

Legal Analysis & Regulations

1600 Wilson Boulevard, Suite 1100, Arlington, Virginia 22209-2594 • 703/841-9000 • Fax 703/841-9514

LAR-471e

February 21, 2006

The Silica Scam: Plaintiffs' Lawyers Take a Page From Their Asbestos Playbook in Search of the Next Big Mass Tort Payout; Dubious Claiming Practices, However, May Be Denying Traction to Their Cash Bandwagon

by
Frederick T. Stocker
Vice President, General Counsel
and Secretary
fstocker@mapi.net



Copyright © 2006
Manufacturers Alliance/MAPI
All rights reserved.

The Alliance promotes the technological and economic progress of the United States through studies and seminars on changing economic, legal, and regulatory conditions affecting industry.

The Silica Scam: Plaintiffs' Lawyers Take a Page From Their Asbestos Playbook in Search of the Next Big Mass Tort Payout; Dubious Claiming Practices, However, May Be Denying Traction to Their Cash Bandwagon

Introduction¹

Within a one-week period in September 2003, *The Wall Street Journal*, the *New York Times*, and *The Times* of London ran stories touting silica as the possible successor to asbestos as the next significant mass tort in the United States.² While that concern may prove to be overstated, the fact that three highly respected newspapers contemporaneously picked up on this issue caught the attention of many in U.S. industry. Indeed, in the past three years

¹ Background material relied upon in the preparation of this report included the following: Lorraine Woellert, "A Break for the Defense—As doctors who validate tort claims come under scrutiny, business is on the offense," *BusinessWeek*, November 7, 2005, p. 106; Roger Parloff, "Diagnosing for Dollars—A court battle over silicosis shines a harsh light on mass medical screeners—the same people who have cost asbestos defendants billions," *FORTUNE*, June 13, 2005, p. 97; Jeff Slivka, "Silica—The Next Environmental Issue," *New Day Underwriting Managers*, April 2005, <http://www.irmi.com/Expert/Articles/2005/Slivka04.aspx>; "Shifting Sands—Recent Silica Developments," *Hazardous Times*, April 2005 (Gen Re Corporation); "Update #1, Silica—A Litigation Sandstorm," February 2005 (Guy Carpenter & Company, Inc.); Joseph Egan, "An Update on Silica Claims," November 30, 2004 (Navigant Consulting); Vicki Spencer, "Silica Liability: Ready to Explode," *Canadian Underwriter*, August 2004, <http://www.cbis.net/news4.htm>; Robert Hartwig and Claire Wilkinson, "Silica Liability," July 2004 (Insurance Information Institute); David May and Douglas Stewart, "Silica—Another New Asbestos?" *International Reinsurance Market Review 2004* (Aspen Re, published by Euromoney Yearbooks); and "Silica Primer—An Asbestos 'Spin-Off?'" *Hazardous Times*, October 2003 (Gen Re Corporation).

² Susan Warren, "Silicosis Suits Rise Like Dust/Lawyers in Asbestos Cases Target Many of the Same Companies," *The Wall Street Journal*, September 4, 2003, p. B5; Jonathan Glatar, "Suits on Silica Being Compared to Asbestos Cases," *New York Times*, September 6, 2003, p. C1; and James Doran and Helen Leonard, "Claims Surge as U.S. Lawyers See Silica as the New Asbestos," *The Times*, September 10, 2003, p. 4M.

there has been a dramatic increase in the number of lawsuits filed by people claiming to have been injured by exposure to silica. Notwithstanding the fact that a significant number of workers in the United States continue to be exposed to silica each year, and the relatively long latency period between certain exposures and resulting illnesses, this spike in lawsuits occurs at a time when such maladies are on the verge of virtual elimination in this country. The fact that these diseases are disappearing in the workplace is due in large part to regulatory restrictions on permissible limits of exposure and aggressive safety measures being employed by industry.

