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\$151 Million Settlement Approved in Foam Class Action

Celia Ampel, Daily Business Review

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A Miami attorney helped negotiate a \$151 million antitrust class action settlement for people and companies that bought pillows, mattresses and other products containing polyurethane foam.

The settlement resolved claims that nine U.S. and Canadian manufacturers conspired for more than a decade to illegally fix prices for polyurethane foam and products that used it in cushioning or insulation.

As co-lead plaintiffs counsel, Jay Shapiro of Stearns Weaver Miller Weissler Alhadeff & Sitterson in Miami and Marvin A. Miller of Miller Law in Chicago fought the manufacturers' defense arguments and appeals, which included an unsuccessful petition for the U.S. Supreme Court to hear the case.

"The defense fought this case on a scorched-earth basis for the last almost six years," Shapiro said after U.S. District Judge Jack Zouhary in Toledo, Ohio, gave final approval to the settlement Jan. 27.

The companies that settled were Carpenter Co., Leggett & Platt Inc., Mohawk Industries Inc., Woodbridge Foam Corp., Hickory Springs Manufacturing Co., Future Foam Inc., FFP Holdings LLC, FXI Holdings Inc., Vitafoam Inc. and Vitafoam Products Canada Ltd.

Evidence of the alleged conspiracy came to light when North Carolina-based Vitafoam decided to self-report evidence of illegal antitrust activities to the Justice Department antitrust division's leniency program, according to the class action complaint filed in the Northern District of Ohio.

Vitafoam told federal authorities the defendants gathered twice a year at Polyurethane Foam Association meetings and agreed on the percentage and timing of price increases and market allocation for the foam, according to the 2010 complaint.

The manufacturers explained the price increases by saying they were due to an uptick in raw material costs under a plan that allegedly ran from 1999 to 2012.

Lawsuits filed across the country were consolidated in multidistrict litigation, and plaintiffs were divided into two classes. The direct purchasers included mattress and furniture companies, while the indirect purchasers Shapiro represented included hotels, hospitals and individual consumers.

"The hardest part of our case was obtaining class certification," Shapiro said. "The defendants put up a full-court press trying to defeat class certification at every point."

The defendants argued it was impossible to identify with any precision who was in the class and claimed the plaintiffs couldn't prove an injury common to the class. They also argued the name plaintiffs lacked standing to make claims on behalf of people in other states where they didn't make purchases, Shapiro said.

When the judge granted class certification, the defendants took an interlocutory appeal to the U.S. Court of Appeals for the Sixth Circuit. The plaintiffs defeated the appeal, and the defendants unsuccessfully asked the U.S. Supreme Court to hear the case. Discovery also was a challenge since plaintiffs counsel collected and analyzed millions of documents, Shapiro said.

"We took hundreds and hundreds of depositions of the executives and the other employees who were involved in conversations with their competitors," he said.

The manufacturers settled just a few months before the scheduled trial, Shapiro said. The cases involving direct purchasers were set for trial within weeks, and the indirect purchasers would have followed.

The \$151 million settlement agreement followed a number of sessions with mediator Eric Green of Resolutions LLC in Boston.

The general counsel for Missouri-based Leggett & Platt said the company firmly denied all allegations made by the indirect purchasers.

"But we, along with several other foam and carpet pad manufacturers, settled to avoid the risk, uncertainty, expense and distraction of litigation," Leggett & Platt senior vice president and general counsel Scott Douglas said on behalf of the company in an emailed statement.

The other defendants did not respond to requests for comment by deadline.

Shapiro said tens of thousands of people and companies have filed claims so far. The classes included large institutional purchasers such as hotels and hospitals, which have claims in the millions of dollars. One of the name plaintiffs is a purchasing agent for JW Marriott and Ritz-Carlton hotels.

There is no set cap on individual claims, although each class member's recovery will depend on how much is available once all claims have been filed and reviewed.

The judge allocated \$36.3 million, or 24 percent of the recovery, to attorney fees and costs.

Shapiro said the size of the settlement was based on strong evidence of an extensive conspiracy.

"We're very proud of the recovery," he said. "This isn't a case where all the class members are getting coupons or a few dollars."

Shapiro was assisted by Stearns Weaver lawyers Samuel Patmore, Maria Fehretdinov, Matthew Dates, Abigail Corbett and Molly Bowen.

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