No. 90878-8

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 44545-0-II)

LOUSIANA PACIFIC CORPORATION,

Petitioner,

v.

CANTERBURY APARTMENT HOMES, LLC,

Respondent.

CANTERBURY APARTMENT HOMES, LLC'S ANSWER TO MOTION TO EXTEND TIME TO FILE PETITION FOR REVIEW

GORDON THOMAS HONEYWELL LLP

Margaret Y. Archer, WSBA No. 21224
Attorneys for Respondent Canterbury
Apartment Homes, LLC

Suite 2100
1201 Pacific Avenue
Tacoma, WA 98401-1157
(253) 620-6500

[100099636]

IDENTITY OF ANSWERING PARTY

Respondent Canterbury Apartment Homes LLC ("Canterbury") respectfully submits this Answer opposing petitioner Louisiana Pacific Corporation's ("LP") request to extend the deadline to file a petition for Supreme Court review.

SUMMARY OF ARGUMENT AND REQUEST FOR RELIEF

Petitioner LP requests this Court to authorize late filing of its petition for review. Despite that RAP 18.6 unambiguously provides that a petition for review is not deemed filed upon mailing, but "must be received by the appellate court within the time period for filing," LP mailed its petition for review on the due date. LP does not deny that it failed to timely file its petition for review, but asks this Court to invoke RAP 18.8 to extend the filing deadline.

Such relief, however, may not be granted under RAP 18.8 unless LP demonstrates that the extension is warranted by "extraordinary circumstances" and necessary "to prevent a gross miscarriage of justice." LP has not met this high burden. The rule with regard to filing by mail is unambiguous and presents no reason for confusion. It appears that LP simply failed to consult the applicable rule before electing to file by mail.

Nor is the extension necessary to "prevent a gross miscarriage of justice." LP has had ample opportunity to present and litigate its claims

that the remedy stated on LP's Limited Warranty is exclusive and that the federal class settlement bars or restricts respondent Canterbury's damages. In fact, LP has presented its argument regarding the class settlement, without success, in three different forums. The argument was rejected by the United States District Court for the District of Oregon, by the Pierce County Superior Court and by Division II of the Washington Court of Appeals. In this case in particular, the stated policy of RAP 18.8 favoring finality of decisions outweighs the privilege of extending additional time to LP. Accordingly, Canterbury respectfully requests the Court to deny LP's motion to extend its appeal deadline and dismiss LP's appeal.

ARGUMENT OPPOSING EXTENSION

RAP 18.8(a) authorizes this Court to enlarge the time in which an act must be done in order to serve the ends of justice. But RAP 18.8(b) "severely restricts" an appellate court's authority to extend the time to file a request for appellate review. *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). "In contrast to the liberal application" it generally gives the Rules of Appellate Procedure, "RAP 18.8 expressly requires a narrow application." *Beckman v. State Dep't of Soc. & Health Services*, 102 Wn. App. 687, 693, 11 P.3d 313 (2000).

RAP 18.8(b) provides in relevant part:

> **(b) Restriction on Extension of Time.** The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section. ... (Bolding in original, underlining added.)

The phrase "extraordinary circumstances" as applied in RAP 18.8(b) was defined on *Reichelt v. Raymund Indus., Inc., supra.*[1] There, the Court of Appeals refused to extend the time for filing a notice of appeal that was filed 10 days late. The appellants sought an extension of time on the ground that one of the "two trial attorneys left the firm during the 30 days following entry of the judgment and that the firm's appellate attorney had an unusually heavy workload." *Reichelt*, 52 Wn. App. at 764. The court was unmoved. It defined "extraordinary circumstances" as "circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Id.* at 765 (emphasis added). "In such a case," the court explained, "the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent

---

[1] *Reichelt* has been described as the "leading case" on RAP 18.8(b), KARL B. TEGLAND, 3 WASHINGTON PRACTICE SERIES: RULES PRACTICE 497 (7th ed. 2011).

conduct." *Id.* at 765-66. After review of the record the court held that the appellants had not demonstrated such diligence. *Id.* at 766.

In so holding, the court observed that "[t]his rigorous test has rarely been satisfied in reported case law since the effective date of the Rules of Appellate Procedure on July 1, 1976," and that "[i]n each of those cases, the moving party actually filed the notice of appeal **within the 30-day period** but some aspect of the filing was challenged." *Id.* at 765 (citing *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (notice timely filed in wrong court); *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978) (notice timely filed without filing fee); *Structurals N.W., Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 714, 658 P.2d 679 (1983) (notice filed within 30 days of stipulated "amended" judgment)). *See also*, *Meyers v. Harris,* 82 Wn.2d 152, 155, 509 P.2d 656 (1973)(notice timely filed but filing fee was not timely paid). Notably, the court also concluded that "RAP 18.8(b) does **not** turn on prejudice to the responding party," reasoning that, "[i]f it did, there would rarely be a denial of a motion to extend time." *Reichelt,* 52 Wn. app. at 765 (emphasis added). It noted that "[m]ost respondents would be hard-pressed to show prejudice where the notice of appeal is filed late. Rather, the prejudice of granting such motions would be to the appellate system

and to litigants generally, who are entitled to an end to their day in court." *Id.* at 766 n.2.

