

11th Circ. Upholds Fee Award In Chinese Drywall MDL

By **Carolina Bolado**

Law360 (June 9, 2021, 8:34 PM EDT) -- The Eleventh Circuit ruled Wednesday that court-appointed class counsel in the defective Chinese drywall multidistrict litigation could receive 45% of the total fees paid to attorneys who negotiated settlements for 497 Florida plaintiffs because their work on the common case helped lead to the individual recoveries.

The appeals court said U.S. District Judge Marcia G. Cooke did not abuse her discretion when she awarded class counsel \$5.8 million of the more than \$40 million paid by Taishan Gypsum Co. Ltd. to end claims over shoddy drywall imported from China.

The class counsel includes firms Colson Hicks Eidson, Lief Cabraser Heimann & Bernstein LLP, Morgan & Morgan, Herman Herman & Katz LLC and Seeger Weiss LLP.

The Eleventh Circuit said that although the attorneys for the 497 plaintiffs had worked hard to get the deal, their work "did not exist in a vacuum."

"They benefited from the decade of foundational work that class counsel exerted in this groundbreaking MDL, which involved evasive defendants in China, complex jurisdictional challenges requiring two trips to the Fifth Circuit, decertification attempts and liability determinations," the appeals court said. "That class counsel has otherwise been compensated for this work does not prevent them from continuing to reap the rewards of their efforts."

The 497 plaintiffs were part of 1,734 Florida cases remanded in 2018 from the MDL in Louisiana to Judge Cooke in the Southern District of Florida for further proceedings.

Following the settlement with the 497 plaintiffs, class counsel said that much of their foundational work was used to secure the deals, entitling them to 20% of the total settlement. After a global settlement was approved in January 2020 between Taishan and the remaining class members, the class counsel amended their award request to 60% of the attorney fees paid out to the individual plaintiffs, according to the opinion.

In May 2020, Judge Cooke awarded them a 45% cut.

The counsel for the individual plaintiffs appealed the decision, arguing that common benefit fees are only appropriate when there is a common fund from which to award them. In this case, there is no common fund or judicial supervision of a fund, they said.

They also argued that class counsel have already been highly compensated for their common benefit work by the MDL court.

But the Eleventh Circuit said that particularly in complex litigation, courts have broad managerial power and discretion to award fees.

"The district court had control over the funds pursuant to the agreement of the parties to litigate common benefit fees in the SDFL and the actions taken by the court after the settlement agreement was first filed," the appeals court said. "Awarding a portion of these fees to class counsel was therefore within the district court's power."

The appeals court added that preventing appointed counsel from recovering fees when their work leads to settlements down the road would make it more difficult for courts to find competent lawyers to take on that work.

Jimmy Faircloth, who represents the attorneys who worked on the individual settlements, told Law360 the ruling conflicts with Eleventh Circuit precedent by allowing contractual attorney fees to be used as a fund for purposes of the common benefit doctrine.

"[The ruling] allows MDL authority to reach even deeper into the jurisdiction of a transferor court following a remand," Faircloth said. "This creates a slippery slope with negative consequences for the class action device."

Patrick Montoya, who represents the class counsel, said he was pleased the Eleventh Circuit affirmed Judge Cooke's "well-founded opinion recognizing class counsel's efforts in this decade-long, hard-fought case."

"The settlement obtained by class counsel was an unprecedented result against Chinese companies and the first of its kind in the United States," Montoya said. "Judge Cooke and the Eleventh Circuit prevented a group of splinter lawyers from doing an end-around and unfairly benefitting from the class counsel's monumental efforts and the excellent results obtained for class members by class counsel."

U.S. Circuit Judges Charles R. Wilson, Robin S. Rosenbaum and Frank M. Hull sat on the panel for the Eleventh Circuit.

The counsel for the individual plaintiffs are represented by Jimmy R. Faircloth Jr. and Mary Katherine Price of Faircloth Melton Sobel & Bash LLC.

The class counsel are represented by Richard J. Serpe of Law Offices of Richard J. Serpe PC, Patrick Shanana Montoya of Colson Hicks Eidson, Arnold Levin and Sandra L. Duggan of Levin Sedran & Berman LLP and Stephen J. Herman of Herman Herman & Katz LLC.

The case is *Amorin et al. v. Parker Waichman LLP et al.*, case number 20-12100, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Jill Coffey.

Update: This story has been updated to include comment from a representative for the class counsel.