While plaintiffs' lawyers would argue that this increase in lawsuits is due to improved medical diagnosis of these diseases and a workforce that is increasingly knowledgeable as to its legal rights, skeptics have noted that this new litigation phenomenon just happened to occur at a time when the U.S. Congress is seriously considering legislation to address the nation's asbestos litigation morass.³ Whether the possibility of enactment of asbestos litigation reform legislation⁴—which, among other things, would establish medical criteria for asbestos

³ In 2003, the Manufacturers Alliance/MAPI published a book entitled *I Pay, You Pay, We All Pay—How the Growing Tort Crisis Undermines the U.S. Economy and the American System of Justice*, which highlighted the need for meaningful civil justice/tort reform in the United States. This report represents a continuation of the Alliance's efforts to call attention to these serious national issues. Chapter V of that book, "The Asbestos Avalanche," chronicles the magnitude and economic and social impact of, and the abuse inherent in, the United States' asbestos litigation crisis.

⁴ A detailed review and analysis of this pending legislation, with a candid assessment of its prospects for passage, can be found in a recent Alliance report by Jane Ceryak Wishneff, "The Fairness in Asbestos Injury Resolution Act of 2005: A Look Into the Latest Attempt To Rein in the Asbestos Litigation Beast," LAR-468e, November 18, 2005.

victims and cap attorneys' fees—has served as a stimulus for silica suits is open for debate. It is indisputable, however, that the expertise honed in asbestos litigation has created a cadre of plaintiffs' lawyers specializing in toxic torts who are anxious to diversify their practices for similar financial payoffs.

Finding the next cash cow to succeed asbestos has not proved to be an easy task. Candidates for that dubious distinction have included mold, welding fumes, electromagnetic fields, fast foods, pharmaceutical products and devices, and vehicle safety. A clear frontrunner anywhere near the magnitude of the asbestos bonanza has yet to emerge and, hopefully, for the sake of the U.S. economy, never will. Still, ever-resourceful plaintiffs' attorneys have set silica in their sights as a potential growth area for their well-developed business model.

This new-found interest by trial lawyers was predictable inasmuch as there are certain superficial similarities between asbestos and silica. Both materials are still used in the United States, notwithstanding recognized health hazards. Injuries that can result from exposure to either substance are similar; that is, pulmonary diseases diagnosed by x-rays. Exposure to both asbestos and silica may well have occurred simultaneously at the same work location. Increasingly, claims based on exposure to both are filed together or in succession. Entrepreneurial lawyers are reviewing their settled asbestos cases and bringing new silica-based claims on behalf of the same plaintiffs, often alleging that due to advancements in medical science unexplained health problems can now be attributed to silica exposure. Also, the litigation infrastructure of expert witnesses and physicians laid in asbestos cases is firmly in place to be built upon in the silica context.

Given these parallels to their obscenely successful asbestos campaign, it is understandable why the plaintiffs' bar eagerly embarked upon the silica offensive. Tried and true tactics were relied upon to support this initiative, such as: mass screenings of potentially exposed workers; the filing of consolidated claims against multiple defendants in an effort to induce settlements (which tend only to beget even more suits); and the selection of jurisdictions notorious for their pro-plaintiff/anti-corporate biases. The stage seemed to be set for a lucrative payout, but the new cash bandwagon rolled out by the plaintiffs' lawyers hit a significant pothole on the way to the bank.

In 2003, some 111 silica cases involving approximately 10,000 plaintiffs were consolidated

and removed to federal court, pursuant to so-called multi-district litigation (MDL) procedures, upon the motion of some 30 of the defendants. A MDL panel sent the cases to the Federal District Court for the Southern District of Texas, where pretrial proceedings were conducted before Judge Janis Graham Jack.⁵ Judge Jack presided over pretrial proceedings involving extensive coordinated discovery, culminating in hearings over a several day period to examine the reliability of the diagnosis by doctors employed by plaintiffs in support of their claims. After a thorough review of the evidence, the judge concluded that these claims amounted to a "phantom epidemic" of silicosis generated by a litigation-driven screening process. She added that the involved doctors provided a "scientifically virtually impossible" diagnosis of silicosis. Interestingly, it was established that more than half of the involved plaintiffs had previously filed asbestos cases. Judge Jack found that federal jurisdiction was lacking over the vast majority of these cases and they were remanded to state court. Notwithstanding her jurisdictional determination, she issued a strongly worded 200+ page advisory opinion in which she recommended to the courts where the suits were remanded that the medical evidence supporting the suits be thrown out.

The Texas MDL proceeding has received widespread national attention and served to create a broader public awareness of the rampant screening and diagnosis abuses inherent in mass toxic tort litigation—not just in the silica context, but in asbestos and other cases as well. Indeed, Judge Jack's revelations have prompted criminal investigations into these practices in several jurisdictions. The exposure of these fraudulent dealings is likely to go a long way toward cleaning up this country's civil litigation cesspool.