Unlike in the cases cited in *Reichelt* and cited by LP in its motion, this is not a case in which the petition for review was filed within the 30-day deadline. "LP does not dispute that, under the Rules of Appellate Procedure, LP's Petition for Review was filed one day late." (Motion at p. 2.) Nor is this a case in which reasonable diligence was exercised. Extraordinary circumstances are not presented in this case; and LP does not qualify for an extension under RAP 18.8.

A. There is no evidentiary foundation to support LP's motion.

Significantly, LP does not present the Court with any sworn declarations or documentary evidence regarding the facts and circumstances leading to its decision to file the petition for review by mail on the due date. Instead, LP presents an unsworn recitation of facts that is devoid of detail and then unilaterally and summarily concludes that its own actions were reasonably diligent.

LP does not identify who from "counsel's office" called the Clerk's office, with whom he or she spoke at the Clerk's office and there is no indication that the Clerk's office was informed that the inquiry was made on the due date or that other methods of service (such as hand delivery) were or were not discussed. The unsworn recitation does not

advise who in "counsel's office" made the decision to file the petition by mail without further consulting the Rules of Appellate Procedure. Nor does the motion even indicate if a lawyer participated in or supervised the critical decision to file by mail in light of the certain fact that, if mailed on the due date, the petition could not and would not be received by the court until after the filing deadline expired.

LP seeks relief that may only be granted if "extraordinary circumstances" are established and necessarily requires a demonstration that LP's counsel was reasonably diligent and its late filing was due to excusable error beyond LP's control. LP cannot meet this burden without evidentiary support. LP's brief does not constitute evidence.

RAP 17.4(f) directs that all affidavits and other papers supporting a motion should be filed and served with the motion. LP failed to file any evidentiary foundation for its motion either in the form of sworn testimony or documentary evidence. This failure and the absence of evidence cannot be rectified in a reply and should result in denial of LP's extension motion.

B. Even accepting the unsworn recitation, LP has not established extraordinary circumstances or that an extension is necessary to prevent a gross miscarriage of justice.

RAP 13.4(a) provides that a party seeking Supreme Court review of a Court of Appeals' decision must file a petition for review within 30 days of the of the appellate court's decision. LP candidly admits that it did

not meet this filing deadline. Instead, LP claims there were extraordinary circumstances and that an extension is necessary to prevent a gross miscarriage of justice.

As explanation for its late filing, LP states in its motion:

- LP was confused with regard to whether the Court of Appeals would accept a petition for review for filing by electronic mail, since the Rules of Appellate Procedure do not specify what filings are authorized by electronic mail.
- LP thus inquired with the Clerk's office regarding whether a petition for review may be filed electronically.
- An unidentified Clerk's office staff member advised that the petition "should not be filed by electronic mail but by U.S. mail." (Motion at p. 2.)

Notably, LP does not claim that it informed the Clerk's office staff that its brief was due on the same date LP made its phone inquiry. Nor does LP offer any explanation why LP's counsel delayed their "effort to cure their misunderstanding regarding the proper method of filing"[2] until the due date. LP likewise does not claim that the Clerk's office advised that filing could not be accomplished through the traditional method of hand delivery, or that the Clerk's office discouraged such method of filing.

[2] Motion at p. 3.

Most importantly, while LP states that it consulted the Rules of Appellate Procedure with regard to authorization of electronic filing, LP does not claim that it consulted the RAPs with regard to filing by mail. Had it done so, LP would have obtained a clear answer.

RAP 18.6 sets forth the rules for the computation of time for calculating and complying with filing deadlines. With regard to filing pleadings by mail, RAP 18.6(c) provides:

> **(c) Filing by Mail.** Except as provided in GR 3.1, a brief authorized by Title 10 or Title 13 is timely filed if mailed to the appellate court within the time permitted for filing. Except as provided in GR 3.1,[3] any other paper, *including a petition for review*, is timely filed *only if it is received* by the appellate court within the time period for filing. (Bolding in original, underlining and italics added.)

