
ORIENTED STRAND BOARD HOME SIDING LITIGATION:¹
IN RE LOUISIANA-PACIFIC INNER-SEAL SIDING²

PROLOGUE

Louisiana-Pacific Corporation is a leading forest products firm headquartered in Portland, Oregon. In about 100 facilities throughout the United States, Canada, and Ireland, it manufactures lumber, pulp, structural and other panel products, hardwood veneers, and cellulose insulation. In the early 1980s, Louisiana-Pacific began developing alternatives to lumber for use as home siding. The idea was to develop materials that could be constructed cheaply from wood manufacturing by-products and lower-grade wood.³ These alternative products were intended to be competitive with the numerous nonwood construction products that were beginning to increase in market share, such as aluminum siding and plastic construction products that are less expensive than more conventional wood products.⁴

The product created by Louisiana-Pacific was called “oriented strand board” (OSB). OSB is a composite product similar to Masonite and is manufactured from wood wafers.⁵ OSB panels can be shaped and finished into a variety of end products such as flooring, sheathing, beams, and siding.⁶ The base materials for Louisiana-Pacific’s OSB are a variety of softwoods, including fast-growing, low-grade aspen; the product therefore has the potential to reduce demand for rarer old-growth fir or pine trees. The wood is cut into razor-thin chips four inches long by one-half-inch wide. These chips are dried, mixed with wax and resin, laid onto large mats, and formed into panels or strips. As the mixture is laid onto mats, the strands are placed (or oriented) in all directions, giving the board strength and flexibility in all dimensions.

Initially, OSB was used primarily for structural support panels in roofs, floors, and walls. However, Louisiana-Pacific soon developed the product for use as exterior siding.⁷ OSB siding has a resin-saturated, preprimed paper overlay on the exposed face (facing the outside environment) that is fused to the core material by heat and pressure. Beginning in 1995, resin-soaked paper was also

applied to the backs of the boards. As the material emerges from the press, it is embossed to resemble cedar siding and cut and shaped into appropriate sizes.⁸ Louisiana-Pacific produces two varieties of exterior siding: panel and lap. The latter consists of strips that are installed to resemble clapboard. In a final production step, a sealer is applied to all edges.

Originally, Louisiana-Pacific called the siding “waferboard,” but the company soon decided to market it as “Exterior Inner-Seal Siding”⁹ and promoted it as offering the strength and character of plywood without the irregularities that limit plywood’s uses.¹⁰ The company also promoted the siding as an environmentally friendly alternative to redwood or cedar siding because it was not made from first- or old-growth lumber. Inner-Seal’s target market was residential construction and, to a lesser extent, commercial construction; it was distributed through home centers, construction distributors, and through Louisiana-Pacific’s own distribution centers.¹¹

Since its introduction, Inner-Seal has been a successful product, constituting roughly a third of Louisiana-Pacific’s sales.¹² Between 1985 and 1995, approximately 2.7 billion square feet of siding was sold.¹³ Its largest market is in the northwest, where Louisiana-Pacific is based, although it is sold nationwide.¹⁴

Inner-Seal sales have always included a warranty. Initially the warranty provided protection to the consumer against manufacturing defects for 25 years from the date of installation, and against blistering and peeling for five years from the date of installation.¹⁵ The warranty limited any payment by Louisiana-Pacific to twice the cost of the original siding material. This cap applied to the first five years of the warranty period; after the fifth year Louisiana-Pacific’s liability would be reduced by five percent per year, finally ending after the 25th year. For homeowners to collect payment under the warranty, they had to demonstrate that the Inner-Seal was “installed according to Louisiana-Pacific’s published installation and application instructions and properly maintained.”¹⁶ If Louisiana-Pacific determined that the siding had not been installed or maintained correctly, it had the option of refusing any application under the warranty program.¹⁷

The installation requirements and age deduction were controversial aspects of the warranty because both features limited Louisiana-Pacific’s liability for failed siding. Indeed, Louisiana-Pacific has strenuously argued that most of the complaints that arose out of OSB siding resulted from faulty installation or maintenance. Consequently, the company argued that it should not be liable for any damages, either under its warranty program or as a result of the litigation that eventually arose. In addition, Louisiana-Pacific argued that siding that failed was older siding, and so any liability it might have would be reduced by the age-deduction provisions of the warranty.

Another controversial aspect of the warranty was the calculation of amounts consumers would receive. The “cost of the original siding material” was interpreted by Louisiana-Pacific as being the amount of the sale of the siding from Louisiana-Pacific to a distributor, typically \$0.52 per square foot.¹⁸ Therefore, maximum recovery under the warranty, which was limited to twice the original cost, amounted to about \$1 per square foot. According to our interviews, the actual cost incurred by consumers to replace defective siding was usually considerably more than this amount.¹⁹ This difference reflects the difference in purchase prices available to builders and distributors, on the one hand, and to consumers on the other, as well as the additional cost of removing old and installing new siding.²⁰ According to critics, even without the age deduction, the full warranty provided about one-fourth of the expense of remedying a problem with OSB siding. In addition, critics of the warranty have noted that it did not provide compensation for damages to a home’s framing that might be caused by compromised OSB siding, and that such collateral damage increased as the damaged siding remained in place. Thus, according to these critics, the age deduction resulted in a warranty that provided the least amount of money to those with the greatest damage.

BEGINNING OF LITIGATION

Consumer complaints against Louisiana-Pacific OSB products began in the early 1990s. The first complaints arose out of the use of OSB panels on the roofs of houses in Florida. During Hurricane Andrew in 1993, many Florida homes lost shingles off their roofs, exposing the roof panels to the elements. In the aftermath, there were reports that OSB, when used as roofing, began to deteriorate rapidly.²¹ While no one expected building materials to survive a hurricane, the rapid deterioration of OSB panels after exposure to the heavy rains accompanying it was remembered when consumer complaints arose later.

Within a short time Florida consumers who had not been affected by the hurricane began complaining that Inner-Seal was deteriorating much more rapidly than it should—within two or three years of installation.²² Generally, the complaints alleged that when OSB siding comes into contact with water, it soaks up moisture. As the siding absorbs water, it expands. While wood typically regains its natural shape, the siding does not. This expansion causes a number of problems: paint flakes or peels off; nails driven through the material are forced out, loosening the panel. One indication of damaged siding is “puffed marks that look like halos around the nail heads.”²³ In addition, the expansion promotes further water intrusion, eventually causing the panel to deteriorate and fall apart. One homeowner described her siding as “corn flakes being held together by [a] layer of paint.”²⁴ As the surface adherent loosened and the panel deteriorated, it became fertile ground for airborne spores and

pollens. According to one account, a homeowner found that “mushroom-like growths have broken out on several spots on the . . . house, the longest measuring five inches.”²⁵

Louisiana-Pacific told consumers who complained that most of their problems were the result of improper installation and maintenance. If the siding had been properly installed, the deterioration of the product would not have occurred.²⁶ Periodic painting and caulking after installation are necessary, the company asserted; either homeowners were not made aware of, or ignored, instructions regarding maintenance.²⁷

In our interviews, company representatives said that homeowners who followed the recommended maintenance regime did not have problems with their siding. However, they also acknowledged that the humid climate of Florida and Georgia requires diligent adherence to the installation and maintenance procedures.²⁸ Louisiana-Pacific argued that only a small portion—less than 2 percent—of all Inner-Seal Siding actually failed and that over 90 percent of these failures were caused by errors in installation or maintenance by defective components.²⁹

The Sawmill subdivision of Ocoee, Florida, was one of the first sources of public policy debate over Inner-Seal Siding. In March 1994, residents of this subdivision sought to have OSB siding banned by the local city commission.³⁰ Although this attempt failed, the growing number of complaints led to additional formal complaints to local authorities in Ocoee and other communities across the state.³¹ By the fall of 1994, consumer complaints were being filed in other states as well.³²

Initially, Louisiana-Pacific responded by offering compensation under the warranty program. If homeowners felt that payments offered under the warranty were insufficient to compensate their damages, the company gave them the option of entering into binding arbitration or pursuing their complaint in court.³³ But Louisiana-Pacific soon realized that it could not afford to arbitrate all potential claims. Furthermore, the warranty program did not prevent consumers from bringing lawsuits and did not address the growing tension between Louisiana-Pacific and its primary customers—the home builders and developers who also might be held liable in lawsuits brought for damages associated with OSB deterioration.

Despite Louisiana-Pacific’s position that only a minute fraction of siding failed for reasons other than improper maintenance or installation, it received about 30,000 claims under the warranty program.³⁴ In its required Securities and Exchange Commission filings for the year ending 1994, Louisiana-Pacific indicated that claims were pending involving approximately 1300 dwellings. It had also “paid approximately \$37 million to settle claims relating to siding war-

ranties on approximately 15,000 dwelling units.³⁵ This total includes claims of approximately \$10 million paid in 1994, \$5 million in 1993, and \$5 million in 1992.”³⁶ By the end of the first half of 1995, Louisiana-Pacific had paid an additional \$5 million in claims.³⁷

On October 21, 1994, Walter S. McLin III, of McLin, Burnsed, Morrison, Johnsen, Neuman & Roy, P.A., of Leesburg, Florida, filed a class action—*Anderson v. Louisiana-Pacific Corp.*—in Florida state court on behalf of all Florida homeowners whose homes were constructed using Inner-Seal Siding and were claiming compensation for defective siding.³⁸ McLin and his associates were general business litigators located in central Florida who had no significant consumer or class action practice. Within a year, *Anderson* was settled as a statewide class action. Under the settlement, claimants received either \$2.82 or \$3.40 per square foot of damaged siding, depending on whether they had panel or lap siding, respectively. As of October 31, 1997, approximately 31,700 claims forms had been requested by *Anderson* class members, and approximately 21,000 claims had been paid by Louisiana-Pacific at an aggregate cost of about \$48.7 million.³⁹

Attorneys General Investigations and Other Regulatory Action

The rash of OSB consumer complaints led to investigations of the allegations against Inner-Seal Siding by attorneys general in several states. By late 1994, Louisiana-Pacific faced attorney general investigations in Florida, Minnesota, Oregon, and Washington.⁴⁰

In January 1996, Oregon and Washington attorneys general settled their complaints with the company. In Washington, Louisiana-Pacific agreed to pay \$250,000 in civil penalties and \$100,000 in attorney fees and costs to the state, and to contribute \$1,000,000 to Washington State University’s Department of Wood Materials.⁴¹ In Oregon, Louisiana-Pacific agreed to pay \$505,000 to the Oregon Department of Justice for the Consumer Protection and Education Revolving Account.⁴²

The Washington and Oregon settlements also resulted in Louisiana-Pacific’s agreeing to an injunction prohibiting the company from engaging in a number of business practices regarding OSB. The company agreed not to

- represent OSB as suitable for exterior use without substantiation
- condition the availability of warranty remedies on adherence to installation procedures that cannot be met in accordance with industry norms or on adherence to unreasonably stringent maintenance procedures, and

- sell Inner-Seal lap siding without first conducting sufficient tests and research to confirm the appropriateness of the product for its intended purposes.⁴³

The Florida attorney general took no formal action against Louisiana-Pacific; however, by 1996 Louisiana-Pacific had agreed to donate funds to Florida A & M University as part of an informal agreement. Louisiana-Pacific gave \$600,000 toward a chair in the school's education department, which was matched by \$400,000 in state funds. Louisiana-Pacific also agreed to provide another \$250,000 to the schools' scholarship fund for the School of Business. In addition, Louisiana-Pacific agreed that any Florida resident who settled with Louisiana-Pacific as part of *Anderson*, and who would have received more in compensation under a subsequent agreement, could obtain the difference between the two settlements.⁴⁴

NATIONWIDE CLASS LITIGATION BEGINS

The nationwide class action had its genesis in three different cases. Table 13.1 provides an overview of these actions and includes *Anderson* for comparative purposes. These cases originated separately; in fact, our interviews indicated that even though the attorneys were aware of the existence of other pending litigation, there was little or no contact between them before complaints were filed. Ultimately, it was the Sandpiper Village case that was the vehicle for settling the litigation nationwide.