This report will explore the silica litigation phenomenon with an eye toward predicting its future course. After providing background about the characteristics and uses of silica, the health hazards associated with exposure to it are identified. The recent proliferation of silica-related lawsuits is discussed (i.e., who is being sued, where the claims are being brought, the importance of significant decisions, etc.). A more thorough comparison of asbestos and silica suits is also set forth. Finally, the report takes a closer look at the Texas MDL proceeding and its potential impact.

⁵ *In re Silica Products Liability Litigation*, MDL Docket No. 1553, 398 F. Supp 2d 563, S.D. Tex., June 30, 2005.

What Is Silica and What Health Hazards Are Posed by Exposure to the Substance?

What Is Silica?

Silica refers to the chemical compound silicon dioxide (SiO₂). It is a natural material which appears in crystalline and non-crystalline form. Because the issues focused upon in this report are centered on the inhalation of the crystalline form, our references to silica generally are to be construed as crystalline silica. While there are three forms of crystalline silica that are commonly found in the workplace (i.e., quartz, tridymite, and cristobalite), the most common is quartz. Quartz is the second most abundant mineral found in the earth's crust after the gemstone feldspar and is a major component of soil, sand, stone, gypsum, granite, and many other minerals. In fact, granite is found in virtually all soil in the United States. By way of example, the "rock" sandstone is found throughout the country except in certain southern coastal areas where the beaches are mostly limestone. Quartz is also present in concrete, bricks, cement, mortar, asphalt, and many aggregates.

Industrial sand, which contains a high percentage of crystalline silica, is mined by either blasting and then crushing formations of hard rock or by scooping up unconsolidated material. The resulting sand is rinsed, drained, filtered, and sorted by size of granule. It is then ground and packaged for sale. Some 85 producers operating at 150 facilities in the United States turn out approximately 26 million tons of industrial sand each year.⁶

Silica enjoys wide usage throughout industry. It is a primary ingredient in the manufacture of glass, fiberglass, paints, ceramics, foundry molds and cores for metal castings, sand blasting abrasives, bricks, tiles, and gypsum wallboard. It is also used in shipbuilding and water filtration as well as for enhancing the production of gas and oil.

Health Risks

In its natural state, silica is harmless. It becomes dangerous, however, when it is reduced to respirable dust by industrial processes; that is, it is harmful to humans when it is inhaled after workers cut, chip, grind, drill, blast, or otherwise act upon it, creating dust particles. To be respirable, these particles of dust must be smaller than 10 micrometers

(approximately four ten-thousandths of an inch)—that is, about one-sixth the diameter of a human hair. Inhaled silica particles may be trapped in the lungs, causing areas of swelling and scarring. Scarring is a result of the body's continuous and unsuccessful attempt to rid itself of the silica particles. The scarring of lung tissue makes breathing burdensome since the organ's ability to extract oxygen from the air is impeded. As the scarring and swelling worsen, breathing becomes increasingly difficult and, eventually, the lungs may fail completely, resulting in death. This disease is known as silicosis. There is no known cure for the disease absent lung transplant.

The dangers associated with inhaling silica dust have been well known since the early part of the 20th Century. In the 1920s, more than 90 percent of Vermont granite workers were said to have contracted silicosis. Public awareness was heightened in the early 1930s by the so-called Hawk's Nest Incident,⁷ a tragedy that has been referred to as the worst U.S. industrial accident. The incident involved a Tennessee Valley Authority hydro-electric project in Gauley Bridge, West Virginia. In connection with the project, workers drilled a tunnel through Gauley Mountain. No safety precautions, such as use of ventilators, were taken when they drilled through almost one mile of pure silica. Approximately 1,200 of the workers developed silicosis and some 400 to 600 are said to have died from the disease. Consequently, unlike the situation involving asbestos where certain parties conspired to suppress research as to the attendant health risks, the dangers associated with silica in the workplace have long been recognized.