RAP 18.6(c) thus explicitly and unambiguously provides that a petition for review is not deemed filed upon mailing, but only when actually received

[3] GR 3.1 addresses service and filing by an inmate confined in an institution. RAP 18.6(c) was amended in 2006 to add reference to GR 3.1 to address the rule articulated in *In re Personal Restraint of Carlstad*, 114 Wn. App. 447, 58 P.3d 301 (2002). In *Carlstad*, an incarcerated person attempted to file a personal restraint petition by delivering the petition to a prison official for mailing five days before the filing deadline. The petition was not received by the court, however, until one day after the filing deadline. The *Carlstad* court held that, despite the harsh result, the petition would not be deemed filed upon mailing. To do so, the court held, would be contrary to the express language in RAP 18.6(c) that "unambiguously" defined filing to preclude application of the mail box rule. *Id.* at 456. The court also found that the circumstances presented in that case did not warrant application of equitable tolling to excuse the late filing. *Id.* at 458. Following this decision, RAP 18.6 was modified to address the unique circumstance of filings by an incarcerated person and expressly authorize inmates to file by mail. But the express language in RAP 18.6(c) providing that a petition for review is timely filed only if received by the appellate court within the time permitted for filing remained unchanged. *See* History of RAP 18.6 set forth in KARL B. TEGLAND, 3 WASHINGTON PRACTICE SERIES: RULES PRACTICE 492-94 (7th ed. 2011).

by the court. In light of this clear instruction readily available in the Rules of Appellate Procedure, LP cannot credibly argue that it acted with reasonable diligence when it elected to mail its petition for review on the due date based exclusively on informal (and likely incomplete) inquiries rather than consulting the rules that govern the appeal.

RAP 18.6(c) is not a new rule; the express language advising that a petition for review is timely filed only if received by the appellate court has been included in the rule since its 2000 amendment. *See* History of RAP 18.6 set forth in KARL B. TEGLAND, 3 WASHINGTON PRACTICE SERIES: RULES PRACTICE 493 (7th ed. 2011). The issue presented in this motion could have been avoided by simply reading this now well-established rule. LP's failure to consult the rule that provided specific and unambiguous direction cannot satisfy any standard proffered for "reasonably diligent conduct" and certainly was not "due to excusable error or circumstances beyond the party's control." *Reichelt,* 52 Wn. App at 765.

LP's attempt to shift responsibility for its failure to the Clerk's office is not well taken. Again, even LP's unsworn recitation of the facts does not indicate that the Clerk's office was informed that LP deferred its inquiry to the due date. Indeed, filing by mail is permitted by the rules, provided that the petition for review is mailed sufficiently in advance to be

received by the deadline. There is no evidence that the Clerk's office specifically assured LP that the petition would be deemed timely filed if mailed on the due date. The unsworn recitation also does not indicate that the Clerk's office sought to dissuade LP from filing its petition through hand delivery in favor of filing by mail. Regardless, it is the responsibility of LP's counsel to review and analyze the rule specifically applicable to filing by mail. The Clerk's office is available to assist when feasible, but its staff is not charged with educating parties and their attorneys on the rules or to provide them with legal advice. Canterbury is aware of no legal authority that litigants and their attorneys are relieved of their responsibility to comply with court rules if they elect to forego review of the rules in favor of informal inquiries to the Clerk's office.

LP's counsel acknowledges that they made a mistake, but the mistake did not follow reasonable diligence because there was a failure to consult a clear and unambiguous rule. "Negligence, or the lack of 'reasonable diligence,' does not amount to 'extraordinary circumstances.'" *Beckman, supra,* 102 Wn. App. at 695 (citing *Shumway v. Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998); *Reichelt, supra,* 52 Wn. App. at 765-66; *State v. One 1977 Blue Ford Pick-Up Truck*, 447 A.2d 1226 (Me. 1982)).

C. The desirability of finality of the combined decisions by a federal court, a state superior court and a state court of appeals outweighs the requested extraordinary privilege to extend LP's appeal deadline.

Finally, LP asserts that an extension would favor the "desirability of finality of decisions" because it would allow LP the "opportunity to reinforce the finality of the nation-wide class action settlement agreement" which is at the foundation of its petition for review. (Motion at pp. 5-6. *See also* Petition at pp. 2-5, 9-15.) But LP has had ample opportunity to present and litigate its claim that the federal class settlement bars or restricts Canterbury's damages. In fact, LP has presented this argument, without success, in three different forums. The argument was rejected by the United States District Court for the District of Oregon,[4] by the Pierce County Superior Court and by Division II of the Washington Court of Appeals.