Matherly, et al. v. Louisiana-Pacific Corp., et al.

In November 1994, Seattle attorney Christopher Brain of Tousley Brain began to consider litigation against Louisiana-Pacific. According to our interviews, Brain was a commercial litigator with some previous class action litigation experience. However, the bulk of his practice did not consist of either class action litigation or plaintiff representation. The case was brought to his attention by an

Table 13.1

Louisiana-Pacific Inner-Seal Siding Litigation

	<i>Anderson</i>	<i>Matherly</i>	<i>Sandpiper Village</i>	<i>Hudlicky</i>
Location	Florida	Washington	Oregon	Oregon
Jurisdiction	State	State	Federal	Federal
Extent of class	Florida	Nationwide	Nationwide	Nationwide
Filing date	Oct. 21, 1994	April 28, 1995	June 19, 1995	Sept. 15, 1995
Settlement date	July 25, 1995	Oct. 18, 1995	Oct. 18, 1995	Oct. 18, 1995

unidentified client of the Tousley Brain law firm who had damaged siding and was dissatisfied with the remedy offered by the Louisiana-Pacific arbitration program. Dale Matherly was associated with the unidentified client and volunteered to act as class representative.

Because of the potential size and significance of the litigation, Brain determined it would be appropriate to associate with Foster Pepper and Shefelman, a Seattle firm with class action litigation experience. Brain and Ben McConaughy of Foster Pepper and Shefelman filed suit in Washington state court on April 28, 1995 on behalf of a nationwide class of plaintiffs under the name of *Matherly, et al., v. Louisiana-Pacific Corporation, et al.*⁴⁵ In their complaint, they alleged as causes of action violations of the Washington state Unfair Business Practices Act,⁴⁶ breach of express warranties, breach of implied warranties, and negligent representation.⁴⁷ In addition to damages, they sought rescission of the warranty (with all its limitations) and an injunction preventing Louisiana-Pacific from obtaining releases in connection with the warranty.⁴⁸

The representative plaintiffs originally included Dale and Joan Matherly and Douglas Meckling, all Washington homeowners whose Inner-Seal Siding had deteriorated.⁴⁹ The putative class was defined as “all persons who own or have purchased or used Inner-Seal Siding material” manufactured by Louisiana-Pacific. One subclass of this class (the “Releasing Subclass”) consisted of all persons who had previously released claims (i.e., waived any rights to litigate against Louisiana-Pacific related to Inner-Seal Siding).⁵⁰

Sandpiper Village, et al., v. Louisiana-Pacific Corporation, et al.

Media reports of homeowner complaints in the southeast had prompted Tallahassee attorney William Garvin to investigate Louisiana-Pacific siding for its litigation potential early in 1994. Unlike Brain, Garvin was an experienced plaintiffs’ attorney specializing in class actions and aggregate litigation. Based in Florida, he was aware of the *Anderson* class action although he was not associated with the *Anderson* attorneys. In May 1995, Garvin filed an action seeking statewide class action status in Florida state court under the name *Terrell, et al., v. Louisiana-Pacific Corporation, et al.* The class action in *Anderson* had been under way since October 1994, and the parties were already negotiating a statewide settlement in that action, which was reached two months later in July. Garvin consulted with the *Anderson* attorneys but was not able to become a part of that action and settlement.

Nonetheless, Garvin and his associates moved forward. Recognizing the potential for a nationwide class action, they dismissed the Florida statewide class action they had filed and in June 1995 refiled a nationwide class action, *Sandpiper Village, et al. v. Louisiana-Pacific Corporation, et al.*, in federal district

court in Oregon.⁵¹ It was this action—alleging the same set of claims against Louisiana-Pacific as the *Matherly* case that had been filed two months earlier—that eventually became the basis for the settlement of the entire litigation. Garvin and his associates chose this court for strategic reasons; in the event all Louisiana-Pacific siding cases were consolidated, it was likely that they would be moved to this court because Louisiana-Pacific was headquartered in Portland. The *Sandpiper Village* attorneys would be well positioned to be chosen as lead counsel if they filed there. The case was initially assigned to Magistrate Judge John Jelderks for pretrial proceedings and was subsequently transferred to Judge Robert E. Jones.⁵² In their complaint, the *Sandpiper Village* attorneys alleged only breach of warranty.⁵³ The complaint was amended in late September to include a cause of action for violation of RICO statutes.⁵⁴

The class representative in the complaint was the Sandpiper Village Condominium Association, Inc., the residents' association of a 73-unit condominium development located in Destin, Florida.⁵⁵ Importantly, the complaint limited the putative class to building owners with damage over \$50,000, a limitation necessary to obtain diversity jurisdiction and to bring the case in federal court.⁵⁶

Hudlicky, et al., v. Louisiana-Pacific Corporation, et al.

Meanwhile, other attorneys were investigating the potential for a nationwide class action against Louisiana-Pacific. A group of experienced plaintiffs' attorneys specializing in class action and aggregate litigation were already pursuing a class action against International Paper, Inc., the manufacturers of Masonite, for similar product defects.⁵⁷ That action, *Naef v. Masonite Corp.*, was filed and settled as a nationwide class action in Alabama state court and was an even higher stakes case, because Masonite had been installed on four times as many homes as Louisiana-Pacific's Inner-Seal Siding. The lead plaintiff firms for the Masonite action were McRight, Jackson, Dorman, Myrick & Moore of Mobile, Alabama; the San Francisco law firm of Lieff, Cabraser, Heimann & Bernstein; and Doffermire, Shields, Canfield, Knowles & Devine of Atlanta.⁵⁸

In the course of investigating Masonite, plaintiff attorneys engaged in extensive discovery, including an examination of corporate documents. They compared Masonite to its competitors' products, and discovered the similarities with Louisiana-Pacific's Inner-Seal Siding.⁵⁹

On September 15, 1995, the Masonite class counsel filed a nationwide class action in U.S. District Court in Oregon—the same court in which *Sandpiper Village* had been filed two months earlier—under the name of *Hudlicky, et al., v. Louisiana-Pacific Corporation, et al.*, against Louisiana-Pacific and its president and chairman of the board, Harry A. Merlo.⁶⁰ In their complaint, the

Hudlicky attorneys alleged numerous causes of action including violation of RICO statutes;⁶¹ violation of consumer protection statutes in each of the 50 states and the District of Columbia; fraud; intentional, reckless, and negligent misrepresentation; negligence; strict liability, breach of express warranty; and breach of implied warranty.⁶² In addition to seeking damages, the plaintiffs sought injunctive relief preventing Louisiana-Pacific from obtaining releases in connection with its warranty.⁶³ By seeking injunctive relief, the *Hudlicky* attorneys may have been setting the stage for a mandatory non-opt-out subclass.

The complaint named Ben Hudlicky, Douglas G. and Tamarack K. Dixon, and David Startzel as representative plaintiffs. All were homeowners whose siding had deteriorated. Hudlicky and Startzel lived in Washington; the Dixons lived in Idaho. The putative class definition included “All parties or entities that presently own structures in the United States on which Louisiana-Pacific Inner-Seal exterior siding manufactured since January 1, 1980, has been installed.”⁶⁴

THE PRESSURES TO SETTLE

Both the defendants and the various plaintiffs’ attorneys had good reasons to settle the litigation instead of pursuing it to trial. Louisiana-Pacific Corporation was enduring particularly tough times. Between March 1994 and March 1995, the company’s stock price dropped over 50 percent in value, from a high of almost \$46 per share to approximately \$23 per share. On May 25, 1995, Louisiana-Pacific disclosed that it was facing a grand jury indictment regarding violation of environmental laws in Colorado.⁶⁵ This disclosure contributed to an additional \$4.25 drop in Louisiana-Pacific’s share price.⁶⁶ It also resulted in a shareholder class action against the company, filed in U.S. district court in Colorado, on July 31, 1995.⁶⁷ On July 31, 1995, codefendant Harry Merlo resigned from the company. Finally, with the *Sandpiper Village* action, Louisiana-Pacific faced the potential of defending competing nationwide class actions in more than one court, a 25-year exposure under its existing warranty, and negative media exposure brought on by the lawsuits.

Although Louisiana-Pacific was convinced that it would win all Inner-Seal suits on the merits at trial, it felt that the best possible outcome was to settle all disputes as quickly as possible. Vinson & Elkins, the Houston, Texas, law firm that had represented Louisiana-Pacific in *Anderson*, also represented the company as the nationwide class actions mushroomed. The *Anderson* settlement that Vinson & Elkins had negotiated seemed to provide a good model for the settlement of the larger dispute.

For their part, the various plaintiffs’ attorneys faced a daunting prospect in pursuing the dispute either as individual litigation or as a nationwide class action. First, they faced difficult substantive legal issues. It was uncertain that any

plaintiff camp could establish a valid case against Louisiana-Pacific under either contract or tort theories of liability. Second, it was unclear whether the plaintiffs could successfully achieve class certification of their cases. Because the claims underlying any class were subject to the laws of the different states where plaintiffs lived and where the products were sold, a class action jury might have to render a decision under as many as 49 separate legal standards (Florida claims were already settled).⁶⁸

LITIGATION AND SETTLEMENT NEGOTIATIONS

During the summer of 1995, all of the parties engaged in settlement negotiations that began virtually as soon as the various cases were filed. Indeed, pleading papers filed by objectors to the settlement suggest that the *Hudlicky* attorneys were engaged in negotiations two months before they filed their complaint.⁶⁹ Although the settlement discussions were all aimed at settling the entire litigation, the competing factions within the plaintiff community negotiated separately with the defendant. In all our interviews, we were told that the different factions of plaintiff attorneys were vying for control of the plaintiff class. Our interviews also suggested that Louisiana-Pacific attempted to take advantage of the divisions within the plaintiff community by playing each group off against the others. One source likened the situation to the holding of a “reverse auction” where defendants can easily inform competing counsel that they would settle first with the lawyers who offer them the best opportunity to resolve all their liabilities in one case.

