[4] With respect to the qualifications of plaintiffs' counsel, CertainTeed does not contest counsel's long experience, high reputation, or the vigorousness with which they have represented their clients.

members, based on differences in the application of state law or on individual factual situations, adequacy of representation does not demand 100% uniformity among the class. Plaintiffs' counsel are a team of lawyers experienced in this type of litigation and have vigorously represented their clients.

2. Rule 23(b)(3)

In addition to showing that a class action meets Rule 23(a), plaintiffs must show that the proposed class is maintainable under Rule 23(b). Here, plaintiffs ask the Court to certify a class under Rule 23(b)(3), which provides in pertinent part:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if . . . .
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23. The principle criterion is "predominance", which tests whether "the proposed class 'is sufficiently cohesive to warrant adjudication by representation.'" *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 108 (D.N.J. 2012) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The mere presence of individual questions does not defeat certification for settlement purposes. *Id.*

The plaintiffs' theory of the case is that CertainTeed's conduct did not vary with regard to individual class members, and that each class member was harmed by the installation of Siding prone to fail. While CertainTeed takes a different view of the evidence, the plaintiffs

can meet the predominance requirement. *See First State Orthopedics v. Concentra, Inc.,* 534 F. Supp. 2d 500, 511 (E.D. Pa. 2007) (concluding that allegations of standardized misconduct applicable to all class members predominated over individual differences in rights and remedies applicable under state laws).

Rule 23(b)(3) also requires analysis of whether the class action is superior to individual litigation. The factors to take into account are the interest of the class members in controlling their own claims, the extent and nature of litigation already begun, and the desirability of concentrating litigation in one forum. *Alexander,* 2012 U.S. Dist. LEXIS 171606, at *16. In the context of settlement-only class certification, the Supreme Court has concluded that "manageability" is not a factor that courts need to consider:

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. *See* Fed. Rule Civ. Proc. 23(c), (d).

Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997).

This case involves a large number of small property damage claims with no personal injury component. Since the settlement provides an enhancement of compensation available to class members, the settlement represents a far more desirable outcome than individual litigation for the class members. When there is little benefit to be derived from individual claims, and individualized claims would waste judicial resources because each claim involves the same evidence, a class action is superior to individual claims. *See Alexander*, 2012

U.S. Dist. LEXIS 171606, at *17 ("A class action [in such case] promotes judicial economy, avoids inconsistency, and provides a single forum to resolve numerous common claims.").

In sum, Class Counsel can show that the requirements of Rule 23 are satisfied for purposes of conditionally certifying a settlement class.

D. The Court Should Direct Notice Of The Settlement As Set Forth In The Notice Program Agreed Upon By The Parties.

CertainTeed requests that the Court direct notice of the Settlement as set forth in the proposed notice program agreed upon by the parties. "[I]n a settlement class maintained under Rule 23(b)(3), class notice must meet the requirements of both Federal Rules of Civil Procedure 23(c)(2) and 23(e)." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.,* 226 F.R.D. 498, 517 (E.D. Pa. 2005); *see also Grunewald, M.D., et al.* v. *Kasperbauer, et al.*, 235 F.R.D. 599, 609 (E.D. Pa. 2006) ("[W]here the parties seek to simultaneously certify a settlement class and settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement).").

As to the content of the notice, Rule 23(c)(2)(B) requires that "[t]he notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). For notices relating to a proposed settlement, courts within the Third Circuit have interpreted Rule 23(e) to require that "notice of a proposed settlement must inform class members: (1) of the nature of the pending litigation; (2) of the

settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing." *In re Diet Drugs,* 226 F.R.D. at 517-18. "Although the 'notice need not be unduly specific ... the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it.'" *Bradburn Parent Teacher Store, Inc. v. 3M,* 513 F. Supp. 2d 322, 328 (E.D. Pa. 2007) (quoting *In re Diet Drugs,* 226 F.R.D. at 518). Review of the proposed Notices will show that they have been carefully crafted to comply with each of these requirements.

With respect to the particular media and scope of publication of the notices, under Rule 23(c)(2)(B), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Courts have consistently found that "first-class mail and publication regularly have been deemed adequate under . . . Rule 23(c)(2)[(B)]." *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 91 (3d Cir. 1985). Courts have also found individual notice coupled with dissemination via television broadcasts or the Internet to meet the requirements of Rule 23(c)(2)(B). *Boone v. City of Phila.*, 668 F. Supp. 2d 693, 709 (E.D. Pa. 2009) ("Because individual notices were sent to all identified class members and because the notice was widely disseminated through local publications and television broadcasts, the Court finds that the notice given meets the requirements of Rule 23(c)(2)(B).").

To ensure that the Notice Program for the proposed Settlement meets or exceeds these standards, Class Counsel has engaged BMC Group ("BMC") to design and implement a class action settlement notice program ("the Notice Program"). BMC uses statistical methodologies to estimate the probable reach of class action settlement notices, and it has

successfully developed and directed numerous national class action settlement notification programs throughout the United States. As described in greater detail in Plaintiffs' brief, the Notice Program meets the requirements of Rule 23.

CONCLUSION

For the foregoing reasons, CertainTeed respectfully requests that the Court enter an order substantially in the form of the proposed order attached to the parties' Settlement Agreement, certifying this case as a class action for settlement purposes only, preliminarily approving the Settlement, setting a Final Approval Hearing, and directing notice of the Settlement to the Settlement Class Members as set forth in Notice Program agreed upon by the parties.

Respectfully submitted,

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Dated: September 30, 2013

CERTIFICATE OF SERVICE

I, Anthony Vale, hereby certify that on September 30, 2013, a true and correct copy of the foregoing Memorandum In Support Of Plaintiffs' Motion For Preliminary Approval Of Class Action Settlement was electronically filed and served on all counsel of record who are deemed to have consented to electronic service.

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