

Lawsuit deadline looms for homes insulated with Zonolite

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LINCOLN COUNTY DISTRICT COURT/AP FILE PHOTO

Asbestos dust from the mill stack at the W.R. Grace vermiculite mine at Libby, Mont., would powder the area.

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As with myriad marketing come-ons, this one held out the promise of a little bit of magic.

"Actually snuffs out flames," was the sell line in one advertisement. "Easy as pouring popcorn from a bag," was another.

It was a light-as-a feather, do-it-yourself product ideal for homeowners eager to keep their houses snug in winter and help repel the sweltering heat of summer. What was not to love?

In fact, the popcorn-light insulation, carrying the brand name Zonolite, proved so popular that the substance was poured into the attics of thousands of Canadian homes. How many thousands has never been precisely determined: a report prepared in June 2006, for Health Canada, which had struck an interdepartmental scientific committee on Zonolite, came up with an estimate of 242,000.

We do know that Zonolite's insulating properties were deemed impressive enough to qualify for the country's Canadian Home Insulation Program. CHIP, which was launched at the height of the energy crisis in 1977 and terminated in 1986, extended grants to assist Canadians in making their homes more energy efficient.

There would have been little reason then for the average Canadian homeowner to know that the insulating miracle came from a single source: a deposit of vermiculite mined from the Disneyesque sounding Zonolite Mountain in Libby, Mont.

Nor would the average homeowner have been attuned a decade ago to the breaking tragedy that the vermiculite was contaminated with tremolite, an especially toxic form of asbestos that has taken a terrible toll on Libby. Declared a Superfund site for environmental cleanup in 2002, the Environmental Protection Agency took the unprecedented action this June of declaring a public health emergency there.

And to many it will come as a surprise to learn that legal efforts in Canada to financially assist homeowners in the containment or removal of Zonolite from their attics has resulted in a frail settlement that is just a fraction of what U.S. homeowners are in line to receive. The deadline for Canadian homeowners to submit a claim for slight compensation is 5 p.m., Aug. 31.

It has been such a long and tortured journey, with a story line tricky to plot.

That once upon a time there was an outfit called the Zonolite Company, whose "Warmer in Winter Cooler in Summer" sales pitch dates at least as far back as 1928. That the Zonolite Co. was purchased by W.R. Grace & Co. in 1963. That processing plants, where the vermiculite was exfoliated through a heat process that literally popped the mineral into shape, dotted the American landscape and Canada's too, with plants in Vancouver, Calgary, Regina, Winnipeg, St. Thomas, Ont., and one in Ajax that today recycles Styrofoam into commercial fireproofing.

The people in Libby grew sick. And though the mine was closed in 1990, they grew sicker. In

November 1999, Pulitzer Prize-winning journalist Andrew Schneider penned a two-part series for the Seattle Post-Intelligencer, marking the deaths of 192 miners from asbestos-related diseases and at least 375 cases of asbestosis, mesothelioma and other cancers. The asbestos dust from the dry mill stack was such, Schneider wrote, that it did not have to snow for Zonolite Mountain to be white: "Some days, when the east wind blew, sheets on the clotheslines of Libby would be covered in the dust, and children would write their names in the dust on their parents' cars."

Given the latency period for asbestos-related diseases, a period that can last as long as 40 years, the ultimate toll is still not known. "So in Libby," Schneider wrote, "the dying goes on." In April 2001, facing more than 100,000 personal injury lawsuits related both to Zonolite and other asbestos products manufactured elsewhere in its corporate operations, W.R. Grace filed for bankruptcy protection. (The company remains financially robust, with pre-tax income of \$300 million (U.S.) on revenues of \$3.3 billion last year.)

As the tragedy in Libby became clearer, the effects of the fatally flawed mineral that was shipped, processed, bagged and sold to consumers across North America was much less transparent.

In Spokane, Wash., Darrell Scott became the first lawyer to take legal action, in December 2000. The property damage suit sought, says Scott, the establishment of a homeowner program to both notify residents of the product's potential dangers and fund the removal or abatement of the asbestos contamination where it occurred, and that Grace pay for it. "Our argument before the court had always been that very few homeowners would recognize Zonolite if they ran into it," says Scott, not anticipating then that Grace would end up in one of the longest bankruptcies in U.S. history.