The symptoms of silicosis are also well known. The most common is shortness of breath which is brought about by even simple activities. This shortness of breath is typically accompanied by severe coughing or wheezing. Other symptoms include fatigue, fever, chest pains, appetite loss, weight loss, and occasionally, bluish coloring of the skin at the lips or earlobes. The National Institute for Occupational Safety and Health (NIOSH) and the U.S. Department of Labor (DOL) identify three different types of silicosis—all have similar symptoms but different latency periods. The three types are:

⁶ David May and Douglas Stewart, *op. cit.*, fn. 1, pp. 1-2.

⁷ Martin Cherniak, *The Hawk's Nest Incident: America's Worst Industrial Disaster* (Yale University Press, 1986).

- **Chronic silicosis**—the most common of all types of silicosis. Symptoms normally occur after 10 or more years of exposure at relatively low concentrations. Chronic silicosis may go undetected for a number of years in its early stages. It can take 10 years to 15 years after initial exposure for abnormalities to show up on chest x-rays.
- **Accelerated silicosis**—also referred to as progressive massive fibrosis. This is the rarest of the three types of silicosis and its symptoms develop more quickly than those for chronic silicosis. It results from higher exposures and develops over a five- to ten-year period. Typically, accelerated silicosis results in death within a few years of its development.
- **Acute silicosis**—the most rapidly developing type of silicosis, causing massive lung damage in an extremely short time period. Acute silicosis occurs after exposure to high concentrations of silica dust and symptoms develop within a few weeks to up to five years.

Various studies have linked exposure to crystalline silica to other serious adverse health problems, including scleroderma (an autoimmune disorder), chronic obstructive pulmonary disease (COPD), kidney disease, lung cancer, emphysema, tuberculosis, nephrotoxicity, rheumatoid arthritis, renal disease, lupus, and mixed dust pneumoconiosis. Concerning the cancer connection, in 1997 the International Agency for Research on Cancer upgraded crystalline silica to a “Group (1) human lung carcinogen.” In its 2000 Annual Report, the U.S. National Toxicology Program upgraded silica to the category of “known to be a human carcinogen.” It should be noted that many reputable sources still dispute silica’s link to cancer. Other prominent studies into the health hazards associated with silica included the 1997 paper by the American Thoracic Society, which said that the inhalation of crystalline silica caused or contributed to silicosis and extrapulmonary diseases including scleroderma, rheumatoid arthritis, and renal disease. Finally in this lamentable litany of maladies, in 2003 the U.S. Occupational Safety and Health Administration (OSHA) and NIOSH conducted an extensive survey which “corroborated the reported association between crystalline silica and several respiratory and autoimmune diseases.”

Degree of Exposure

In 1971, OSHA adopted general industrial standards for permissible levels of exposure to airborne silica and, a few years later, specific

exposure levels for the construction and maritime industries. At present, the agency is said to be considering lowering the permissible exposure limits. At the time OSHA was first setting these limits, NIOSH had proposed a total ban on the use of sand as an abrasive in blasting operations. Once OSHA opted for the exposure limit approach to regulation, NIOSH followed suit. Today, limits are in place for respirable particulates and nuisance respirable dust.

The 1970s also saw aggressive measures taken by industry to limit exposure and their concomitant liability. Respirators and exhaust systems became common safety precautions. Other techniques employed included wetting down work areas and processes to control dust. A more sophisticated, and costly, approach to safety involves elimination of the human element in processes that generate silica dust; for example, operating mechanical equipment from enclosed quarters. Also, some success at eliminating silica dust has been achieved by substituting other abrasive materials for silica. Once safety precautions are in place, they need to be monitored at regular intervals for continued effectiveness.

Warning labels on silica products and similar postings in the workplace where such products were being used also began to appear in the 1970s. In the 1980s, similar warnings began to appear on invoices submitted by silica producers as well as on material safety data sheets maintained by employers.

OSHA also has a number of safety standards for personal protective equipment and NIOSH has released guidance on the effectiveness of respirators. Both agencies have stressed that respirators should not be considered the principal means of preventing exposure to crystalline silica, but rather they should be used in conjunction with other safety measures of employers to limit the levels of such exposures. In the 1990s, OSHA began a “Special Emphasis Program” to increase employer/employee awareness of the dangers associated with exposure to silica dust and ways to mitigate the problem.

The bottom line for these regulatory/safety initiatives is that risk can be reduced but not completely eliminated. Moreover, employer compliance with developed regulatory standards cannot be assumed and even full compliance does not completely ensure workplace safety.

