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Lawyer Spat Threatens Lumber Liquidators Class Action Settlement

Lawyers representing a plaintiff class made up of persons alleging they got sick from exposure to formaldehyde gas in laminate flooring insist they were cut out of last month's \$26 million class action settlement with Lumber Liquidators and want a federal judge to reject the deal.

By Amanda Bronstad | November 20, 2017



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Lawyers representing individual plaintiffs who say they became sick from exposure to formaldehyde gas in laminate flooring have asked a federal judge to spurn a \$26 million class action settlement with Lumber Liquidators.

The attorneys insist their clients were cut out of the deal, which was struck late last month.

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The settlement resolved civil lawsuits brought on behalf of Lumber Liquidators consumers who claimed economic losses. Lumber Liquidators stopped selling the products in 2015.

But attorneys Shawn Reed and Kevin Sullivan, who were appointed lead counsel (<http://images.law.com/contrib/content/uploads/documents/398/4522/Lumber-Liquidators-lead-counsel-order-3.pdf>) in August for personal injury plaintiffs, said class counsel in charge of the multidistrict litigation cut them out of settlement talks, according to a Nov. 8 motion (<http://images.law.com/contrib/content/uploads/documents/398/4522/Lumber-Liquidators-mtn-on-hrg.pdf>). They asked U.S. District Judge Anthony Trenga of the Eastern District of Virginia for a hearing and to reject the settlement so they could participate in negotiations.

“Unfortunately, lead plaintiffs’ counsel decided to freeze these lawyers out of the settlement process,” they wrote. “Because these plaintiffs’ claims have been negotiated by lawyers admittedly not representing their interests, these plaintiffs have been denied due process. Any purported settlement is a nullity as a result, and this case must proceed.”

A Lumber Liquidators spokesman and the company’s attorney, Diane Flannery of McGuireWoods in Richmond, Virginia, did not respond to a request for comment. But in a response filed on Monday (<http://images.law.com/contrib/content/uploads/documents/398/4522/Lumber-Liquidators-mtn-on-hrg-opposition.pdf>), Flannery disputed many of the facts. She also said that Lumber Liquidators “has also offered to continue mediating with the personal injury plaintiffs before Judge Brinkema,” referring to U.S. District Judge Leonie Brinkema of the Eastern District of Virginia, “but as of the time of this filing, the personal injury plaintiffs have not responded.”

Sullivan, of The Sullivan Law Firm in Seattle, declined to talk beyond the filings. But he insisted in an email that the settlement “was intended to include the claims of people who suffered personal injuries from the flooring in their homes.”

Not so, said Steve Toll, managing partner of Cohen Milstein Sellers & Toll in Washington, D.C., one of three attorneys appointed to lead the multidistrict litigation.

“They wanted to be included in our mediation and we didn’t want them there,” he said. “None of us wanted them there.”

The response from Toll and the other lead attorneys, Steve Berman of Seattle’s Hagens Berman Sobol Shapiro and Nancy Fineman of Cotchett, Pitre & McCarthy in Burlingame, California, is due this week, as are the first settlement documents to be filed with the court.

Attorney disputes over how to handle both consumer class actions and personal injury plaintiffs in the same MDL have arisen in other mass torts, such as in settlements with the National Collegiate Athletic Association (<https://www.law.com/nationallawjournal/almID/1202780496281/>) and National Football League (<https://www.law.com/thelegalintelligencer/almID/1202726491293/>) over concussion-related injuries.

More than 100 lawsuits were filed (<https://www.law.com/nationallawjournal/almID/1202722650302/60-minutes-expos-spurs-suits/?back=law>) against Lumber Liquidators after a “60 Minutes” exposé in 2015 found that it mislabeled the safety of flooring, which violated California emissions standards. The news caused Lumber

Liquidators shares to plummet, and its CEO resigned.

In July, Reed, of Howard, Reed & Pedersen in Covington, Louisiana, and Sullivan appeared at a status conference on behalf of injured plaintiffs. They told Trenga they were worried they wouldn't get a seat at the settlement table and [filed a motion \(http://images.law.com/contrib/content/uploads/documents/398/4522/Lumber-Liquidators-mtn-for-separate-track.pdf\)](http://images.law.com/contrib/content/uploads/documents/398/4522/Lumber-Liquidators-mtn-for-separate-track.pdf) to create a separate track for injured plaintiffs to proceed with discovery.

“For example, these plaintiffs should be allowed to participate in all settlement conferences, have an attorney appointed to represent their interests, and conduct settlement negotiations on their own behalf,” they wrote.

They initially estimated the number of injured plaintiffs be about 20, but revised it this month to about 75. Then, on Aug. 17, Trenga halted discovery, which “came as a surprise,” according to this month's motion.

“The reason for the discovery stay was because a settlement mediation had occurred the day before,” they wrote. “Neither Mr. Sullivan nor Ms. Reed had been told about the mediation or been invited to participate, although both lawyers had made this request in open court and in their pending motion.”

When Flannery emailed Reed and Sullivan about another mediation session on Sept. 20, she said Toll and another lead plaintiffs attorney, Alexander “Trey” Robertson of Robertson & Associates in Westlake Village, California, did not want them to be there, the motion says.

The settlement includes \$22 million cash and \$14 million in store vouchers, according to a Lumber Liquidators press release. Last month's deal also resolves claims that Lumber Liquidators flooring scratches too easily—the subject of a second multidistrict litigation proceeding created last year that also was before Trenga.