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REVIEW & OUTLOOK

Judging Asbestos

February 13, 2007; Page A24

Asbestos bankruptcies have become a favorite trial-lawyer scam in part because judges have been reluctant to police fraud in their own courts. So it's a milestone that two more federal judges have issued opinions exposing these shakedowns.

The first comes courtesy of Judge Kathryn Ferguson, who has been overseeing the Congoleum bankruptcy. The maker of floor materials has become a poster child for everything wrong with the trial-lawyer innovation of "prepackaged" asbestos bankruptcies. Prepacks are a legitimate means of getting through bankruptcy, but most asbestos versions have become giant self-enrichment schemes. Our Kimberley Strassel exposed the Congoleum prepack's gory details on these pages last April.

In Congoleum and similar cases, the company and plaintiffs lawyers team up in a cost-shifting alliance. Congoleum rushes through bankruptcy at minimal cost and with a clean slate. The lawyers -- in this case, tort kingpins Joe Rice and Perry Weitz -- make a bundle and get preferential treatment for their clients. Meanwhile, the bills are dumped on Congoleum's insurers, who don't participate in crafting the bankruptcy plan. Convenient, huh?

A little too convenient, said Judge Ferguson, in a groundbreaking opinion last month that threw out the Congoleum plan. The judge scored Congoleum's own meager contribution as well as the special treatment that certain plaintiffs (and lawyers) were getting in this deal -- claiming both violated the bankruptcy code. She also granted Congoleum's insurers standing to object. Her ruling greatly decreases the likelihood that more such scams will be brought to court, especially in the Third Circuit where she presides and which oversees most major asbestos bankruptcies.

The other big news concerns the case of W.R. Grace, which remains one of the most prominent asbestos bankruptcies because of the publicity surrounding its operation of a vermiculite mine in Libby, Montana, that contains asbestos.

W.R. Grace sold something called Zonolite Attic Insulation, or ZAI, which was made with products from the Libby mine. It didn't take long for class-action lawyers to file suits claiming the mere presence of ZAI in an attic created an "unreasonable risk of harm." This was no small claim, given that some three to 30 million homes were estimated to contain ZAI.

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Bankruptcy judges have been notoriously reluctant to dig into the science behind such accusations, for fear of dragging out proceedings. But in this case Judge Judith Fitzgerald chose to get to the bottom of the matter and held a trial. This included months of discovery, as well as scientific testing and testimony from experts on both sides.

And in December she ruled that ZAI does not pose an unreasonable risk of harm. She noted it wasn't enough for trial lawyers to say that the insulation contained asbestos, and that this asbestos could contaminate the air. The important point was the level at which asbestos was released, and whether the level could reasonably cause harm.

Trial lawyers have long held that there is "no threshold" at which asbestos is safe, an argument that is the basis for tens of thousands of lawsuits. Judge Fitzgerald noted instead that the best scientific evidence showed that regular homeowner activity in an attic didn't result in unsafe levels of asbestos; that even if attic insulation is disturbed it doesn't elevate asbestos levels throughout a house; and that it is unlikely the average person would be in an attic long enough to breathe asbestos at unhealthy levels. ZAI has been around for 80 years, with no evidence it has caused harm.

The ZAI claims are only a small part of the W.R. Grace bankruptcy, but Judge Fitzgerald has set a standard that other judges would do well to emulate. The No. 1 reason courts are heaving with asbestos claims is because few judges have been willing to challenge the veracity of the claims or the motives of those driving the litigation. With both now getting more scrutiny, the great asbestos legal fraud may finally be contained.

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