The fact remains that millions of U.S. workers are exposed to silica dust each year. In 1983, the National Occupational Exposure Survey estimated that 2,250,097 employees were potentially exposed to silica dust at 53,724 facilities in some 254 industries. Current estimates vary, but it is often

said that between 1 million and more than 3 million workers are exposed to crystalline silica annually. The source many cite as being definitive on this issue is NIOSH's 127-page report issued in 2002 entitled, "Health Effect of Occupational Exposure to Respirable Crystalline Silica," which found that at least 1.7 million U.S. workers have jobs in which they are potentially exposed to respirable silica dust. Notwithstanding the authoritative source of this data, some suggest that the 1.7 million figure is understated because it is based on 1986 employment data and an occupational exposure study conducted between 1981 and 1983. It also should be mentioned that an undetermined number of the 3.7 million agriculture workers in the United States are exposed to dust containing silica. Suffice it to say that current exposure levels in this country remain high.

According to NIOSH and DOL, the following list of activities/industries pose the most significant exposure threat for workers:

- Construction (sandblasting, tunneling, rock drilling, jack hammering, and masonry work);
- Mining (drilling or cutting through granite and sandstone);
- Foundry work;
- Stone cutting (sawing, grinding, chipping, abrasive blasting);
- Glass manufacturing;
- Agriculture (dusty conditions caused by disturbing the soil such as harvesting or plowing);
- Shipbuilding (abrasive blasting);
- Ceramics, pottery, clay;
- Railroad (setting and laying track);
- Manufacturing of detergents or soap; and
- Manufacturing and use of abrasives.

These two agencies have estimated that in excess of 100,000 workers in the United States at present face high risks of developing silicosis from sandblasting, mining, and rock drilling. OSHA notes that abrasive blasting with sand to remove paint or rust from such surfaces as ships, vessels, pipes, bridges, oilfield storage tanks, and other items with metallic, steel, and/or concrete surfaces gives rise to the most serious exposures. According to the World Health Organization (WHO), more than 100,000 U.S. workers are currently employed in sandblasting alone and more than half of them are expected to develop silicosis. Other construction activities that can give rise to severe exposure include jack hammering, rock/well drilling, mixing concrete, cutting/sawing brick and concrete blocks, concrete drilling, tuck pointing, and tunneling operations.

The U.S. Department of Health and Human Services has reported that miners with the highest exposure to respirable crystalline silica are in operations—including oil and gas extraction, lignite and bituminous coal mining, mining and quarrying of non-metallic minerals other than fuel, and metal mining. Data from the most recent U.S. economic census puts the total number of U.S. employees in these mining operations and sandblasting at 340,200.

The OSHA Silica Advisor website elaborates on the exposure issue to demonstrate the prevalence of silica dust in today's U.S. workplace.⁸ It notes that if you can answer "yes" to any of the following questions concerning industry, occupations, and materials, then it is likely that silica is used at your work and that it is airborne.

First, do you work in any of these industries—abrasive blasting; asphalt pavement manufacturing; blast furnaces; cement manufacturing; ceramics, clay, and pottery; concrete mixing; concrete tunneling; construction (mainly cement, concrete work); demolition; electronics industry; foundry industry; grinding, molding, shakeout, core room (*high risk*); hand molding, casting, and forming; jack hammer operations; manufacturing abrasives, paints, soaps, and glass; mining; repair or replacement of linings of rotary kilns and cupola furnaces; rolling and finishing mills; sandblasting (*high risk*); setting, laying, and repairing railroad track; steelwork; stone, brick, and concrete block cutting, blasting, chipping, grinding, and sawing; or tunneling operations?

Second, are you in one of these occupations—brickmason/stonemason; construction laborer; crane and tower operator; crushing and grinding machine operator; furnace, kiln, non-food oven operator; grinding, abrading, buffing, and polishing machine operator; hand molder/shaper (not jeweler); heavy-equipment mechanic; janitor or cleaner; machinist; metals/plastics machine operator; molding and casting machine operator; mining machine operator; miscellaneous material moving equipment operator; millwright; operating engineer; painter who sandblasts (*high risk*); production supervisor; rock driller (*high risk*); roof bolter (*high risk*); sandblaster (*high risk*); steelworker; or welder/cutter?

