

## Stucco class action proves sticky

By: Sharon McCloskey August 10, 2012

### Some homeowners now suing others, along with lawyers who settled case

What exactly was that \$825,000 for?

That's the question Court of Common Pleas Judge J. Mark Hayes III wants two Charleston law firms to answer at an October 1 hearing he's ordered them to attend.

Back in 2002, Leath Bouche & Crawford and Mullen Wylie acted as class counsel to South Carolina homeowners suing Rhode Island-based Dryvit Inc., the maker of synthetic stucco siding they said trapped water inside walls and caused moisture damage.

Years later, several of those homeowners accused the firms of taking sizable counsel fees — some \$825,000, according to the court — and leaving the class hanging out to dry. They sued both the firms for malpractice and the original plaintiffs for breach of fiduciary duty in Beaufort County.

That has left the original Dryvit class action pending in Beaufort County for close to ten years and forced Hayes — who is handling both that action and the two homeowner actions against the former plaintiffs and their counsel — to try to unravel events that took place both here and in courts in Tennessee.



And what he's learned has him troubled.

"The record in this case is substantial in size," Hayes said in the June order directing the attorneys and class representatives to appear on Oct. 1, as he considers whether to impose a constructive trust on fees and benefits they received from Dryvit for the benefit of the class.

"The vast majority of the record in this case, however, does not relate to the [underlying] product liability claim . . . but rather . . . to the use of a South Carolina Circuit Court judge's order granting class certification as a sword against a sister states' attempt to finalize a nationwide class action settlement, and the subsequent conduct of original class counsel and original class representatives."

Take the money and run?

In April 2002, Dryvit agreed to settle a class action pending in Tennessee on a nationwide basis. A state court there preliminarily approved the settlement and notice of the pending settlement was sent to affected homeowners across the country.

A handful of South Carolina homeowners objected to the settlement and filed a separate class action against Dryvit in Beaufort County in August of that year. Within a month, Judge Thomas Kemmerlin had certified a class of all affected South Carolina homeowners, effectively opting them out of the nationwide settlement class. The judge also directed counsel to serve notice of the action to other potential South Carolina class members. That didn't happen.

Instead, according to Hayes, class counsel used the South Carolina action as a bargaining chip in Tennessee. At first counsel told the court there that the entire state of South Carolina had opted out of the settlement.

Two months later though, after settling the original South Carolina plaintiffs' individual claims against Dryvit and negotiating a sizable counsel fee award for themselves — conditioned, Hayes suspected, upon their delivering a dismissal of the case here — they told the Tennessee court that South Carolina homeowners were now on board with the settlement.

Nobody bothered to tell that to the pending South Carolina class of affected homeowners or the South Carolina court, however. The action here languished for close to three years, according to Hayes, while counsel waited for their fee checks to arrive after the Tennessee settlement received final approval.

That happened in April 2005. Dryvit then moved to dismiss the South Carolina action, claiming that the final judgment in the Tennessee action barred any new claims.

After several hearings in which he learned about the settlements by the original class plaintiffs and the fees paid to their counsel, Hayes denied Dryvit's motion to dismiss in 2009.

He would not honor the Tennessee settlement, Hayes said, because he was concerned that Dryvit had effectively bought the final judgment there by settling with the original plaintiffs in South Carolina – and not the entire class — and suspected that their counsel had promised to deliver a dismissal of the South Carolina action in exchange for sizable counsel fees.

"This court is compelled to ascertain why fees of \$825,000 were promised to original class counsel, which the emails and other documents in the record say are conditioned upon the dismissal of this case," Hayes said in his recent order.

Breach of duty

Dryvit finally agreed to a settlement of the South Carolina action in June 2010, but the saga doesn't end there.

In 2008, the new class plaintiffs and other SC homeowners sued the original class representatives for breach of fiduciary duty, claiming that they put their personal interests ahead of the class, and original class counsel for legal malpractice. Motions to certify the classes in both actions have been stayed by Hayes, pending the Oct. 1 hearing.

M. Dawes Cooke, Jr., of Charleston, who represents the original class representatives, says his clients acted properly in settling claims against Dryvit and other defendants in cases that were pending in addition to the underlying class action.

"They had their own lawsuits individually before there even was a class action pending," he said. "When the class action was filed they were named class representatives, but they still had their individual cases pending against some defendants that weren't even a part of the class action. Dryvit was just one of them, and they didn't do anything to prejudice the class."

"What they're charged with in this case is having settled a class action without getting court approval, but they didn't settle a class action, they settled their individual cases," he added.

But what about original class counsel, who received hundreds of thousands of dollars in attorneys fees for a class action they seemingly abandoned?

Kent T. Stair of Charleston, who represents Leath Bouche and Crawford, did not respond to requests for comment, although he told the Beaufort Gazette that his clients "adamantly deny any wrongdoing and intend to vigorously defend themselves against all claims."

But Thomas Pendarvis, the Charleston attorney representing the homeowners, is confident his clients will prevail. "We look forward to the trial of these legal malpractice and breach of fiduciary duty cases at the earliest opportunity after Judge Hayes lifts the order temporarily imposing a stay," he said.

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