As it has from the time Canterbury first filed this lawsuit, LP again seeks refuge in the 1996 class settlement, which through 2002, barred some 800,000 purchasers from bringing suit and required that claims for LP's defective product be addressed through a specified settlement

[4] The U.S. District Court Judge Robert Jones presided over the LP class action when the settlement was approved in 1996 and also issued two orders specifically addressing Canterbury's lawsuit in 2012. The first order was issued on July 26, 2012 and is at CP 247-255; and the second order was issued shortly before the trial, on November 1, 2012 and is at CP 426-28. Both of Judge Jones' orders are described and addressed in Division II's opinion (*see* Opinion at pp. 5-6, 9-11) and are also attached to this Answer as Appendix A and B, respectively.

program. However, the class program ended on January 1, 2003. Thereafter class members were expressly authorized to make claims for defective LP siding under the warranty. (CP 249.) The class settlement neither interpreted nor modified LP's limited warranty; it simply reinstated it. Yet twice LP asked the federal court with exclusive jurisdiction to enforce the class settlement to intervene. It also asked the state trial court and court of appeals to apply the class settlement to limit Canterbury's remedies. Each time LP's request was denied.

On its first federal court motion, LP asserted all state court claims were released in the settlement. U. S. District Court Judge Robert Jones, the same judge that presided of the LP class action and approved the 1996 settlement, ruled that the warranty claim was not released. He ruled that the class settlement did not bar Canterbury from prosecuting its asserted breach of warranty claim in state court – which claim expressly disclosed that Canterbury sought replacement costs in excess of $900,000. (Appendix A at CP 251, 254-55.)

In its second motion, LP asserted all the arguments that it makes in its petition for review. LP argued, Washington law aside, the class settlement directs that the limited remedy stated in LP's warranty is exclusive and, by approving the class settlement, the federal court deemed the remedy adequate. LP claimed Canterbury was barred from seeking

UCC remedies in state court and was limited only to the remedy stated in LP's Limited Warranty. (CP 609, 615-23.) Judge Jones, the court with exclusive jurisdiction to interpret and enforce the class settlement, refused to intervene. Judge Jones ruled:

> The Washington state trial court is in the best position to interpret the warranty in light of Washington law, and make rulings concerning Canterbury's remedies and damages. (Emphasis added.)

(Appendix B at CP 427.) LP did not appeal either federal court decision.

Pierce County Superior Court Judge Edmond Murphy understood the federal court and acted in complete accord with Judge Jones unappealed ruling. Judge Murphy ruled:

> Judge Jones did rule in the November ruling just a few weeks before trial, that it was up to this Court to interpret the warranty in light of Washington law and to make rulings regarding the plaintiff's remedies and damages, which the Court has done..
>
> I don't find that there was anything in either the settlement agreement or in what Judge Jones has ruled that prohibits this Court from doing that.

(RP 981.)

Division II's decision was in accord with both the federal court and the Pierce County trial court decisions. It held that the class settlement did not specify the remedies available to a class member under the Limited Warranty. (Opinion at p. 10.) Division II also acknowledged and properly applied Judge Jones' decisions in its review of Judge Murphy's ruling:

> The federal court held that it "did not make any determination concerning Canterbury's damages, only the claims it could pursue," and the "Washington state trial court is in the best position to interpret the warranty in light of Washington law, and to make rulings concerning Canterbury's remedies and damages." CP at 109. Thus, the federal court did not conclude whether the remedy provided in the Limited Warranty is exclusive. Instead, the federal court ordered Canterbury to dismiss all of its claims against LP except it claim for breach of the Limited Warranty. It allowed the trial court discretion to interpret Washington law to determine the specific remedies and damages available under the Limited Warranty.

(Opinion at p. 11.)

From the beginning, LP has tried to hide behind the class settlement even though (1) it expressly reinstated LP's warranty, (2) it excluded warranty claims from the release, and (3) LP's position was rejected by the federal court with exclusive jurisdiction to enforce the class settlement. The U.S. District Court, the Pierce County trial court and Division II are all in accord. The class settlement did not interpret or modify the Limited Warranty and certainly did not correct its deficiencies under Washington law. Thereafter, both the state trial court and the state court of appeals applied Washington law to the plain language of LP's Limited Warranty and concluded that its stated remedy is not the sole and exclusive remedy available to Canterbury under that Warranty. In any event, the issue has been extensively litigated.

In addition to presenting its position to the federal court and the state trial court, LP exercised and fully prosecuted the appeal to Division II that it held as a matter of right. If this motion is denied, LP does not forfeit an appeal to which it ordinarily would be entitled, but only the opportunity to request permission to obtain even further review by this Court – permission that cannot be presumed will be granted.