Finally on this point, are any of these materials used at your workplace—abrasives, coal dust, concrete, dirt, filter aids, graphite (natural), mica, mineral products, paints, pavement, perlite, plant materials, plastic fillers, polishing compounds,

⁸ http://www.osha.gov/SLTC/etools/silica/determine_exposure/determine_exposure.html.

Portland cement, sands, silicates, slag, soapstone, or soil?

Risk of Death Posed by Exposure to Silica in the Workplace

Workers in a wide array of industries and occupations have silicosis listed on their death certificates. According to NIOSH, the occupations/industries with the most silicosis deaths are mining machine operators and laborers. Silicosis is listed on death certificates of workers at such locations as quarries, foundries, construction sites, mines, and shipyards. OSHA's Silica Advisor website⁹ has statistically labeled some occupations/industries with varying rates of silica-related deaths. The occupations identified with the highest rate of death are: miscellaneous metal and plastic machine operators; hand molders and shapers, except jewelers; crushing and grinding machine operators; hand molding, casting, and forming occupations; molding and casting machine operators; and mining machine operators. The industries identified with the highest rates of death are: metal mining; miscellaneous nonmetallic mineral and stone products; non-metallic mining and quarrying, except fuel; iron and steel foundries; pottery and related products; and structural clay products.

Mortality Rate

Despite the significant continuing level of exposure of U.S. workers to silica dust, silicosis mortality is on the verge of virtual elimination in this country today. We have learned that silicosis is highly preventable. As intimated above, a combination of regulatory discipline and aggressive industrial safety practices is, to a large extent, working. Since 1968, the mortality rate from silica exposure has fallen by 80 percent. In the late 1960s, approximately 1,000 people died from silicosis each year. The National Center for Health Statistics, which is part of the Center for Disease Control and Prevention (CDC) has estimated that a total of 14,892 deaths related to silicosis occurred between 1968 and 1994. Today, about 200 people still die from silicosis each year.

The Recent Surge in Lawsuits

Volume and Venue

In 2002, there were fewer than 10,000 pending silica claims. Today there are more than 50,000 claims pending. More than 20,000 of these claims

were filed in Mississippi in the 18-month period prior to that state's passage on September 1, 2004 of tort reform legislation (which, among other things, limits venue shopping and caps pain and suffering awards). While Mississippi, by far, leads the league in volume of claims filings, Texas is the runner up. That latter state also may see the number of claims taper off after its recent passage of so-called medical-criteria legislation.¹⁰ Some 37 states have witnessed the filing of silica claims in their courts including California, Georgia, Illinois (particularly in the notorious judicial hellhole, Madison County), Kentucky, Minnesota, New Jersey, New York, Ohio, South Carolina, West Virginia, and Wisconsin.

Who Is Being Sued?

The party best positioned to protect workers from the danger inherent in respirable silica dust is the employer. Generally speaking, however, employees contracting silica-related illnesses from exposure at work are precluded from suing their employer by workers' compensation laws. While the treatment of injured workers through the workers' compensation system can be expensive, the costs pale by comparison to the civil litigation alternative. Increasingly, injured employees are attempting to circumvent those laws by alleging that their employer intentionally harmed them by exposing them to a known hazardous substance. To date, such attempts to erode the exclusivity principle of workers' compensation have met with limited success.

As a result, the typical targets of silica lawsuits are:

1. Suppliers of silica sand or other products containing silica;

¹⁰ In May 2005, Texas became the fourth state (after Ohio, Georgia, and Florida) to pass asbestos/silica litigation reform legislation. A key aspect of these reforms is that they establish medical criteria requiring that claimants show illness or impairment from exposure to asbestos or silica. The Ohio law has a unique feature that may go a long way toward doing away with frivolous asbestos and silica cases by setting standards for doctors who are making the diagnosis. In essence, claimants are required to establish their case by using "competent medical authority;" that is, the diagnosis must be made by a doctor who has a physician/patient relationship with the plaintiff and who spends less than 25 percent of his/her time serving as a legal witness or consultant. This requirement addresses the worst abuses of mass screening techniques using doctors who have spent little or no time examining prospective plaintiffs.

⁹ http://www.osha.gov/SLTC/etools/silica/determine_exposure/silicadeaths/silicadeaths.html.

2. Machinery and/or equipment manufacturers whose products are used in processes involving silica (i.e., sandblasting and grinding); and/or
3. Manufacturers of protective gear.