Discovery

Because these cases settled relatively quickly, only limited discovery took place. *Matherly* class counsel had the most opportunity to pursue discovery, however, since it was filed before the other cases. They collected an extensive number of documents, took numerous depositions, and reportedly interviewed and obtained documents from many third-party witnesses, contractors, and product distributors. No formal discovery took place in any of the other actions before the settlement. The parties engaged in “confirmatory discovery” after the settlement, and in our interviews parties said that considerable time was devoted to post-settlement production of documents and depositions to establish the ability of Louisiana-Pacific to satisfy settlement provisions.

Jurisdiction

By the summer of 1995, the various plaintiff attorneys had filed two actions, *Matherly* in Washington state court and *Sandpiper Village* in federal court in

Oregon; *Hudlicky*, also filed in federal court in Oregon, would follow in September. Consequently, there was a question as to which court was most appropriate to resolve the dispute. All parties preferred to reach a settlement of the action in federal court, because they felt that a nationwide class action filed in a state court might provide potential objectors with an argument against a settlement.

Federal jurisdiction, however, was problematic. For one thing, most of the homeowner disputes involved damages of less than \$50,000, which at that time was the monetary floor for federal diversity litigation. In addition, the case did not clearly depend on a federal question such as breach of a federal statute or an issue that has original federal jurisdiction. Apparently, the *Hudlicky* attorneys suggested violation of federal RICO statutes as a means of establishing federal jurisdiction;⁷⁰ RICO ultimately became the basis for jurisdiction in the Second Amended Complaint in *Sandpiper Village*, as well as for the overall settlement. Plaintiffs claimed that Louisiana-Pacific and Harry Merlo “engaged in a pattern or practice of racketeering conduct by making untrue and fraudulent statements in advertisements and reports filed with governmental authorities regarding the performance of LP siding.”⁷¹

Class Certification

The issue of class certification was never completely argued in any of these cases. Motions for class certification were filed and briefed in *Matherly* and *Sandpiper Village*, but never argued. Because the parties were moving quickly toward settlement, a motion for class certification was never even filed in *Hudlicky*.⁷²

TERMS OF INITIAL SETTLEMENT

On October 5, 1995,⁷³ all of the plaintiff attorneys reached a settlement agreement with Louisiana-Pacific on a nationwide basis, which was preliminarily approved on October 18, 1995, by Magistrate Judge Jelderks. *Hudlicky* was consolidated with *Sandpiper Village*, and the *Matherly* plaintiffs were allowed to intervene. Magistrate Judge Jelderks preliminarily certified the class defined as follows:

Settlement Class means all Persons who owned, own, or subsequently acquire property on which exterior Louisiana-Pacific Inner-Seal Siding has been installed prior to January 1, 1996 and who are given notice in accordance with the due process clause of the U.S. Constitution.

Excluded from the Settlement Class are:

- (1) All Persons who, in accordance with the terms of this Agreement, properly execute and file a timely request for exclusion from the Settlement Class;
- (2) All Persons who are members of the certified class in the Florida action entitled *Anderson v. Louisiana-Pacific Corp.*, No. 94-2458-CA-01.⁷⁴

Finally, Magistrate Judge Jelderks approved a notice program designed to apprise the settlement class of the existence of the class action and the terms of the settlement. Objections to the proposed settlement had to be received at least 15 days before the final fairness hearing.

Attorney fees and costs were not included in the Settlement Agreement.⁷⁵ They were to be established by subsequent negotiations between the parties and then submitted for court approval.⁷⁶ The defendants would pay fees and costs from a separate fund.

Creation of a Common Fund

The settlement provided for a minimum fund of \$275 million funded periodically by Louisiana-Pacific with payments between \$100 million and \$15 million over seven years.⁷⁷ Any interest earned by the fund also would become available for distribution. The minimum size of the fund was established after lengthy and difficult negotiations because no one knew the amount needed to satisfy possible claims. According to class counsel, “[u]nlike the typical class action the exact number of class members cannot be calculated with precision as no one can say with absolute certainty the exact number of homes with damaged siding and some of the damage has not occurred yet.”⁷⁸ As we have seen, such problems are common in mass tort class actions.

Table 13.2 provides the schedule of Louisiana-Pacific’s funding commitments. An initial payment of \$100 million would be due within 30 days of the entry of the Final Order (i.e., settlement approval) and subsequent payments would be due in years two through seven on the anniversary date of the Final Order. These first eight payments were known as the Initial Funding Obligation. Additionally, Louisiana-Pacific had the option of making additional payments to the compensation fund to cover any claims that exceeded the amounts already paid through the Initial Funding Obligation.

All class members would be bound by the agreement for the first four years after the entry of the Final Order, regardless of whether the Initial Funding Obligation was adequate to satisfy all filed claims.⁷⁹ If, however, at any time after this first four years the claims administrator notified Louisiana-Pacific that the

Table 13.2

Louisiana-Pacific's Contributions to the Common Settlement Fund*

Period	Payment
Initial payment	\$100m
Year 2	\$55m
Year 3	\$40m
Year 4	\$30m
Year 5	\$20m
Year 6	\$15m
Year 7	\$15m
Second Funding Obligation	Up to \$50m
Third Funding Obligation	Up to \$50m
Final Funding Obligation, "Year 8"	Up to \$50m if sum of outstanding claims and expenses are \$100m or less; otherwise could exceed \$50m cap
Final Funding Obligation, "Year 9"	Up to \$50m if sum of outstanding claims and expenses are \$100m or less; otherwise could exceed \$50m cap

*Settlement Agreement § 4.10.

amount of approved (paid or pending) claims—and any allowable administrative expenses—exceeded the \$275 million Initial Funding Obligation, any still-unfunded claims would be released from all provisions of the settlement agreement *unless* the defendant chose, within 60 days of such notification, to provide additional funding (an Additional Funding Election).⁸⁰ If Louisiana-Pacific made such a decision, it would then have 12 months to provide the lesser of \$50 million or the aggregate sum of any unfunded claims. Once the defendant made this Additional Funding Election (known as the Second Funding Obligation), all class members would be bound for an additional 12 months beyond the point at which the claims administrator notified the defendant of excessive claims. If the Second Funding Obligation turned out to be insufficient to pay all claims filed prior to the expiration of the additional 12-month period, the defendant could elect to satisfy a Third Funding Obligation (payment of the lesser of \$50 million or the sum of the still-unfunded claims). If the defendant made such a funding election, class members would again be bound by the terms of the agreement for an additional year.⁸¹

If, at the end of the first seven-year period, there still remained unsatisfied but approved claims or administrative or other allowed expenses, the defendant could elect to make two Final Funding Obligation payments at the end of each of the next two years.⁸² The amount of each additional year-end funding payment would be dependent on the size of outstanding claims and expenses at the end of the period. If this sum were \$50 million or less, then there would be a single payment of the full amount in the first year; if the aggregate sum were between \$50 million and \$100 million, the first year payment would be capped at \$50 million and the second would be the full amount of the remainder. If the

aggregate sum exceeded \$100 million, then each of the two year-end payments need only be 50 percent of the aggregate sum (but would therefore be at least \$50 million). If the Final Funding Obligation payments were made as required, class members would be bound by an additional 24-month period beyond the original seven-year term as anticipated in the settlement agreement.

Thus, at least \$275 million, and as much as \$375 million, might be paid into the settlement fund over the first seven years but, as explained above, if unsatisfied claims remained at the end of this period, the defendant could provide additional funding to prevent unsatisfied claimants from seeking compensation outside the settlement provisions. How much would be required from the defendant for the Final Funding Obligations would depend upon the size of the outstanding claims and expenses, but conceivably two additional payments of \$50 million or more might be made. The uncertainty regarding the ultimate amount of funding (beyond the \$275 million Initial Funding Obligation) makes it somewhat difficult to determine what exactly was being offered to the class in the aggregate. However, parties to the litigation have consistently used a benchmark of \$475 million as a potential upper bound to the range of the defendant's obligations.⁸³ In any event, all amounts remaining in the settlement fund—after the claims administrator determines that all claims have been paid and processed—would revert to Louisiana-Pacific.⁸⁴

Under the settlement agreement, if the defendant made all required and optional payments specified, class members would be deemed to have released Louisiana-Pacific from all claims for damaged siding (except for claims arising under their existing 25-year limited warranty after termination of the settlement agreement).⁸⁵ As anticipated in the settlement agreement, should Louisiana-Pacific decide not to make the optional payments, unsatisfied class members (if any) could pursue any available legal remedies without restriction.⁸⁶ This “walk away” provision, apparently modeled on a similar mechanism used in the polybutylene pipes litigation settlement (in which many of the *Hudlicky* attorneys participated), was thought by class counsel to make the issue of accurately estimating the aggregate class loss and its relationship to the settlement funds moot.⁸⁷ They claimed that even if the allocated fund later proved inadequate, despite the best predictions of the parties' experts, uncompensated class members would not be hurt because they would be free to initiate individual litigation if need be.⁸⁸ As we shall see, both sides failed to anticipate the cost of settling claims, and the settlement fund and provisions for claiming were subsequently modified.

Potential class members could opt out of the settlement by sending an exclusion request to the claims administrator by March 7, 1996.⁸⁹ Up to ten days before the fairness hearing, Louisiana-Pacific had the option of terminating the settlement agreement if the remaining class pool were too small.

Individual Recovery Amounts

Claimant compensation was to be calculated according to a formula that accounted for the damage sustained by the structure's siding and age. (Maintaining the aging provision in the compensation formula had been a deal-breaking condition for Louisiana-Pacific in the settlement negotiations.) The compensation program did not compensate physical damage to property or bodily harm to persons resulting from the deterioration of Louisiana-Pacific siding. However, individuals with claims for physical damage to property or bodily harm were free to pursue these claims elsewhere.⁹⁰

The settlement stipulated that an independent adjuster would determine the amount of OSB siding on a wall and the amount and specific location of damaged siding. All fees related to the adjustment process, including training and inspection, would be paid directly by Louisiana-Pacific and were not drawn from the settlement fund. The adjusters were to be trained through a course developed by Louisiana-Pacific with the assistance of class counsel.