LP has presented and extensively litigated its position – repeatedly and without success. Under the circumstances of this case, the desirability of finality of decisions – to include the decisions by three different courts – greatly outweighs LP's request for the extraordinary remedy to extend the time to file yet another appeal.

CONCLUSION

LP has failed to demonstrate extraordinary circumstances sufficient to excuse LP's failure timely file its petition for review. Nor has LP presented sound reason to abandon the preference for finality – especially in this case where the parties have had ample and fair opportunity to present and litigate their respective positions and the simple exercise of consulting the applicable rule would have informed LP that its filing would be deemed untimely. Waiver of the rules to allow even further review is unnecessary to avoid a gross miscarriage of justice.

Canterbury respectfully requests this Court to deny LP's motion for extension and to dismiss this appeal.

Dated this 19th day of November, 2014.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____
Margaret Y. Archer, WSBA No. 21224
Attorneys for Respondent Canterbury Apartment Homes LLC

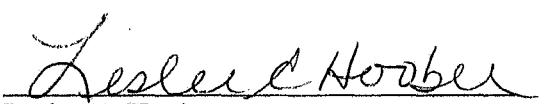
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on November 19, 2014 I did serve via email and U.S. Mail and email, true and correct copies of the foregoing by addressing and directing for delivery to the following:

Counsel for Appellant:

Julia E. Markley
PERKINS COIE LLP
1120 NW Couch Street, Tenth Floor
Portland, OR 97209-4128
JMarkley@perkinscoie.com

Kathleen M. O'Sullivan
Abha Khanna
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
KOSullivan@perkinscoie.com
AKhanna@perkinscoie.com



Leslee E. Hoober
Legal Assistant
Gordon Thomas Honeywell LLP

APPENDIX A

OPINION AND ORDER OF FEDERAL DISTRICT COURT JUDGE ROBERT JONES, JULY 26, 2012 (CP 247-255)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IN RE:	)	
	)	
LOUISIANA-PACIFIC INNER-SEAL SIDING LITIGATION	)	No. 3:95-cv-00879-JO (LEAD)
	)	
	)	OPINION AND ORDER
	)	

Warren J. Daheim
GORDON THOMAS HONEYWELL LLP
1201 Pacific Avenue, Suite 2100
P. O. Box 1157
Tacoma, WA 98401-1157

Attorneys for Class Member Canterbury Apartment Homes LLC

Julia E. Markley
PERKINS COIE
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128

Ashley A. Locke
PERKINS COIE
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Attorneys for Defendant Louisiana-Pacific Corporation

Christopher I. Brain
TOUSLEY BRAIN STEPHENS PLLC
700 Fifth Avenue, 56th Floor
AT&T Gateway Tower
Seattle, WA 98104-5056

Co-Lead Class Counsel

Christopher I. Brain
TOUSLEY BRAIN STEPHENS, PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101-1332

JONES, J:

L-P and Class Counsel have filed a joint motion to enforce the settlement agreement in this Inner-Seal Siding class action against Canterbury Apartment Homes LLC ("plaintiff"), asking the court to order plaintiff to take no further steps to prosecute any released claims against L-P and to dismiss with prejudice all claims plaintiff alleges in his Washington state court complaint, filed in November 2011. Plaintiff opposes the motion and moves to strike the declaration of Class Counsel Christopher Brain.

BACKGROUND

In October 1995, Magistrate Judge Jelderks preliminarily approved the class action settlement and an initial form of notice to class members. As defined in the preliminary settlement agreement, "Settlement Class" included "all Persons who have owned, own, or subsequently acquire Property on which Exterior Inner-Seal™ Siding has been installed prior to January 1, 1996 who are given notice in accordance with the Due Process Clause of the United States Constitution." Declaration of Ashley Locke ("Locke Decl."), Exhibit ("Exh.") G, p. 6. The only exclusions from the class were persons who opted out, and persons who were members of a Florida class action. Id. at pp. 6-7.

The initial notice informed recipients that:

> You may be a part of this Class if you: have owned, own, or subsequently acquire a home or structure in the United States on which exterior L-P Inner-Seal Siding was installed prior to January 1, 1996, and that siding is damaged or becomes damaged and you submit a claim prior to January 1, 2003.

Id. at p. 38. The notice explains who is excluded, i.e., those who opt out and those involved in the Florida litigation. The notice explains that a settlement class member shall be an "Eligible Claimant" entitled to the benefits of the settlement agreement "if he or she has incurred damage or incurs such damage to exterior L-P Inner-Seal Siding installed prior to January 1, 1996, and files a claim prior to January 1, 2003." Id. at p. 39.