These suits are based on such theories as strict liability, negligence, and misrepresentation. Allegations in product liability cases include failure to provide adequate warnings, defective/dangerous design, inadequate instruction for proper usage, and inadequate product testing. Evincing the breadth of the current litigation, as well as its migration beyond obvious targets, is the fact that some 650 entities from some 50 classes of businesses are said to have been named as defendants in silica injury suits. Some of the newer classes of plaintiffs' targets include the manufacturers of power tools and related components, the makers of jewelry manufacturing and polishing equipment, and a producer of nanoscale clays.

U.S. Silica, perhaps the largest silica manufacturer in this country, saw the number of claims brought against it grow from fewer than 60 a year from 1975 through 1996 to 3,505 in 2002 and 22,000 a year later. Since January 1, 2002, some 30,000 alleged silicotics have filed claims against the company. Also indicative of this litigation explosion, respirator manufacturer 3M reported 54,000 outstanding claims alleging failure of those products at the end of the first quarter in 2003.

Another area for possible expansion of silica litigation involves premises liability in situations where there are indoor releases of the substance. Such releases could affect contractors or guests coming into facilities. Invitees to premises, including third-party contractors performing work within facilities, might well be able to recover against the property owner if that latter party had both knowledge of and control over the hazardous condition. Conversely, employees of the property owner might be able to hold an invitee liable if that latter party creates a dangerous condition—for example, those employees might recover against a third-party sandblaster who contracted to do work on the premises. If the hazardous condition is created by the invitee, that party's employees generally would not have legal recourse against the property owner.

Usual Defenses

There are two typical defenses available to the targets of these silica lawsuits: the so-called "sophisticated user" and the "bulk supplier" defenses. As will be detailed in the discussion of specific cases below, the sophisticated user defense

is based upon the premise that the dangers of respirable silica dust are so well known there is no duty to provide warnings for the use of these products. Silica suppliers maintain that they have long sold their products to knowledgeable professionals in a relatively limited number of industries such as sandblasting. According to this line of reasoning, it is the duty of those purchasers, not the supplier, to warn their employee users of the attendant dangers. Thus, if a worker using the product is injured, the employer who was aware of the risks involved is liable for any resulting claims—not the supplier.

The related bulk supplier defense provides that once the supplier conveys warnings to the purchaser through such vehicles as labels on packaging, it then becomes the duty of that buyer to convey that warning message to employees who will be using the product.

Significant Case Law

Several relatively recent court decisions are generally favorable to silica defendants. Notwithstanding such positive developments, the fact that significant liability awards were made by lower courts in certain of these cases still might serve as an inducement to litigate. Moreover, as has been witnessed in the asbestos litigation context, the increasing volume of litigation—particularly suits with multiple claimants and defendants—might well force settlements without reference to the underlying merits of the allegations made by plaintiffs.

The *Badger Mining* Cases

In March 2004, the Minnesota Supreme Court denied a silica supplier the protections of the sophisticated user defense in reversing a lower court's judgment for the defendant.¹¹ Mr. Gray was employed by Smith Foundry where sand was used to create molds in which metal objects were cast. Badger Mining Corporation supplied sand to the

¹¹ *Gray v. Badger Mining Corporation*, 676 N.W.2d 268 (Minn. 2004). A detailed review of this case, focusing on the Minnesota Supreme Court's analysis of the learned intermediary defense, the raw material/component part supplier defense, the sophisticated user defense, the sophisticated intermediary defense, and the bulk supplier can be found in Kerri Nelson, "Case Note: Tort Law—Shades of Gray: Sophisticated Intermediary Defense Is Now Available for Minnesota Industrial Failure To Warn Actions—*Gray v. Badger Mining Corp.*," Vol. 31:2 *William Mitchell Law Review*, p. 659 (2004).

foundry. Mr. Gray brought a products liability action against Badger Mining and other suppliers of sand to the foundry. He alleged that his repeated exposure to silica dust caused his silicosis. His claims were based on negligence and strict liability for failure to warn as well as certain breaches of warranty. The Court held that “[b]ecause there is evidence that Badger Mining had greater general knowledge of the dangers of the use of silica in the foundry process and had specific knowledge of the ineffectiveness of disposable respirators, it cannot be said as a matter of law that Gray’s knowledge was sufficient to relieve Badger Mining of its duty to warn.”¹² Pursuant to a procedurally unusual stipulated entry of judgment for the plaintiff, pending appeal, Mr. Gray was awarded \$75,000.