The inspection protocol, possibly the most controversial aspect of the settlement, was the result of lengthy negotiations between the parties and the subject of vociferous objection by intervening class members at the fairness hearing.⁹¹ The protocol established (1) the method by which the evaluation was to take place; (2) the criteria by which damage or degradation was to be determined; and (3) the compensation that claimants were to receive. Instead of relying on visual inspection, the inspector was required to use a moisture meter, calipers, and an edge check probe to determine damage to each panel. According to the adjusters' training manual, damage could be deemed to exist if the adjuster saw fungal degradation, buckling, or physical deformation.⁹² In addition, damage existed if any two of the following three conditions were found: thickness of the product in excess of 0.54 inch; moisture content in excess of 28 percent; or gaps in the panel edges.⁹³ An entire panel was to be deemed damaged if any portion of the panel was damaged.⁹⁴ Panel siding was evaluated and replaced panel by panel. For lap siding, if more than 70 percent (later reduced to 65 percent) of a wall were damaged and the damage appeared dispersed throughout the wall, then the claimant would be compensated for the actual cost of replacing the damaged siding; in the event that the owner went ahead and replaced the entire wall, he or she would be compensated for the additional costs of replacing undamaged Louisiana-Pacific siding. If the damage to the wall were less than the cutoff percentage, the claimant would be compensated for replacing the damaged lap siding only.⁹⁵

The information gathered by the inspector⁹⁶ was relayed to the claims administrator, who in turn calculated the amount of compensation using information that included replacement costs prepared by an outside consulting firm.

Square-foot compensation amounts ranged from \$2.20 to \$6.40⁹⁷ and were keyed to the geographic location of the structure and the type of product.

If a class member had previously submitted or resolved claims under any of the defendant's other warranty or claims programs, he or she would be entitled to recover the difference resulting from increased compensation from the settlement claims process.⁹⁸ Of utmost importance to many class members, the settlement prevented the defendant from asserting any defenses against claims that were based on improper installation or maintenance of the product, or based on the expiration of any applicable statute of limitations.⁹⁹

Notice

The extensive notice program launched prior to final approval was reported to have cost at least \$4.9 million, though the actual cost is not public information.¹⁰⁰ The agreement required that, within three business days after preliminary court approval of the settlement agreement, Louisiana-Pacific deposit enough money to finance the initial notice program in an account set up by class counsel. With the assistance of Louisiana-Pacific, the class administrator compiled a list of potential class members at their last known addresses.¹⁰¹ In November 1995, these individuals were mailed a notice of the class action, the terms of the settlement, a claim form, an exclusion request form, and information to assist a homeowner in determining whether he or she had Louisiana-Pacific siding and whether that siding was deteriorating. As might be expected, this direct mailing was quite small, reaching only about 27,000 households. For the most part, Louisiana-Pacific supplied its materials through contractors and had little contact with the eventual property owner. A supplemental mailing to additional, newly identified individuals in the four states (California, Florida, Oregon, and Washington) with the highest Inner-Seal Siding sales was conducted on March 11, 1996.

Louisiana-Pacific also implemented a print media advertising campaign. Full and abbreviated notices appeared in the national edition of the *Wall Street Journal* on December 7, 1995; in *USA Today* on both November 17, 1995, and January 12, 1996; in seven major newspapers on January 14, 1996; and in almost 300 other daily and weekly newspapers on January 18, 1996. Notice also appeared in eight major weekly or monthly periodicals in January and February 1996 and in seven construction-industry periodicals. A news release was also sent to wire services and news programs.

The third part of the preapproval notice campaign was a television advertisement describing the class action and its settlement. This advertisement was aired on national television in prime-time slots January 6–14, 1996. The television advertisement was also broadcast in targeted local markets for a week in

December 1995 and again for another week in January 1996. In addition, a radio announcement was broadcast 792 times on 611 stations across the country. Finally, class counsel established a toll-free telephone information hot-line for the purpose of receiving requests for class notice and other materials.

The settlement also provided for a subsequent notice program to take place no later than the end of the third and sixth years of the settlement.¹⁰² This program would include direct mailings to all prior claimants and advertisements designed to reach new class members and publicize the existence of a toll-free telephone number to request more information. The anticipated or actual costs of the subsequent notice were not shared with us, though it appears that such costs, as well as the costs of providing ongoing information to claimants, class members, or other parties after the final approval, may come from the common fund.¹⁰³

NOTICE PERIOD, ADDITIONAL NEGOTIATIONS, AND OBJECTIONS TO SETTLEMENT

On March 29, 1996, the case was reassigned to Judge Jones for all further proceedings.¹⁰⁴ Procedurally, Judge Jones—not Magistrate Judge Jelderks—would be required to sign any dispositive order such as the final judgment. Important details of the settlement, such as the plaintiff attorney fees and the inspection protocol, were to be negotiated before the final fairness hearing set for April 15, 1996.

Negotiation of Class Counsel Attorney Fees

Days before the final fairness hearing, the parties attempted to reach agreement on the amount of fees to be paid to the plaintiffs' attorneys. After much negotiation, the issue was submitted to mediation by agreement of the parties. The mediator was former Judge Terrence Carroll, a member of JAMS/Endispute, one of the largest for-profit providers of arbitration and mediation services in the country and one with whom both defense and plaintiffs' counsel had prior experience. After a day of mediation, the parties agreed that \$26.25 million would be paid by the defendants to the entire group of class counsel; this amount would be separate from and in addition to the settlement fund.¹⁰⁵ Distribution of the fees among the class counsel was left to them and is not part of the public record.

Opt-Outs, Objections, and Interventions

By early April 1996, a relatively small number of class members had requested to be excluded from the settlement. As of April 8, 1497 valid exclusions out of a

potential class of 700,000–900,000 homes had requested to be excluded.¹⁰⁶ However, small but vocal groups of objectors had organized to oppose the settlement. Collectively, they objected on the grounds that (1) the amount of compensation was inadequate,¹⁰⁷ (2) the inspection protocol was unfair,¹⁰⁸ (3) class members should have the option of arbitrating compensation if they were dissatisfied with the fund administrator's offer,¹⁰⁹ and (4) the settlement fund was inadequate to meet the claims. In their motion for final approval of the settlement agreement, counsel noted these objections, but stated that they were either invalid or irrelevant. However, by the time of the final fairness hearing, three groups—builders, a collection of class members who became known as the Gronvold Intervenors, and an independent attorney—were still actively opposing the settlement.

One group of objectors comprised builders who—although they were not part of the settlement process—occupied a precarious position in relation to this litigation. Homeowners usually have no interaction with a manufacturer like Louisiana-Pacific but may have considerable contact with the developers of their property. Therefore, homeowners often look to their builders for compensation for any property damage. Because the settlement did not include the builders, homeowners could seek compensation from the builders for remaining uncompensated damage. Builders then would have legal rights against Louisiana-Pacific for any amount they paid out for damages caused by Louisiana-Pacific products. However, the builders wanted Louisiana-Pacific to assure them that they would not be harmed in future actions.

Another objector group that appeared at the settlement hearing was organized by Richard Rosenthal, a California attorney representing homeowners in central California who eventually joined the class settlement.¹¹⁰ Rosenthal and his associates felt that the settlement did not adequately compensate the class.¹¹¹ The group of class members Rosenthal represented became known as the Gronvold Intervenors; they included Richard and Darcy Gronvold, Reginald and Beverly Meyer, Timothy J. and Colleen Kelly, and David Startzel.

Another motion to intervene was filed by Lawrence Schonbrun, a well-known critic of class counsel attorney fees who often appears in class actions to object to fees.

FINAL FAIRNESS HEARING AND SETTLEMENT

By all accounts, the April 15 fairness hearing was highly contentious. The final terms of the settlement had only recently been completed, and the objectors had outstanding complaints about both the terms of the original settlement and the additional provisions. The judge was presented with estimates of the adequacy of the settlement by experts in economics and statistics retained by

counsel for Louisiana-Pacific. An economics consulting group projected future claims by using available claims and sales information; it concluded that the anticipated cost of remediation could be as much as \$168 million, with an assumed remediation cost of \$4 per square foot.¹¹² A statistical consulting firm reviewed the work of the economists and concluded that “the 2002 end year is sufficient to capture future claims. . . with a risk of missing 0.3% of all potential claims, and the total \$475 million settlement fund will be adequate to cover the cost of all projected claims through year 2002. . .”¹¹³

At the hearing, Judge Jones raised questions and expressed concerns regarding those homeowners who were dissatisfied with the amount of compensation calculated by inspectors under the adjustment protocol. In general, fairness hearings allow parties to present their arguments in favor of any particular settlement, and objectors to present their complaints. Sometimes the hearings are very brief, but in this instance, the judge gave the objectors considerable time to present their arguments.¹¹⁴

At the end of two days, Judge Jones disapproved the settlement as presented.¹¹⁵ First, he wanted the opt-out date to be extended to May 27, 1996, with notice of opt-out rights mailed to the individuals who already had been sent a claim form. Second, he indicated his dissatisfaction with details of inspection protocol, including the age deduction and total replacement limit. He then continued the hearing for one week to allow the parties to negotiate amendments to the settlement agreement that would satisfy both him and the objectors. Intervenors were allowed to participate in the ongoing settlement negotiations, but only with regard to issues raised at the fairness hearing; they could not raise any new issues.

During the next week, the parties worked to address the judge’s concerns. They obtained the assistance of Judge Carroll in mediating some of the more contentious issues.¹¹⁶ Judge Jones contacted Judge Carroll and advised him that, in addition to the protocol and opt-out date, Judge Jones also thought there should be a provision for arbitration for dissatisfied class members.¹¹⁷ By the next week, the parties had made all the changes identified by Judge Jones.

The most important agreement reached during this week was the addition of an arbitration provision. Any claimant who was dissatisfied with the amount of compensation offered under the inspection scheme would have the option of submitting his or her claim to arbitration.¹¹⁸ Once the claimant chose arbitration, he or she would abandon the option of claiming benefits under the administrative claim process. At arbitration, the claimant could assert any and all claims and theories of liability, and Louisiana-Pacific could assert any and all defenses available to it. Thus, the claimant could get nothing, or more or less than offered originally. The arbitration decision would be binding on the par-

ties, barring both from subsequent appeal. The alternative dispute resolution firm of JAMS/Endispute was chosen to arbitrate such disputed claims.

