The New York Times | http://nyti.ms/19qMDAQ

THE OPINION PAGES | OP-ED COLUMNIST

The Asbestos Scam, Part 2

JAN. 13, 2014

Joe Nocera

Six weeks ago, I wrote a column about a ridiculous lawsuit being brought by Carolyn McCarthy, a congresswoman from Long Island. A smoker for most of her life, McCarthy has lung cancer. Yet her lawyers claimed that it was her "exposure" to asbestos, through the work clothes of her father and brother, both boilermakers, that triggered her cancer. Though McCarthy certainly deserves our sympathy as she fights cancer, it is hard to see her lawsuit as anything but an undeserved money grab — and the latest twist in asbestos litigation, the longest running tort in American history, with no end in sight.

Then again, maybe there is finally an end in sight. Late Friday afternoon, Judge George Hodges, a federal bankruptcy judge in North Carolina, wrote a breathtaking decision, in which he essentially pulled the lid off another form of asbestos scam. Though he shrank from labeling the actions of the plaintiffs' lawyers involved in asbestos litigation as "fraudulent," he did describe the litigation as "infected with the impropriety of some law firms." It's a potential game-changer.

There are two reasons it can be difficult to write about asbestos lawsuits. The first is that the modern-day plaintiff truly is sick — if not with lung cancer then with mesothelioma, a deadly disease that results from extensive exposure to asbestos decades earlier. Given the rules of American society, mesothelioma victims undoubtedly deserve compensation from whichever company used the product that caused their illness.

The second reason is that asbestos litigation has become more complicated than 3-D chess. For years, it was easy to explain the scam: People who weren't sick were being diagnosed with asbestosis by doctors being paid by asbestos lawyers. That has largely ended — hence the current emphasis on mesothelioma lawsuits, which have the added advantage (for the lawyers) of being potentially multimillion-dollar cases. Today, with around 100 companies having been bankrupted by asbestos litigation, and $37 billion set aside in trusts for victims, you would think the litigation would be winding down. Guess again.

Enter Garlock Sealing Technologies, a maker of gaskets. For years, it was on the periphery of asbestos litigation because, while its gaskets had once contained asbestos, it was a kind that had 1/100th of the risk of the more commonly used product. In addition, the asbestos was sealed, usually behind far-more-dangerous asbestos insulation made by some other, more culpable, company.

Stephen Macadam, the chief executive of EnPro, Garlock's parent company, told me that he had expected that the litigation pressure would ease on Garlock as other companies succumbed to bankruptcy and set up trusts for victims. Instead, the opposite happened. Garlock became a prime target, precisely because it was still standing.

For years, Garlock had made calculated decisions about how to deal with its asbestos litigation. It fought some cases and settled others. But, by 2010, inundated with mesothelioma cases, it too filed for bankruptcy protection. Then it did something different. It fought back.

The judge allowed the company to do a deep dive into 15 cases that Garlock had previously settled. For a victim to demand money from Garlock, he or she had to stipulate that Garlock's gasket had been a primary exposure to asbestos. To maximize the money they could get from Garlock, they would deny, under oath, other exposures to the products of the bankrupt companies that had set up trusts.

But as Garlock soon discovered, no sooner had the victims settled then they would file documents with a dozen or more trusts stipulating the opposite: that they had had "meaningful and credible exposure" to asbestos from the bankrupt companies. (The plaintiffs' lawyers, who control the trusts, have successfully fought to keep this information confidential.) Judge Hodges, in his decision, seemed thunderstruck that this pattern occurred in every case that Garlock investigated. The phrase he used to describe this behavior was "withholding evidence."

It would have been helpful if this decision had come a decade or more ago, before so many companies were forced into bankruptcy. But maybe, just maybe, other companies will start to follow Garlock's example and finally put an end to the asbestos scam.

As to why anyone should care whether innocent companies have to pay millions to asbestos victims and their lawyers, I would offer three reasons. First, when victims get more than they should under the rules, it means that someone else down the road will wind up with less than he or she should. Second, litigation designed to bring innocent companies to their knees is an impediment to economic growth and job creation.

And, finally, there is the rule of law, which the asbestos lawyers suing Garlock clearly flouted. We are very good in this country at pointing out the failure of other countries' judicial systems to abide by the rule of law. Shouldn't we be just as rigorous when the failure is our own?

A version of this op-ed appears in print on January 14, 2014, on page A27 of the New York edition with the headline: The Asbestos Scam, Part 2.