But what were the product's dangers?

In December 2006, U.S. bankruptcy judge Judith Fitzgerald released a key opinion: there is no dispute, Fitzgerald concluded, that Zonolite is contaminated with asbestos fibres and that disturbance of the product can release those fibres into the air. However, she added, in the absence of any epidemiological studies, Zonolite posed no "unreasonable risk" of harm.

The finding echoed health advisories posted by the EPA in the spring of 2003 and Health Canada a year later that the best course of action for homeowners is to leave the material thoroughly sealed, secured and undisturbed. That view is supported by experts in the home inspection industry and in the medical community. "We say the same thing here don't disturb it, leave it alone," says John Graff, co-director of the National Center for Vermiculite and Asbestos-Related Cancers at the Barbara Ann Karmanos Cancer Institute in Detroit. "We wish we had a better answer to that, but we don't."

That presumes an awareness on the part of homeowners, an awareness that a young Raven Thundersky and her family on Manitoba's Poplar River First Nation Reserve in Manitoba did not possess. The 520-square-foot home, built by the federal government in 1964, was a tight fit for Thundersky and her seven siblings. The children would, she said in a sworn affidavit in the spring of 2005, access the attic as additional play space. Documents dating to the time of the home's construction reveal that 46 bags of Zonolite were used for insulation. In fact, hundreds of reserve homes, largely in Manitoba and Saskatchewan, were constructed with Zonolite. In her affidavit, Thundersky testified that four of her siblings, and one or more of her parents, had died from asbestos-related disease. In September 2005, Thundersky sued Grace and the Canadian government. That suit, which briefly drew the story of Zonolite into the headlines, has been stayed pending completion of the bankruptcy proceedings.

Under settlement terms in the Grace bankruptcy, two trusts have been established: a personal injury trust to address all present and future asbestos-related claims against the company, which admits no liability; and a property damage trust, to address claims related to Zonolite. "The U.S. plan will have an actively managed fund that runs for at least 20 years, potentially 25 years that will both encourage people to remove it when necessary and pay for most of the cost of removing it," says Darrell Scott. "That's what we sought to do 10 years ago."

Should Grace's reorganization plan be approved hearings are scheduled for early next month U.S. claimants can expect to receive 55 per cent of a payment cap of \$7,500.

The Canadian plan is far more meagre. "We were able to at least negotiate some compensation, though nominal," says David Thompson at Scarfone Hawkins LLP, one of two law firms representing Canadian claimants. Those who can prove the presence of Zonolite and additionally prove costs incurred to contain the insulation can expect to see \$300. Those who undertook major remedial measures i.e., removal will receive just \$600. The average cost to remove the product: \$7,000 to \$8,000.

Unlike the U.S., there will be no opportunity beyond Aug. 31 for Canadian homeowners to make any claim at all. Should the presence of Zonolite become apparent five or 10 years from now, the homeowner can count him or herself out of luck.

Thompson says a main objective was a \$1 million notification program rolled out last fall through print and television advertisements as part of the claims process. "We felt that was absolutely key here," he says of commercials that ran on TSN and HGTV and others. "There are perhaps thousands of Canadians out there who do not realize they have this insulation and don't realize that by disturbing it they may be exposing themselves and their families to harm."

Clearly the EPA feels that more must be done on the notification front in the U.S. In late June, it announced a public awareness campaign "to ensure that the general public, and those individuals whose jobs routinely put them in attic spaces, such as electricians, plumbers and other contractors, are aware of the potential risks of exposure."

Has enough been done here at home? David Thompson ponders those old CHIP grants, and the way the federal government bore the cost of the removal of urea formaldehyde foam insulation, or UFFI, back in the early '80s, and suggests the federal government could "do the right thing" this time by extending similar financial aid to homeowners.

In Detroit, John Graff is leading a pilot study, funded by the EPA, analyzing insulation for asbestos fibre content; interviewing homes owners; estimating cumulative exposures. "We want to make sure that the public has all the facts that they need," he says, adding that it's too early to draw any conclusions. "I wish we had a magic wand and we could wave it and make it go away. ... I think we're going to be telling this story for an awfully long time."