At the resumed fairness hearing, the judge indicated that he was still dissatisfied with a number of aspects of the settlement. One concern involved counsel's inability to tell class members exactly what they might be getting under the settlement. Because the inspection protocol for adjusters was still being negotiated, the judge felt that "[a]s of this moment, none of you can agree as to what constitutes what should be replaced or what replacement costs means."¹¹⁹

The judge also stated that he felt homeowners should be allowed to replace an entire wall of siding if 50 percent of the lap siding were bad.¹²⁰ (Originally, the parties had negotiated a provision that allowed total replacement of a wall if 70 percent of lap siding panels installed were bad.¹²¹) This provision was not a trivial issue; for instance, dropping the cutoff figure from 65 percent to 60 percent would cost another \$110–\$120 million.¹²²

Because a number of terms of the settlement agreement had changed significantly—or, like the inspection protocol and training manual, had been created since preliminary approval—the judge thought it necessary to notify the class of the new terms and to provide an additional opportunity to opt out, even though that might entail an "enormous expense."¹²³ The existence of an arbitration option for those who were dissatisfied by the adjuster's decision was not enough in the judge's view to eliminate the need for an extended opt-out period, especially since the defendant would be able to assert additional defenses at the arbitration, such as improper installation.¹²⁴ As a compromise, the judge indicated that he would consider dropping the idea of extending the opt-out period if the 70 percent lap siding damage threshold were reduced to 50 percent and if the defense of improper installation at arbitration were eliminated.¹²⁵

The judge also wanted the plaintiffs' attorneys to be paid incrementally over the following four years because they would have continuing obligations to monitor settlement provisions.¹²⁶ The judge likened the situation to how building contractors are compensated with incremental payments as the work progresses while withholding final payment until the work is finished and satisfactory.

Finally, the judge was concerned about the impact of using part of the settlement fund to cover administrative expenses because he was of the opinion that the minimal obligation of the defendant to the fund (\$275 million) might already be too low.¹²⁷

The hearing was recessed for 40 minutes after testimony. When the hearing resumed, the parties had agreed to a 65 percent cutoff for replacing an entire wall but retained the ability of the defendant to assert improper installation as a defense at arbitration. Judge Jones then approved the settlement but ordered

that class members would have a new opt-out period in which to consider the modified agreement.¹²⁸ Other changes to the initial settlement are discussed below.

Terms of Final Order

In regard to provisions for funding the settlement, the agreement that was approved on April 26, 1996, is substantially the same as the initial agreement put forward on October 18, 1995. Homeowners had until May 27, 1996, to opt out of the settlement, after which anyone opting out could pursue his rights in court. If a homeowner chose to be part of the settlement, he or she would submit a claim to an inspector who would calculate the amount of damage and compensation. A homeowner dissatisfied with the inspection amount had the option of submitting the issue to an arbitrator. Claimants would contribute \$300 to the costs of arbitration with Louisiana-Pacific covering any additional fees (the defendant's contribution would not come from the settlement fund).¹²⁹ At arbitration, all claims and defenses would be available to the parties and the decision of the arbitrator would be binding without the right of appeal. One noteworthy difference between the Final Order and the original agreement is that claimants were not required to waive their rights to pursue claims of consequential damage, including those for personal injury and death.¹³⁰

Class counsel would receive \$26.25 million over the first four years of the settlement period, which would be paid separately by the defendant.¹³¹ On the settlement date, the class attorneys received 60 percent of the fee (\$15.75 million).¹³² The remaining 40 percent (\$10.5 million) was placed in an interest-bearing account. On each of the first, second, third, and fourth anniversaries of the settlement date, the class attorneys were to receive 25 percent of the money originally deposited in this account.

The court found that a percentage recovery was appropriate for the case and that the agreed-to fees and costs award, when compared to the total of the class compensation fund, counsel fees, and administrative expense recoveries, was less than 8.5 percent of the total and "well within the typical range of fee awards."¹³³ With respect to claims protocol issues, intervenors were given permission to apply for reasonable attorney fees.

The settlement agreement approved by the court also provided that incentive payments of \$3000 were to be made to each of the nine married couples or individuals named in the three underlying actions; in addition, a \$10,000 payment was made to the Sandpiper condominium association. These payments were to

come out of the common fund.¹³⁴ Furthermore, it is our understanding that in response to Schonbrun's objections regarding attorney fees and notice, the parties added a supplemental notice program and paid \$100,000 to Schonbrun for his fees and costs. This payment did not come out of the common fund but was paid by class counsel and the defendant.¹³⁵

Originally, the settlement agreement provided that "[a]ll expenses incurred in administering this Agreement, including cost of the Class and Subsequent Notices and costs of implementing and administrating the claims process and the costs of the Independent Adjusters, shall be paid from the Settlement Fund,"¹³⁶ but an amendment to the agreement (executed by the parties on the day of final approval of the settlement by the court) provided that Louisiana-Pacific would directly pay for costs of administration and the adjusters (though not notice expenditures).¹³⁷ At the time of the approval of the settlement, Louisiana-Pacific's costs of administering the claims process were estimated between \$13 million and \$15 million; we were subsequently informed by the defendant's representatives that the actual amounts have not been publicly released, are presently under a protective order, and were greater than originally anticipated.¹³⁸

The court retained continuing jurisdiction over the action and parties including the implementation of the settlement and distribution of class benefits. Subsequently the court, citing the burdens involved in the "constant surveillance and attention" needed, appointed Justice Richard L. Unis, a retired Oregon Supreme Court judge, as Special Master to oversee the administration and implementation of the settlement. Justice Unis's duties included administration of the fund, coordinating Louisiana-Pacific's contributions, paying claimants, and oversight of the arbitration program established under the settlement. As a Rule 53 Special Master, Justice Unis's compensation was borne equally by the defendants and the class counsel (and not deducted from the settlement fund); the court's order appointing the Special Master indicated that his fee would be \$200,000 per year for a five-year period.¹³⁹

POST-FAIRNESS HEARING EVENTS

This settlement was the result of considerable negotiation among many parties. As Judge Jones stated, "[T]his is a settlement agreement. That means a compromise. That means that realistically, nobody is happy with it. You [the defendant] paid more than you wanted to. You [the class] got less than you wanted."¹⁴⁰ The period after the fairness hearing was as contentious as the period leading up to the settlement.

Appellate Record

Builders are Louisiana-Pacific's most important customers, and the company cared about trying to preserve its market among this group. One builder, perhaps unhappy that the settlement did not provide any concessions to builders who might be held liable for damages, filed a notice of appeal from the entry of final judgment.¹⁴¹ Although this appeal was not made on behalf of all builders, it reflected concern about how the settlement would affect them. Louisiana-Pacific responded by agreeing to indemnify builders for any payment that a builder incurred resulting from Louisiana-Pacific Inner-Seal Siding. Consequently, the appeal was dismissed.¹⁴²

A second appeal was filed on behalf of the Gronvold Intervenors. During interviews, we were told that Judge Jones had asked the Gronvold Intervenors if they were satisfied with the settlement and if they planned to appeal. Although they replied that they would not appeal, they filed a notice after the order and final judgment in which they proposed four issues for appeal. They argued that: (1) jurisdiction was improper; (2) class counsel fees were excessive; (3) notice to the class of the amended settlement was inadequate; and (4) the action was not properly maintained as a Rule 23(b) class.¹⁴³ The parties settled with the intervenors in late August 1996, agreeing to allow the intervenors' counsel the right to participate in the "review, structure and implementation of the settlement program. . ." but only insofar as to matters relating to arbitration and subsequent notice.¹⁴⁴ The attorneys for the Gronvold Intervenors received \$1 million for fees and costs related to their intervention into the litigation; this cost was shared equally by the class counsel and by the defendants.¹⁴⁵ Like the representative plaintiffs in the main action, each of the four named Gronvold intervenors received \$3000. This amount was to be paid out of the common fund and was approved by the court.¹⁴⁶

Arbitration

After the final settlement, as claimants began opting for arbitration, it became clear that the arbitration program as administered was not proceeding as anticipated. According to our interviews, certain parties felt that the arbitrators were not following the instruction of the court to determine liability conclusively and were "splitting the baby." They complained to Judge Jones about the process, which led Judges Jones and Unis to attend a number of arbitration hearings.

After observing some arbitrations, Judge Jones reportedly stated that the JAMS arbitrators were "simply mediating damages and were not requiring proof of liability."¹⁴⁷ As discussed above, the process as originally conceived required parties to prove all elements of their claims and allowed them to introduce all

available evidence in support of those claims.¹⁴⁸ Under the rules, in some cases a claimant might go to arbitration and receive no compensation because the facts of the case did not result in liability on the part of Louisiana-Pacific. If the arbitrators were indeed not requiring claimants to prove liability and were merely mediating damages, then claimants would have an incentive to arbitrate claims that were otherwise invalid. This trend would result in more arbitrations than anticipated, bogging down the claims resolution process and escalating costs. At the extreme, Louisiana-Pacific might be forced into bankruptcy.

Ultimately, a confrontation arose between the arbitration administrators and the court, which became public in May 1997.¹⁴⁹ Judge Jones sent a letter to Judge Carroll, the JAMS/Endispute official who headed the panel of arbitrators—and who had helped class counsel and the defendants mediate the attorney fee issue—reminding him that any arbitrator who viewed his or her decision simply as a matter of an equitable reevaluation of damages would be in violation of his or her oath.¹⁵⁰ In response to Judge Jones's attempt to directly reassert the principle that arbitration claimants were required to meet their burden of proof regarding all elements of the claim—over and above the issue of whether the siding was indeed damaged—JAMS/Endispute terminated its relationship with the Louisiana-Pacific settlement process in view of what they termed as Judge Jones's "demonstrated lack of respect for the independence and impartiality of the arbitrators."¹⁵¹ Judge Carroll and JAMS/Endispute general counsel Michael Young asked that Judge Jones recuse himself from overseeing the Louisiana-Pacific arbitrations. In addition, JAMS/Endispute referred the matter to the chief judge of the U.S. District Court for the District of Oregon.¹⁵² The decision of JAMS/Endispute to withdraw from the arbitration program was not a trivial one, because at that time there were several Louisiana-Pacific claim arbitrations pending and the potential for many more fee-producing hearings existed.

After JAMS/Endispute terminated its participation, arbitration was provided on an as-needed basis by other arbitrators. Very few claimants have chosen the arbitration option. As of June 18, 1998, only 316 of approximately 89,000 claimants had sought arbitration.¹⁵³

EPILOGUE

Experience

Two years into the settlement period (June 1998), Louisiana-Pacific had paid claimants a total of approximately \$165 million. Based on these figures, claimants received approximately \$4367 as an average settlement amount.¹⁵⁴ Because the settlement was intended to pay claimants for their losses as calcu-

lated by an adjuster, we can assume that these figures generally reflect the losses actually incurred by the claimants as a result of the Louisiana-Pacific product (though those losses involve the costs of replacing the siding only and not those related to collateral damage to the structure or surrounding property).¹⁵⁵

In addition to the information provided by the Special Master in his year-one and year-two reports, Securities and Exchange Commission filings from Louisiana-Pacific provide some information about expenditures. As of June 18, 1998, 164,046 claim forms had been requested from the claims administrator,¹⁵⁶ and 88,891 of these had been returned to the claims administrator for compensation.¹⁵⁷ Incomplete claims were returned to the claimants and modified. Almost 67,000 inspections had been performed.¹⁵⁸ Of this group, 37,781 claimants had been mailed checks.¹⁵⁹

Recent statistics regarding claimant compensation suggest that the parties underestimated the potential liability resulting from damaged OSB siding. By December 1997, the \$155 million available in the common fund as a result of the initial and year-two payments was almost exhausted.¹⁶⁰ In order to ensure that claims would be paid in a timely manner, Louisiana-Pacific advanced its contribution of \$40 million due in June 1998 for a total of \$195 million in the settlement fund.¹⁶¹ The defendant was required to add in another \$30 million in June 1999 for its year-three contribution.