At the fairness hearing I conducted in April 1996, I raised concerns about certain aspects of the settlement, as did participants at the hearing. As a result, on April 26, 1996, counsel signed an Amendment to Settlement Agreement, Exh. H to the Locke Decl. As relevant here, the amendment revised the definition of "Settled Claim" to exclude "claims made against L-P after the expiration of the term of the Settlement Agreement under the express terms of the L-P 25-year Limited Warranty issued with the product." Locke Decl., Exh. H, p. 2.

On April 22, 1996, I approved the settlement as amended, and on April 26, 1996, signed the Order, Final Judgment and Decree, and a Notice of Approval of Settlement. The Approval Notice described the amendments to the settlement agreement and was sent to persons who had not opted out of the original version; a similar notice was sent to persons who had opted out. See Declaration of Christopher Brain ("Brain Decl."), Exh. 2 (Notice of Approval and cover letter); and Declaration of Warren Daheim ("Daheim Decl."), Exh. G (supplemental notice to opt-outs). For members of the class who had not opted out, the opt out date was extended to May 27, 1996. Brain Decl., Exh. 2, p. 1.

Significant to the present controversy is the wording of the amendment to the settlement agreement concerning the 25-year warranty. The Notice of Approval explains, in a section titled "New Terms From the Last Notice," that

> In the original notice, you were informed that claims under the Settlement must be made by January 1, 2003, after which L-P had no obligations to replace or repair damaged siding.
>
> As a result of continuing negotiations, and after considering the views of Class Members, L-P has now agreed to reinstate the 25 year warranty after January 1, 2003. This means that if you do not make a claim by January 1, 2003, but your siding fails after January 1, 2003, you can still make a claim under the warranty. All claims other than warranty claims (excluding those for consequential damages as described in Paragraphs 5e and 5i) will be released if you stay in the Class. You should remember that most warranties issued for L-P Inner Seal Siding had a depreciation schedule so that by the year 2003 your recovery under the warranty will have depreciated.

Brain Decl., Exh. 2, p. 4 (emphasis added).

PLAINTIFF

Plaintiff owns a multi-structure apartment building that was built during 1994-1995. L-P Inner-Seal siding was installed on the structures in varying amounts and locations. All siding was installed before January 1, 1996.[1] Thus, plaintiff fits the definition of "Class Member" as set forth in the original notice, i.e., "all Persons who have owned, own, or subsequently acquire Property on which Exterior Inner-Seal™ Siding has been installed prior to January 1, 1996 . . . ." Locke Decl., Exh. G, p. 38. Plaintiff was not, however, an "Eligible Claimant," because it had not "incurred damage" and did not "incur[] such damage to exterior L-P Inner-Seal Siding

---

[1] Evidently the original owner was Firgrove Associates, which merged with plaintiff in December 1998. Ray Dally and his wife beneficially owned and still own majority interests in Firgrove and plaintiff.

installed prior to January 1, 1996" during the settlement period that ended January 1, 2003. Id. at 39 (emphasis added).

Plaintiff states that in 1995, its predecessor Firgrove purchased and properly installed L-P Inner-Seal siding. It did so knowing of publicity concerning potential problems with the siding, but "was assured by the distributor that LP had made product changes which cured the problems that brought about the class action." Plaintiff's Opposition, p. 4. According to plaintiff, the siding did not become damaged "at any point prior to January 1, 2003." Id. at 5.

Plaintiff's state court complaint, Exhibit A to the Locke Decl., alleges that plaintiff's siding, which falls within the parameters of the siding addressed in the class action, did not fail until after termination of the settlement period, that is, did not fail before January 1, 2003. It appears from documents of record that plaintiff first noticed early signs of deterioration in December 2008. See Daheim Decl., Exh. D.

Plaintiff made a claim under the L-P 25-year warranty. After inspection of all 24 buildings, calculation of the damaged area, and considering the depreciation schedule under the warranty, etc., L-P offered plaintiff $8,383.32. Locke Decl., Exh. 3. Plaintiff rejected the offer, and in September 2011, plaintiff began replacing all of the siding rather than selectively replacing it, incurring approximately $900,000 in replacement costs, which is the amount plaintiff seeks in damages.

Plaintiff filed his state court complaint on November 15, 2011. The complaint alleges three claims: breach of the written warranty; breach of warranties created by advertising and similar communications to the public; and violation of the Washington Consumer Protection Act.

THE PARTIES' ARGUMENTS

Plaintiff's argument is fairly straightforward. Plaintiff proposes that it reasonably believed it was not a class member due to the class description:

> The Settlement Class is currently composed of those who meet the following criteria:
>
> > You may be part of this Class if you: have owned, own, or subsequently acquire a home or structure in the United States on which exterior L-P Inner-Seal Siding was installed prior to January 1, 1996, **and** that siding is damaged or becomes damaged **and** you submit a claim prior to January 1, 2003.

