

DJ SMALLER ASBESTOS PRODUCERS STUNG BY BANKRUPTCY'S LEGAL SHIELD

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When Garlock Sealing Technologies LLC sought bankruptcy protection in June to deal with its asbestos-related liabilities, it immediately turned its attention to one culprit: the companies that traveled on the same road before it.

The North Carolina company traced its financial troubles, born from years of paying out millions in claims to asbestos victims, back to the giant makers of asbestos insulation and other harmful products that filed for Chapter 11 during the early years of the last decade.

Through bankruptcy, those manufacturers were able to shed their own vulnerability in the legal system, gaining immunity from lawsuits. Now, the smaller companies left behind in their wake argue they've been stuck with an unfair share of responsibility for asbestos damages, leaving their balance sheets in shambles and their faith in the legal system shaken.

"The exit of the most plausible causes of plaintiffs' diseases caused a fundamental breakdown in the integrity of the civil justice system," Garlock said in court papers.

Garlock is one of a trio of so-called second- and third-tier manufacturers that have sought bankruptcy protection over the last few months. These smaller companies made products that they say didn't release dangerous asbestos fibers into the air and therefore couldn't have posed a health hazard equal to the kind seen from major producers such as Owens Corning.

But Owens Corning and a slew of other former manufacturers of asbestos-laden products including cement, plaster and tiles are no longer targets for lawsuits from injured plaintiffs. The companies have reorganized under the section of the U.S. Bankruptcy Code devoted to businesses weighed down by asbestos claims, and they're shielded from further litigation. Claimants must instead seek recoveries from special trusts set up to compensate those who hadn't become ill from asbestos before the bankruptcy cases.

Attorneys like Jeffrey Prol say plaintiffs are going after smaller companies like Garlock because there's no longer the option to sue those big companies, and the special trusts only dole out modest payments.

"They're sort of leaving no stone unturned," Prol, of Lowenstein Sandler PC, said of the plaintiffs. "This is not the low-hanging fruit."

But many of the corporate defendants argue that they're getting slammed with a bigger burden than they deserve. Laws in many states where asbestos lawsuits are filed hold companies accountable for "joint and several liability," leaving companies like Garlock on the hook for the total damages even when a victim was exposed to both dangerous products from a manufacturer that has restructured in bankruptcy and Garlock's purportedly less damaging materials.

Garlock says the average amount it has to pay to resolve claims stemming from mesothelioma—a deadly cancer caused by asbestos—has skyrocketed over the last several years, increasing to annual payments of \$73 million in 2006 from \$6 million in 1999.

"These sharply escalating resolution values were a sign of a tort system that was essentially broken," the company said in a brief filed in its Chapter 11 case.

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Moreover, Garlock accuses asbestos plaintiffs of "double dipping," or seeking payments from a manufacturer's bankruptcy trust and then suing Garlock, claiming the smaller company is the sole cause of their disease. Garlock has denounced the current system of trusts as lacking transparency and making it difficult for other defendants to find out how much and who the trusts are paying.

Attorney J. Andrew Rahl, who worked on the Owens Corning bankruptcy case, acknowledged the system leaves room for possible abuse by the plaintiffs.

"There's certainly a potential for duplicate payments," he said.

But attorneys on the other side of the table dismiss the controversy over the trusts. Peter Van N. Lockwood, whose firm, Caplin & Drysdale, represents the asbestos claimants committee in the Garlock case and trust-advisory committees in other cases, said although there are "always crooks out in the world," he's not aware of any "widespread fraud" in asbestos trusts. He drew a parallel between the often secretive deals that companies and victims strike to end litigation and the way payments are doled out by the trusts, arguing that both are entitled to privacy.

"The trusts are simply behaving the same way that the defendants in the torts system behave," he said.

Still, Garland Cassada, one of the attorneys representing Garlock, is convinced if the trust system continues to operate as it has for the past filings.

"If there's no trust reform to make sure that companies don't have to pay the share of bankrupt companies who've established trusts, then there could be a second wave," he said.

Other attorneys also say they're bracing for the possibility of more filings, noting that additional second- and third-tier manufacturers might be forced to follow Garlock, Specialty Products Holding Corp. and Circor International Inc.'s (CIR) Leslie Controls Inc. into Chapter 11.

"As more companies go into bankruptcy, it increases the pressure on the companies remaining outside of bankruptcy and ultimately can lead to bankruptcy for those companies," said Gilbert LLP attorney Kami Quinn, who described the phenomenon as "a vicious cycle."

Though attorneys like Lockwood and Roger Frankel, whose firm also represents a trust, aren't yet convinced another flood of asbestos-related filings is on the horizon, they acknowledged the dynamics at play can ultimately wreak havoc on those not under the shield of bankruptcy.

"Those that are left in the tort system suffer the consequences," said Frankel, of Orrick, Herrington & Sutcliffe LLP. "Some can afford to, and some can't."