In his year-two report Judge Unis stated that claims were being paid at the rate of approximately \$5 million per month from January through June 1998. By September 30, 1998, after accruing interest on the settlement fund account and after deducting costs of notice and all claims paid to date, approximately \$8.6 million remained in the fund.¹⁶² These numbers implied that the initial, year-one, and year-two payments to the common fund might well be exhausted by late 1998 and that Louisiana-Pacific would once again have to decide whether to contribute additional moneys to the settlement fund in advance of its obligations. If it did not make such accelerated contributions, class members with claims approved but not yet paid by the end of 1998 would have to wait until at least June 1999 and perhaps longer.

At this time, it is unclear if the settlement fund will be able to compensate all class members who might file claims through the end of 2002, even if optional funding potentially worth \$200 million is added to the initial funding obligations. The quarterly report filed with the Securities and Exchange Commission for the period ending September 30, 1998, states:

The claims submitted to the claims administrator to date substantially exceed the \$275 million of payments that L-P is required to make under the settlement agreement. As calculated under the terms of the settle-

ment, as of September 30, 1998, claims submitted and inspected exceeded \$457 million.¹⁶³

Settlement Augmentation

According to the defendant, there is insufficient data available to project the future volume or dollar value of claims that might be made against the settlement fund, and in Fall 1998 the defendant had not yet decided whether to provide the optional funding in excess of the initial \$275 million after the fourth year of the settlement (a decision that must take place by August 2000, assuming immediate notification of fund depletion in June 2000).¹⁶⁴ Under the settlement agreement, the defendant could allow class members with unsatisfied claims to pursue available legal remedies by failing to provide sufficient optional funding payments, thus exposing itself to the potential of significant future litigation. But instead, in October 1998, Louisiana-Pacific and class counsel entered into an agreement that instituted an Early Payment Program for the original settlement fund and established a Second Settlement Fund.¹⁶⁵ This agreement, characterized by the parties as augmenting rather than altering or amending the original court-anointed settlement, was approved by the Special Master on November 9, 1998.

The Early Payment Program offers all claimants who would be entitled to receive compensation—from the remaining \$80 million in four initial funding obligation payments (scheduled for June 1999, 2000, 2001, and 2002), as well as the two \$50 million optional payments resulting from the second and third funding obligations (perhaps as late as the summer of 2001 and 2002)¹⁶⁶—the opportunity to receive payment prior to the scheduled funding dates. To do so, claimants have to agree to accept a payment that is discounted according to the date the funds would have been required to have been paid under the original funding obligation schedule. That discount is 9 percent per year from the initial funding obligation dates in 1999–2002 and 12 percent per year from the potential second and third funding obligation dates in 2001 and 2002. For example, a class member with an approved claim of \$6000 existing on November 1, 1998, that would not normally be paid until June 1999 under the current funding structure would be offered \$5694. Besides agreeing to the reduction, early claimants are *not* able to arbitrate their award (an option available to initial claimants). Those class members who decline to participate in the Early Payment Program continue under the terms of the settlement as negotiated. When the date of the previously scheduled funding opportunity arrives, the defendants will be credited with the undiscounted value of the claims paid under the program.

In addition, the parties agreed to establish a “second settlement fund.” The defendant agreed to establish a \$125-million account to cover all claims filed

prior to the end of 1999 that exceeded the \$375 million in initial, second, and third funding opportunities (thus, these claims would not be eligible for the early payment program). In early 2000 (after the filing cutoff), all claims filed by class members who agree to participate in the second settlement fund program will be aggregated and a pro rata award will be granted from the \$125 million in the fund. Like the early payment program, there will be no right of arbitration; however, claimants dissatisfied with their pro rata share can exercise their “back end opt-out right” and reject the share. If they accept their share, they will be prohibited from submitting additional claims under the settlement. Also similar to the early payment program, class members who decline to opt into the second settlement fund program (or who choose to opt out) continue under the current rules of the settlement.

The use of the second settlement fund mechanism depends both on Louisiana-Pacific’s choosing to provide the \$100 million in second and third optional funding opportunities as well as declining to exercise its right to withdraw from the new program if it feels the level of participation by class members is inadequate. If the defendant does choose to withdraw from the second settlement fund program, the rights and obligations of the parties will be governed by the originally approved settlement (except as modified by the early payment program).¹⁶⁷ It remains to be seen how class members will react to the new programs and how their implementation will affect the ultimate liabilities of the defendant.

Other Issues

Subsequently, and separate from the siding dispute, Louisiana-Pacific has had other problems with its OSB product. Recently, Louisiana-Pacific settled claims in California over the deterioration of OSB used as structural panels for roof and wall sheathing as well as for floor underlayment and subfloors in residential and commercial construction.¹⁶⁸

Our interviews indicate that Inner-Seal Siding is still available for use as an exterior siding material. However, the manufacturing process has been continuously modified during the 12-year production life of the product. About the time of the settlement, Louisiana-Pacific began adding a fungicide to the mixture. Since then (for siding installed after January 1, 1996) the failure claiming rate has been lower than during the previous five-year period.

Key Events	Date
Problems with Inner-Seal Siding become public	Spring 1994
<i>Anderson</i> case filed in Florida state court	October 21, 1994

Louisiana-Pacific faces attorney general investigations in four states	Fall 1994
<i>Matherly</i> complaint filed in Washington state court	April 28, 1995
<i>Sandpiper Village</i> complaint filed in Oregon federal court	June 19, 1995
<i>Anderson</i> settled as statewide class action	July 25, 1995
Shareholder class action against Louisiana-Pacific filed because of decline in stock prices; President and Chairman of the Board Harry Merlo forced out of the company	July 31, 1995
<i>Hudlicky</i> complaint filed in Oregon federal court	September 15, 1995
Settlement agreement reached between all parties in the <i>Matherly</i> , <i>Sandpiper Village</i> , and <i>Hudlicky</i> class actions	October 5, 1995
Settlement preliminarily approved	October 18, 1995
Notice published, broadcast, and distributed to potential class members	November 1995– February 1996
Initial opt-out deadline	March 7, 1996
Case reassigned from Magistrate Judge to District Judge Jones	March 29, 1996
Objector cutoff	March 31, 1996
Final fairness hearing	April 15, 1996
Amendment to settlement agreement accepted that established the inspection protocol	April 22, 1996
Final settlement approval	April 26, 1996
Final opt-out deadline (extended during final fairness hearing)	May 27, 1996
Special Master appointed; year-one payouts to claimants begin	June 1996
JAMS terminates its involvement with the settlement	May 1997
Louisiana-Pacific advances year-three money six months early because common fund is nearly exhausted	December 1997
Year-four money scheduled to be added to the common fund	June 1999
Final installment (year-seven money) due	June 2002

NOTES

¹As part of our research on this litigation, we collected information from the primary plaintiff and defense attorneys, defendant spokesmen, representatives of attorneys general, and judicial officers. We also reviewed the pleadings and papers filed in the case as well as other documents including newspaper and magazine articles, press releases, and internet web site postings.

²*In Re Louisiana-Pacific Inner-Seal Litigation*, Civ. No. 95-879-JO (LEAD), United States District Court for the District of Oregon, filed June 19, 1995.

³Memorandum of Points and Authorities in Support of Motion for Final Approval of Settlement and for an Award of Attorneys' Fees and Expenses (Apr. 10, 1996) at 3-4 (hereinafter Motion for Final Approval). See also David Dobbs, "What's the Best Material for Your Home's Exterior?" *Seattle Times*, May 16, 1993, at G1.

⁴Dobbs, *supra* note 3.

⁵Motion for Final Approval at 7.

⁶*Id.*

⁷When used as a structural panel OSB is not exposed to the elements, but instead is incorporated into the interior of the wall, floor, or roof.

⁸Motion for Final Approval at 7.

⁹Class Action Complaint for Money Damages, Declaratory Relief, and Injunction at 2, *Matherly v. Louisiana-Pacific Corp.*, No. 95-2-10740 (Wash. Super. Ct. King County filed Apr. 28, 1995) (hereinafter *Matherly* Complaint).

¹⁰*Id.* at 2-3; Class Action Complaint at 5-7, *Hudlicky v. Louisiana-Pacific Corp.*, No. CV95-1453-JES (D. Ore. filed Sept. 15, 1995) (hereinafter *Hudlicky* Complaint).

¹¹Motion for Final Approval at 4.

¹²All OSB products, including structural panels, constituted 33 percent of Louisiana-Pacific sales in the 1993 fiscal year. Louisiana-Pacific Corp, *Form 10-K for the Fiscal Year Ending December 31, 1993* (1994).

¹³Motion for Final Approval at 6.

¹⁴*Id.* at 6-7.

¹⁵*Id.* at 4-6.

¹⁶*Id.* at 5.

¹⁷*Id.* at 4-6.

¹⁸*Id.* at 4, 6, 15.

¹⁹See, e.g., Gronvold Objectors' Fairness Hearing Memorandum (Apr. 11, 1996) at 7-8 (hereinafter Objectors' Memorandum).

²⁰Motion for Final Approval at 15.

²¹T. Gauntt, "Louisiana-Pacific Takes Heat over Soggy Siding," *Business Journal-Portland*, Dec. 16, 1994, at 1.

²²See, e.g., Sandra Pedicini, "Ban Asked for Type of Siding," *Orlando Sentinel*, Mar. 1, 1994, at C3, and Will Wellons, "Subdivision Residents Boil Over Soggy Siding; Dozens of Complaints Gain State's Attention," *Orlando Sentinel*, July 21, 1994, at I1.

²³Shelley Emling, "Homeowners Furious About Crumbling Siding," *Atlanta Journal and Constitution*, Sept. 8, 1994, at F1.

²⁴Pedicini, *supra* note 22.

²⁵Jeanette Steele, "A Matter of Mushrooms," *Columbian* (Vancouver, Wash.), July 23, 1995, at F1.

²⁶Pedicini, *supra* note 22; Debra Durocher, "Siding Spat Results in Protective Ruling; The New Rule Requires Siding Manufacturers and Builders to Do Their Jobs Correctly," *Orlando Sentinel*, July 14, 1994, at I3.

²⁷A discussion of the recommended maintenance regimen would be lengthy; however, it includes periodic painting and caulking. In humid climates these procedures should be applied every two years. Wellons, *supra* note 22.

²⁸*Id.*; Pedicini, *supra* note 22.