"And" is emphasized in that paragraph because that is the focus of plaintiff's argument, that when it received the notice, the siding was intact and remained intact through January 1, 2003. See Plaintiff's Opposition, pp. 4-5.

Essentially, plaintiff asserts that the class action notice was unconstitutionally misleading in that it did not apprise potential class members "with sufficient clarity to enable them to make reasoned decisions about how to proceed." Id. at p. 8. Plaintiff also argues that even if it was bound by the class notice, any release of claims was not binding as plaintiff received no consideration. Finally, plaintiff contends, relying on Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), that any class settlement purporting to resolve the claims of potential, future plaintiffs who have suffered no injury at the time of class certification is invalid.

With respect to the Amchem case, which involved the class certification of asbestos-related claims for the purpose of settlement, it does not hold, as plaintiff suggests, that inclusion of plaintiffs who had not yet suffered injury is invalid. As L-P correctly observes:

> *Amchem* involved the class certification of asbestos-related claims for the purpose of settlement. 521 U.S. at 591. Plaintiff cites *Amchem* in arguing that the Claimant Notice here was inadequate, but *Amchem* actually centered on the scope

> of the class certification itself, not the notice provided. *Id.* at 606, 628. The *Amchem* court evaluated the scope of the class members because the *Amchem* class embraced "hundreds of thousands, perhaps millions, of individuals," *id.* at 597, including those exposed to asbestos or products containing asbestos that were traced back to any one or more of a number of different defendants, and those exposed to asbestos or products containing asbestos by virtue of a spouse's or household member's exposure, *id.* at 602.
>
> The *Amchem* class included members who already suffered physical injuries as well as members who had not manifested any personal injuries from asbestos. *Id.* at 603. The settlement outlined four types of categories of disease that those who had not yet manifested personal injuries could suffer: mesothelioma, lung cancer, other cancers, and non-malignant conditions. *Id.* The Supreme Court described the significant factual differences in the class members and their injuries: "In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry." *Id.* at 609, 624 (quotation marks and citation omitted). It was against this backdrop that the Court evaluated the proposed class certification for settlement purposes, finding that the "disparate questions" in each *Amchem* class member's case rendered the class certification unable to sufficiently benefit each class member. *Id.* at 624 (finding commonality and adequacy of representation not met).
>
> Unlike *Amchem*, here the potential damage triggering event here was defined — installation of one specific manufacturer's specific type of siding — and purely economic.

Reply in Support of Joint Motion, pp. 9-10.

With respect to plaintiff's argument that it did not receive consideration, if plaintiff is a class member, then it got the same consideration all class members got: the right to file claims for damage every year for seven years, plus the right to pursue future damages under the 25-year warranty.

Finally, with respect to plaintiff's arguments about notice, L-P puts its emphasis on a different aspect of the class description; specifically, on the language "is damaged **or becomes damaged**," and contends that the highlighted language put recipients "on notice that they were Class Members even if their LP Siding had not yet suffered damage." Reply in Support, p. 8 (emphasis added). In this court's view, an even more compelling reason for finding that plaintiff did indeed receive reasonable notice that it was a class member is the language concerning the 25-year warranty added by amendment to the settlement agreement and included in the Notice of Approval. That language plainly informs recipients, including plaintiff,[2] that:

> As a result of continuing negotiations, and after considering the views of Class Members, L-P has now agreed to reinstate the 25 year warranty after January 1, 2003. This means that if you do not make a claim by January 1, 2003, but your siding fails after January 1, 2003, you can still make a claim under the warranty.

Brain Decl., Exh. 2, p. 4. At that point, plaintiff still could have opted out of the class action, as the opt out date was extended, but chose not to.

In summary, I conclude that plaintiff is a class member and plaintiff's remedy, if any, is the 25-year warranty. L-P claims that plaintiff cannot pursue the warranty claim in state court, but the warranty does not contain any language precluding state court action. Thus, I grant L-P's and Class Counsel's motion (# 694) with respect to all of plaintiff's claims except the warranty claim.[3]

---

[2] Plaintiff does not contend that it did not receive the initial class action notice or the Notice of Approval, which explained the amendments to the original settlement terms. Instead, plaintiff disregarded the notices because it concluded that it was not a member of the settlement class.

[3] Plaintiff moves (# 710) to strike the Declaration of Christopher Brain for a variety (continued...)

CONCLUSION

L-P's and Class Counsel's motion (# 694) to enforce settlement agreement is granted and denied as set forth above. Plaintiff is hereby ordered to dismiss all claims asserted in his state court complaint except the written 25-year warranty claim. Plaintiff's motion (# 710) to strike declaration of Christopher Brain is denied as moot.

