

Judge: Evidence indicates class lawyers paid off

By: Fred Horlbeck February 9, 2009

A construction product-liability class action is moving forward after a state court said there was reason to believe the primary defendant engaged in misconduct with regard to claims that it allegedly paid off lawyers for class representatives.

Circuit Judge J. Mark Hayes denied a motion for summary judgment filed by defendant Dryvit Systems, which had argued that a 2005 settlement in a Tennessee class action against the company barred similar claims by South Carolina plaintiffs.

Judge Hayes ruled that there was evidence supporting the inference that the company "engaged in wrongful conduct" aimed at stifling the South Carolina class action in violation of Rule 23 of the S.C. Rules of Civil Procedure. In a recent order in *Treon et al. v. Dryvit Systems, Inc., et al.*, civil action No. 2002-CP-07-1377, the court said evidence also gave rise to an inference that the company sought individual settlements with class representatives and arranged bonus payments for class counsel.

Under Rule 23, class representatives should have no conflicts of interest with class members and should vigorously prosecute the suit on behalf of the class, the court said.

That class representatives breached the rule and that class counsel received \$600,000 in bonuses are among the claims in a related class action, *Tucker et al. v. Leath, Bouch & Crawford, LLP, et al.*, civil action No. 2008-CP-07-3145, which members of the South Carolina class action filed in August.

Their complaint: Encouraged by Dryvit, the class representatives allegedly abandoned the Treon suit, allowing the Tennessee case to reach its completion first and giving the company an argument that all South Carolina claims against it were barred under *res judicata*.

Citing Rule 23, the Tucker plaintiffs sued class representatives and class counsel for monetary and punitive damages for civil conspiracy, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and fraudulent concealment. A fifth claim asserting negligence targeted the attorneys only.

Lawyers for both sides either declined to comment on the cases or could not be reached by South Carolina Lawyers Weekly.

Judge Hayes' order and the Tucker complaint both mentioned bonus payments, with the judge saying there was a reasonable inference that Dryvit had "significant dealings with the named South Carolina class representatives and their attorneys."

"As a result, all individually filed cases with all the original class representatives were settled by September 2003 and bonus payments were made or arranged to be made to lawyers representing the class representatives," Judge Hayes said.

The Tucker plaintiffs asserted in their complaint that the defendants "participated in and facilitated the abandonment" of the class action "through a scheme wherein the original class attorneys were paid \$600,000 with a promise of an additional \$225,000 upon dismissal."

An amended complaint in Tucker named two law firms, five lawyers and six class representatives as defendants.

The Tennessee case, *Posey, et al. v. Dryvit Systems, Inc., et al.*, was settled in 2005. But whether Posey precluded the claims of S.C. plaintiffs, as Dryvit argued, was open to question, Judge Hayes said.

That was so, he said, because there were several issues of material fact:

- * Evidence supporting the inference that Dryvit "engaged in wrongful conduct" to stifle the South Carolina class action;
- * Evidence indicating that S.C. plaintiffs who opted out of the Tennessee class action properly established their own class action in Treon; and
- * Evidence that the Tennessee court had no jurisdiction to establish Posey as a nationwide settlement.

"A significant inference exists that in order to bolster the Posey settlement and undermine the viability of the South Carolina class action, Dryvit began their negotiations with the original class representatives to compromise and

attempt to fatally wound the South Carolina class by eliminating incentives for vigorous prosecution of the South Carolina class action," Judge Hayes wrote.

Background/B>

Posey got under way in 2002 amid plaintiffs' complaints about synthetic stucco manufactured by Dryvit for use as exterior cladding on homes. Judge Hayes' order noted that Dryvit had sold about a third of its products in the Carolinas.

But what started as a Tennessee state class action soon became a "putative" national class action, excluding North Carolina only, the judge said. Under an order from the Tennessee judge, class members, including South Carolina members, could either opt out of Posey by Sept. 3, 2002, or submit to the terms of its settlement.

Several South Carolina parties opted out, and a South Carolina court granted class certification in Cardamone et al. v. Dryvit Systems, Inc., later to become the Treon case.

Judge Hayes said the Cardamone action "sat dormant" for two years while the Posey case went forward and reached its conclusion in September 2005.

The judge said there was reason to believe that Dryvit "paid bonuses to class representatives and their lawyers" during those two years.

"Discovery strongly indicates that these bonus payments to the attorneys were, at least in part if not wholly, 'contingent' on a South Carolina judge dismissing the South Carolina case based on the preclusive effect of the Posey case," he said.

In September 2005, class members intervened, and the court allowed the substitution of two of them as class representatives, he said. The case then became Treon.

In its motion for summary judgment, Dryvit argued that Posey precluded the South Carolina claims because the Tennessee case had reached its final conclusion and because res judicata and the full-faith-and-credit doctrine had kicked in.

The new class representatives argued against the motion, saying the opt-out of the South Carolina class precluded the enforcement of Posey as a bar to the South Carolina claims. They also asserted that jurisdictional problems prevented Posey from precluding those claims and that Dryvit should be estopped from asserting Posey had any preclusive effect.

Dryvit said the opt-out was ineffective, that Posey was jurisdictionally sound and that its dealings with the original class representatives were proper.

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