²⁹Motion for Final Approval at 8.

³⁰Pedicini, *supra* note 22.

³¹See, e.g., Durocher, *supra* note 26; Will Wellons, “‘People Are Panicking’ Over Rotten Siding, So Oviedo Drafts Ordinance” *Orlando Sentinel*, Sept. 1, 1994, at 11.

³²Emling, *supra* note 23.

³³See, e.g., Wellons, *supra* note 22.

³⁴Motion for Final Approval at 8 n.8.

³⁵Louisiana-Pacific Corporation, *Form 10K for the Fiscal Year Ended December 31, 1994*.

³⁶*Id.*

³⁷Motion for Final Approval at 8.

³⁸*Anderson v. Louisiana-Pacific Corp.*, No. 94-2458-CA-01 (Fla. Dist. Ct. Lake County 1995). The attorneys responsible for this settlement will be referred to hereinafter as the “*Anderson* attorneys.” According to our interviews and our review of available media resources, no other individual or class action was filed prior to October 21, 1994. Because this case study describes the settlement of claims arising out of Inner Seal Siding installed in the remaining 49 states, we do not discuss the settlement of the *Anderson* action in detail.

³⁹Louisiana-Pacific Corporation, *Form 10Q for the Quarterly Period Ended September 30, 1997*.

⁴⁰See, e.g., Louisiana-Pacific Corp., *Form 10-Q for the Quarterly Period Ended March 31, 1995*. See also Rachel Zimmerman, “States Opening L-P Probes,” *Business Journal-Portland*, June 23, 1995, at 1.

⁴¹Consent Decree (Jan. 25, 1996), *State of Washington v. Louisiana-Pacific Corp.*, No. 96-2-02388-4SEA (Wash. Super. Ct. King County 1996) (hereinafter Washington Consent Decree).

⁴²Assurance of Voluntary Compliance (Jan. 25, 1996), *In re Louisiana-Pacific Corp.*, No. 96C10299 (Ore. Cir. Ct. Marion County 1996) (hereinafter Oregon Assurance of Compliance).

⁴³Washington Consent Decree; Oregon Assurance Compliance.

⁴⁴*St. Petersburg Times*, Apr. 27, 1996, at 8B.

⁴⁵*Matherly* Complaint. The attorneys filing this complaint will be referred to hereinafter as the “*Matherly* attorneys.”

⁴⁶Revised Code of Washington section 19.86. The complaint alleged that the defendant’s marketing, warranting, and claims handling constituted unfair or deceptive acts or practices and that class members would be entitled to up to \$10,000 in treble damages for each statutory violation as well as attorney fees and costs.

⁴⁷*Matherly* Complaint at 8–14.

⁴⁸*Id.*

⁴⁹*Id.* at 5–6. Stephen H. Smith, Michael L. Watts, and James W. Gilles were added later as representative plaintiffs.

⁵⁰*Id.* p. 6.

⁵¹Complaint, *Sandpiper Village v. Louisiana-Pacific Corp.*, No. CV-95-879-JE (D. Ore. filed June 19, 1995) (hereinafter *Sandpiper Village* Complaint). The attorneys filing this complaint will be referred to as the “*Sandpiper Village* attorneys.” The lead attorney of this group was William Garvin, currently of the Tallahassee, Florida, law firm of Weller, Green, McGown & Toups. Garvin associated the law firm of Ness, Motley of South Carolina, a leading personal injury and class action firm, which played an important role in the litigation, and associated Oregon counsel Jeffrey Mutnick of Pozzi Wilson Atchison, among others.

⁵²Judge Jones is a U.S. District Court Judge for the District of Oregon. He is a veteran of the bench, having been appointed to the federal bench in 1990 and having sat on the Oregon State Supreme Court from 1983 to 1990 and Oregon Circuit Court from 1963 to 1982.

⁵³*Sandpiper Village* Complaint.

⁵⁴Second Amended Complaint Based Upon Breach of Warranty and RICO and Demand for Jury Trial (Sept. 28, 1995) at 8–13. RICO refers to the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. § 1962(a), (c), (d) and 18 U.S.C. § 1964(c), which provides for treble damages and attorney fees when an enterprise conducts its affairs through a pattern of racketeering activity.

⁵⁵*Sandpiper Village* Complaint at 2–3. The complaint was later amended to include Craig and Cheryl Ostergren. The Ostergrens are identified as coconservators for Keith Ostergren. The house on which the allegedly defective siding is installed is held in trust for Keith Ostergren. They are included on the complaint by local counsel for the *Sandpiper Village* attorneys to provide potential class representatives for both community housing developments and individual family owners.

⁵⁶The statutory dollar minimum for diversity jurisdiction was subsequently raised to over \$75,000. 29 U.S.C. § 1332(a).

⁵⁷Masonite had been manufactured from the 1960s by Masonite Corporation until 1988 when International Paper, Inc. acquired the company.

⁵⁸The lead attorney from McRight, Jackson, Dorman, Myrick & Moore was Richard Dorman; he is now with the Atlanta firm of Cunningham, Bounds, Yance, Crowder & Brown.

⁵⁹In addition to investigating other siding products as part of the development of the *Masonite* case, news reports of consumer complaints against Louisiana-Pacific were appearing in newspapers in Florida and were probably seen by the *Masonite* class counsel.

⁶⁰*Hudlicky* Complaint. The attorneys filing this complaint will be referred to hereinafter as the “*Hudlicky* attorneys.”

⁶¹18 U.S.C. § 1962(a).

⁶²*Hudlicky* Complaint at 33–59.

⁶³*Id.* at 57–59.

⁶⁴*Id.* at 26.

⁶⁵“L-P Expects to Be Indicted,” *Sacramento Bee*, May 26, 1995, at D1.

⁶⁶“News of Inquiry Drops Louisiana-Pacific,” *New York Times*, May 26, 1995, at D3.

⁶⁷B. Scanlon, “Shareholders Sue Louisiana-Pacific; 5 Officials Named,” *Rocky Mountain News*, May 26, 1995, at F10A.

⁶⁸In practice, some states may have identical legal standards, and others may have in common many elements necessary to prove liability under various standards. In *Masonite*, the jury was given special instructions that asked them to reach a decision on the various elements. These elements would be combined to render an overall decision under different legal regimes. But see *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

⁶⁹See Objectors’ Memorandum at 3–4.

⁷⁰This observation is based on information gained from our interviews; on the *Hudlicky* Complaint, in which violation of RICO was first alleged; and on the Objectors’ Memorandum at 4–5.

⁷¹Motion for Final Approval at 32. These serious allegations, of course, never proceeded beyond the pleadings stage. Indeed, one source informed us that they believe the RICO claim was “cooked up between class counsel and a compliant defendant to allow the federal court to have a ‘legitimate’ basis of jurisdiction only so that a national class could be settled.”

⁷²See Objectors’ Memorandum at 3–4.

⁷³The timing of the settlement is interesting. A motion for class certification in *Matherly* had to be heard 90 days after parties have answered the complaint according to the local court rules. King County Local Ct. R. 23(b). Our interviews suggested that this impending deadline provided the parties with some urgency in their negotiations.

⁷⁴Order Consolidating Actions, Granting Preliminary Approval to Proposed Settlement, and Approving Class Action Notice Program (Oct. 18, 1995) at 2–3 (hereafter Order of Preliminary Approval).

⁷⁵Settlement Agreement (Oct. 18, 1995) § 24.

⁷⁶*Id.*

⁷⁷*Id.* at § 9.

⁷⁸Motion for Final Approval at 13.

⁷⁹Settlement Agreement § 4.5.

⁸⁰Settlement Agreement §§ 4.6–4.7.

⁸¹Settlement Agreement § 4.8.

⁸² Settlement Agreement § 4.9.

⁸³See, e.g., Declaration of Richard Kakigi in Support of Final Approval of Proposed Settlement, (Apr. 9, 1996) at 11 (“. . . the total \$475 million settlement fund . . .”); Motion for Final Approval at 1 (“Louisiana-Pacific has agreed to pay a minimum of \$275 million, and up to \$475 million or more . . .”); *id.* at 59 [“. . . the total settlement funding (up to \$475 million). . .”]; *id.* at 60 (“[26.25 million requested for counsel fees and expenses] constitutes between 5 and 9% of the settlement amount . . .”); Declaration of Bennett A. McConaughy in Support of Settlement (Apr. 10, 1996) at 13 (“. . . a total fee and expense agreement of \$26.25 million, or about 5 to 9% of the settlement amount at various funding levels.”); Declaration of Steve W. Berman in Support of Motion to Approve the Settlement (Apr. 10, 1996) at 6 (“Thus any attempt to establish a ‘fixed’ number, even if higher than \$275–\$475 [million], presents a risk that some class members will not be compensated.”)

⁸⁴Settlement Agreement § 4.12.

⁸⁵The net present value of the settlement as it was originally structured would be between \$242 million and \$381 million, using a discount rate of 5 percent (and assuming a minimum contribution of \$275 million and a maximum contribution of \$475 million as a result of \$50 million in optional funding obligation payments in each of years six through nine). However, because the actual funding rates have been significantly accelerated from what was originally anticipated (see text), the net present value of the settlement fund would be higher.

⁸⁶Louisiana-Pacific Corp., *Form 10-Q for Quarterly Period Ended September 30, 1998*. Claims regarding consequential damages (such as personal injury) or for any siding purchased after January 1, 1996, would not be released by the settlement. Settlement Agreement at 6.

⁸⁷Motion for Final Approval at 13–15.

⁸⁸Declaration of Steve W. Berman in Support of Motion to Approve the Settlement (Apr. 10, 1996) at 3. Counsel for plaintiffs, executed April 10, 1996, page 3.

⁸⁹This date was extended to May 27, 1996, pursuant to the Amendment to the Settlement Agreement (Apr. 26, 1996) and the Final Judgment.

⁹⁰Settlement Agreement § 1; Amendment to the Settlement Agreement § 1.3. Damage to property aside from the product itself does not appear to have been a common complaint (although one interviewee asserted that collateral damage to wood framing and base plates from rot, mildew, and similar problems would be a likely consequence of siding failure). Bodily harm resulting from the product was also rare, perhaps nonexistent. Because these contingencies were so unusual, Louisiana-Pacific felt comfortable excluding them from the settlement.

⁹¹See, e.g., Transcript of Fairness Hearing, Apr. 16, 1996, at 220–311. This portion of the settlement was negotiated after the Order of Preliminary Approval was entered on Oct. 18, 1995, and is contained in the Amendment to Settlement Agreement.

⁹²*Independent Adjuster Training Manual* at 16, Exhibit B to Amendment to the Settlement Agreement.

⁹³*Id.* at 15–16.

⁹⁴*Id.* at 16.

⁹⁵This rule is applicable to replacement of lap siding only and not to replacement of panel siding. To receive this compensation, the claimant would have to replace all of the siding.