IT IS SO ORDERED.

DATED this 26th day of July, 2012.

ROBERT E. JONES
U.S. District Judge

[3](...continued)
of reasons, but because I relied only on the exhibits to the declaration, not Brain's statements, the motion is denied as moot.

APPENDIX B

ORDER OF FEDERAL DISTRICT COURT JUDGE ROBERT JONES, NOVEMBER 1, 2012 (CP 426-28)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

IN RE:	)	
	)	
LOUISIANA-PACIFIC INNER-SEAL SIDING LITIGATION	)	No. 3:95-cv-00879-JO (LEAD)
	)	
	)	ORDER
	)	
	)	

JONES, Judge:

Louisiana-Pacific ("L-P") moves (# 719) to enforce the court's July 26, 2012, order that required Canterbury Apartment Homes LLC ("Canterbury"), a class member in the Inner-Seal Siding Litigation, to dismiss with prejudice all claims Canterbury alleges in his Washington state court complaint, filed in November 2011, except its claim under the L-P 25-year limited warranty.[1] Evidently, trial in the Washington state case is set to commence on November 13, 2012.

---

[1] L-P represents that Class Counsel joins in this motion to the extent it seeks a ruling that the Canterbury's sole and exclusive remedy is the remedy stated in the 25-year limited warranty. See L-P's Motion to Enforce, p. 2.

According to L-P, although Canterbury is now pursuing only the warranty claim, it nonetheless intends to seek damages in the sum of $900,000 for full replacement cost, rather than the remedy stated in the warranty; that is, twice the retail cost of the damaged siding less the appropriate aging deduction.

Although L-P frames the pending motion as a request to enforce my earlier opinion and order, I did not make any determination concerning Canterbury's damages, only the claims it could pursue. I ruled that:

> [P]laintiff [Canterbury] is a class member and plaintiff's remedy, if any, is the 25-year warranty. L-P claims that plaintiff cannot pursue the warranty claim in state court, but the warranty does not contain any language precluding state court action. Thus, I grant L-P's and Class Counsel's motion (# 694) with respect to all of plaintiff's claims except the warranty claim.

Opinion and Order, p. 8. Thus, there is nothing for this court to "enforce" concerning the amount Canterbury may seek as damages other than the limitation to warranty damages.

L-P goes further and requests a ruling that Canterbury's damages under the warranty are limited to the sum of $74,361. See Reply in Support of Motion to Enforce, pp. 7-8. I agree with Canterbury that L-P's motion "in reality appears to be a back door attempt to obtain summary judgment . . . without the requisite notice and without a complete presentation of the relevant facts through sworn testimony." Canterbury's Opposition to LP's Motion, p. 23. Although L-P and Class Counsel both press this court to interpret the warranty and determine Canterbury's damages as a matter of law, I decline to do so. The Washington state trial court is in the best position to interpret the warranty in light of Washington law, and to make rulings concerning Canterbury's remedies and damages. If L-P disagrees with the Washington court's ultimate rulings, L-P's remedy is an appeal, not an order of enforcement issued from this court.

In summary, L-P's motion (# 719) is DENIED. L-P's request for attorney fees is also denied.

IT IS SO ORDERED.

DATED this 1st day of November, 2012.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

OFFICE RECEPTIONIST, CLERK

To: Hoober, Leslee
Cc: Archer, Margaret; Ostruske, Frances; JMarkley@perkinscoie.com; KOSullivan@perkinscoie.com; AKhanna@perkinscoie.com
Subject: RE: Louisiana Pacific Corporation v. Canterbury Apartment Homes LLC - 90878-9

Received 11-19-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Hoober, Leslee [mailto:LHoober@gth-law.com]
Sent: Wednesday, November 19, 2014 9:29 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Archer, Margaret; Ostruske, Frances; JMarkley@perkinscoie.com; KOSullivan@perkinscoie.com; AKhanna@perkinscoie.com
Subject: Louisiana Pacific Corporation v. Canterbury Apartment Homes LLC - 90878-9

Attached for filing in PDF format is Canterbury Apartment Homes, LLC's Answer to Motion to Extend Time to File Petition for Review.

The attorney for Response filing this document is Margaret Archer, WSBA No. 21224, marcher@gth-law.com.

Leslee Hoober
Legal Assistant to
Andrea McNeely
Shelly Andrew
Ken Kieffer (of counsel)

GORDON THOMAS HONEYWELL

1201 Pacific Avenue, Suite 2100
Tacoma, Washington 98402
T 253 620 6482
F 253 620 6565
http://www.gth-law.com