⁹⁶Memorandum of Agreement as to Testing Protocol, Exhibit A to Amendment to the Settlement Agreement.

⁹⁷Louisiana-Pacific Corp., *Form 10-Q for Quarterly Period Ended September 30, 1998*.

⁹⁸Settlement Agreement § 5.10.

⁹⁹Motion for Final Approval at 19. Such defenses would, of course, still be available against claims from class members who opt out of the agreement or who have unpaid claims at the expiration of the settlement period and subsequently choose to pursue individual litigation.

¹⁰⁰Motion for Final Approval at 24; Letter from Michael H. Simon, Perkins Coie LLP, to RAND (Nov. 13, 1998); State of the Settlement Report—Year Two (June 18, 1998) at 3.

¹⁰¹Affidavit of Wayne Pines (Apr. 5, 1996) at 4–6; Class Action Settlement Notice Program, Exhibit A to Order of Preliminary Approval.

¹⁰²Settlement Agreement §§ 8.1–8.4.

¹⁰³The latest SEC 10-Q filing from the defendant indicates the deducting of “class notification costs” from the settlement fund. Louisiana-Pacific Corp., Form 10-Q for Quarterly Period Ended September 30, 1998. See also Settlement Agreement § 15.1.

¹⁰⁴Docket entry 175 (Mar. 29, 1996), Civil Docket for *Sandpiper Village v. Louisiana-Pacific Corp.*, available on PACER (Oct. 16, 1997).

¹⁰⁵Motion for Final Approval at 60–65.

¹⁰⁶*Id.* at 47. It was also estimated that the product was used in some 7500 to 8500 multifamily projects and an unknown “small” number of commercial projects such as mini-malls and clinics. See, e.g., Declaration of Christopher I. Brain, Co-Lead Counsel, In Support of Approval of Settlement Agreement (Apr. 9, 1996) at 8–9. However, the estimated class size based on homes with OSB may not have been the best measure of the number of potential claimants. These estimates were based on the total number of board-feet manufactured by Louisiana-Pacific divided by the number of board-feet in an average single family dwelling or multifamily unit and do not take into account the extent to which problems arose (and were noted) in actual use.

As of April 8, 1996, the toll-free phone number established to provide information regarding the settlement and a claim form to all who request one, had received approximately 190,000 calls. Exclusions represent less than one percent of this population. *Id.*

¹⁰⁷This objection included a number of more specific objections: (1) only damaged siding was compensated, not the entire residence; (2) the amount of compensation did not reflect the devaluation of the residence because of the use of Inner Seal Siding; (3) the payment per square foot of damaged siding was too low; (4) consequential damages were waived (the defendants subsequently agreed *not* to release consequential damage claims); and (5) compensation did not reflect devaluation of the property. Motion for Final Approval at 50–60.

¹⁰⁸This objection also included a number of more specific objections such as: (1) the age deduction was too dramatic; (2) the inspection protocol did not adequately describe damages; and (3) inspection timing was vague. *Id.*

¹⁰⁹The objectors felt that in the absence of additional money for the compensation fund and changes in the inspection protocol, the option of an arbitration would allow homeowners to obtain sufficient compensation.

¹¹⁰Rosenthal associated F. Gordon Allen, a Portland attorney, to appear in the action.

¹¹¹See, e.g., Objectors’ Memorandum. Intervenor Startzel was originally a class representative in the *Hudlicky* action.

¹¹²Declaration of Randall J. Pozdena, Ph.D. (Managing Director of ECONorthwest) (Apr. 7, 1996) at 8–9.

¹¹³Declaration of Richard Kakigi in Support of Final Approval of Proposed Settlement (Apr. 9, 1996) at 11. These conclusions were based in part on the assumptions that the product would not start to fail at an increasingly higher rate after nine years of use, that customers would not respond to future publicity campaigns in greater numbers than in the past, that the underlying claims data used by Dr. Pozdena were accurate, that the higher-than-expected claims experience for products of 1986 vintage was atypical of other years, and that Louisiana-Pacific has already paid out \$30 million in claims. *Id.* at 8–11. Two scenarios were presented that did exceed the potential upper bound of \$475 million in funding obligations. First, if the known claims experiences of 1987 vintage siding were typical of the entire production run and if remediation costs were indeed \$4 per square foot, there might be \$504 million in total claims. However, the \$475 million mark would not be breached if either the costs of remediation were less than \$4 per square foot or if, as reported to the statistician, \$30 million worth of claims had already been paid by Louisiana-Pacific. A more serious problem would occur if 1986 vintage product claim experience was used as the model for all siding.

Depending on whether computed at \$2 or \$4 per square foot, total claims could be between \$1 billion and \$2 billion. However, Dr. Kakigi felt that the known claims experience suggested that “. . . the 1986 vintage was [an] unusually bad product. . .” and might not be an appropriate basis for a model estimating claims for the entire production. *Id.*

¹¹⁴See, e.g., Transcript of Fairness Hearing, Apr. 16, 1996, at 220–416.

¹¹⁵*Id.* at 469.

¹¹⁶*Id.* at 4–5.

¹¹⁷*Id.*

¹¹⁸Amendment to the Settlement Agreement at 7.

¹¹⁹Transcript of Fairness Hearing, Apr. 16, 1994, at 5. Many significant details about the inspection program and the factors that would go into the adjuster’s calculations were negotiated after the preliminary approval of the settlement. The Memorandum of Agreement as to Testing Protocol and Independent Adjuster Training Manual set forth the parties’ understandings as to how the process of adjustment was to take place.

¹²⁰Transcript of Fairness Hearing, Apr. 22, 1996, at 7.

¹²¹Memorandum of Agreement as to Testing Protocol, Exhibit A to Amendment to the Settlement Agreement. The initial version of the Testing Protocol required damage to greater than 70 percent of an entire wall of lap siding before total replacement would be considered.

¹²²Transcript of Fairness Hearing, Apr. 22, 1996, at 7.

¹²³*Id.* at 9.

¹²⁴*Id.* at 8–9.

¹²⁵*Id.* at 9.

¹²⁶*Id.* at 7–8.

¹²⁷*Id.* at 10–11.

¹²⁸*Id.* at 34–40.

¹²⁹Amendment to the Settlement Agreement § 9(c). Each side would bear its own attorney fees, if any.

¹³⁰Section 1.3 of the Amendment to the Settlement Agreement also excludes claims for consequential damage to other structural components caused by the failure or repair of the siding product.

¹³¹Order, Final Judgment, and Decree § 11 (Apr. 26, 1996) (hereinafter referred to as Final Judgment).

¹³²*Id.*

¹³³*Id.*

¹³⁴Letter from Michael H. Simon, *supra* note 100.

¹³⁵*Id.*

¹³⁶Settlement Agreement § 15.1.

¹³⁷Amendment to the Settlement Agreement § 10.

¹³⁸Robert Ablon, “Lieff, Cabraser’s New Deal Stands Up to the Elements,” *San Francisco Recorder*, Apr. 23, 1996, at A2; Letter from Michael H. Simon, *supra* note 100.

¹³⁹Order (June 12, 1996) at 2. Justice Unis’s service may be lengthened or shortened by the court, depending on the demands and needs for special master participation. *Id.* at 3.

¹⁴⁰Transcript of Fairness Hearing, Apr. 22, 1996, at 39–40.

¹⁴¹Notice of Appeal of Lexington Development (May 14, 1996).

¹⁴²We do not have any information about payments made to the attorneys representing the builders as part of their agreement to dismiss the appeal.

¹⁴³Notice of Appeal (July 3, 1996).

¹⁴⁴Agreed Stipulation and Order Regarding Attorney Participation and Waiver of Appeal (Aug. 26, 1996) at 1–2.

¹⁴⁵Letter from Michael H. Simon, *supra* note 100. It was reported to us that the court was informed of the payment to the Gronvold attorneys but its approval was neither necessary nor sought.

¹⁴⁶*Id.* We assume that one named intervenor who was also a named plaintiff in the three underlying actions received only one incentive fee. Thus, there would have been twelve total payments to individuals or couples of \$3000 each and one \$10,000 payment to the Sandpiper Condominium Association.

¹⁴⁷Victoria Slind-Flor, “Judge and Arbitrators Lock Horns,” *National Law Journal*, June 30, 1997, at B1.

¹⁴⁸Amendment to the Settlement Agreement at 8.

¹⁴⁹Slind-Flor, *supra* note 147.

¹⁵⁰*Id.*

¹⁵¹See also *Id.* at B2. There was a parallel controversy about comments Judge Jones made to claimants at one of the observed arbitration hearings; reportedly, the judge advised the claimants to reconsider their decision to arbitrate because of the difficulty of proving their claims in light of Louisiana-Pacific’s potential defenses.

¹⁵²It was reported to us that the chief judge found no impropriety and declined to take any action in the matter.

¹⁵³State of the Settlement Report—Year Two (June 18, 1998) at 7. The first arbitrations were held in April 1997. State of the Settlement Report—Year One (May 17, 1997) at 19. Of the 316 requests for arbitration, 255 were withdrawn and the claimants elected to receive their settlement check, 43 have been resolved, and 18 were still in progress as of June 18, 1998. The report does not describe the outcome of completed arbitrations. State of the Settlement Report—Year Two at 7.

¹⁵⁴This average figure is somewhat misleading. The majority of claimants were the owners of single family dwellings but the relatively fewer number of commercial property claimants with typically larger structures (or more structures per property) received significantly higher payments per claim than homeowners. Thus, the average is shifted upward from what a typical claimant would have received.

¹⁵⁵This assumption is of course subject to disagreement. In fact, the original Settlement Agreement was later amended to allow that if a claimant is dissatisfied with an inspector’s conclusions, the claimant has the option of adjudicating the issue in an arbitration procedure described previously. Amendment to the Settlement Agreement at 7–8.

¹⁵⁶State of the Settlement Report—Year Two at 8.

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.* p. 5.

¹⁶¹*Id.*

¹⁶²Louisiana-Pacific Corp., Form 10-Q for Quarterly Period Ended September 30, 1998.

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵Supplemental Funding Agreement (Oct. 26, 1998).

¹⁶⁶Assuming that the defendant is immediately notified of fund depletion by the claims administrator, that the \$50 million in payments added each year is insufficient, and that the defendant takes the full 12 months allowed to make its optional deposits. According to the Supplemental Funding Agreement, these dates would be August 2001 and 2002.

¹⁶⁷Supplemental Funding Agreement at 7–8.

¹⁶⁸*In re Louisiana-Pacific Corp. Inner-Seal Oriented Strand Board (OSB) Trade Practices Litigation*, Master File No. MDL 1114, Civil Action No. C-95-3178 VRW. The court preliminarily approved the settlement of these complaints on October 22, 1997. The terms of this settlement appear to be substantially similar to those of the siding settlement.