Several months later, in July 2004, the Wisconsin Supreme Court, in a similar matter, ruled in favor of Badger Mining.¹³ The plaintiff, Mr. Haase, a diagnosed silicotic, brought a products liability suit against Badger and several manufacturers of respirators alleging both negligence and strict liability claims. His former employer, Neenah Foundry, was supplied sand by Badger. At the foundry, this sand was mixed with other substances and underwent several processes to form molds for molten metal. The Court ruled that Badger’s sand was not respirable—and, hence, not potentially harmful—until it was fractured into smaller particles during processes at the foundry. As delivered by Badger, the sand granules were too large to be inhaled. In upholding the lower courts’ decisions, the Wisconsin Supreme Court determined that “Badger’s product, silica sand, underwent a material and substantial change after leaving its possession”¹⁴ and concluded, therefore, that “Badger cannot be held strictly liable.”¹⁵

Recent Texas Cases

In the past two years, the Texas Supreme Court has reversed and remanded two high-profile silica cases in which juries had awarded multi-million dollar judgments to plaintiffs in products liability negligence actions. In September 2004, the Court reversed a \$1.9 million jury verdict in *Humble Sand & Gravel, Inc., v. Gomez*,¹⁶ two years after hearing oral arguments in the case. Mr. Gomez—in shades of scenarios played out in some 90 percent of

asbestosis cases where plaintiffs are unimpaired—is an asymptomatic plaintiff. He claimed to have developed silicosis while working as an abrasive blaster. Even though he suffered no pulmonary impairment at the time of trial, a determination was made that his life expectancy was reduced by 20 years to 25 years. He claimed that Humble Sand, a company that produced some of the silica flint he used at his job, failed to give adequate warning about the dangers of exposure to silica dust to the users of the material it supplied. Humble Sand asserted the sophisticated user defense; that is, it maintained that it had no duty to warn of the dangers of silica because it sold its product only to those who knew, or should have known, of the hazards associated with silica. Humble Sand argued that this general industrial knowledge, coupled with the warnings it placed on the bags of product it supplied to Gomez’s employer, should have put him on notice of the inherent dangers associated with silica usage. Both the trial court and the Texarkana Court of Appeals rejected the defense. The Texas Supreme Court held that whether a flint supplier owed a duty to warn its customers’ employees of the dangers of using its product in abrasive blasting depends on whether such warning could effectively reach those employees. The case was remanded to the trial court for a determination of that issue. The case was settled in October 2004 prior to the new trial that had been ordered by the Texas Supreme Court.

In a similar case, which the trial bar had hailed as a harbinger of the ringing up of their cash registers, the Texas Supreme Court reversed and remanded a case in which a \$7.5 million jury award had been handed down in November 2002.¹⁷ Mr. Thompson was a sandblaster for several different companies over an 11-year period (1968-1977) who later developed silicosis and emphysema and died. Beneficiaries of his estate alleged that the silicosis was caused by his exposure to flint products supplied by U.S. Silica and that he had not been warned of the danger of using that material. They brought a wrongful death and survivor action against the silica supplier. The trial court found that the supplier did indeed have a duty to warn of the dangers inherent in using its products and the Texas Court of Appeals agreed that such failure constituted negligence which was a proximate cause of the injury. Relying on the precedent of the *Humble Sand & Gravel* case, the Texas Supreme Court, without hearing oral argument, reversed and

¹² 676 N.W.2d 268, p. 276.

¹³ *Haase v. Badger Mining Corporation*, 682 N.W.2d 389 (Wisc. 2004).

¹⁴ *Ibid.*, p. 161.

¹⁵ *Ibid.*

¹⁶ 146 S.W.3d 170 (Tex. 2004).

¹⁷ *U.S. Silica Company v. Tompkins*, 156 S.W.3d 578 (Tex. 2005).

remanded to the trial court for further proceedings to determine whether warnings by the supplier could effectively have reached those individuals exposed.

Silica suppliers had hoped for stronger rulings from the Texas Supreme Court in these two decisions to the effect that the sophisticated user defense would be determinative in these kinds of cases, or at least in those cases where they could show they had placed strong warnings on their packages. Although the *Humble Sand & Gravel* and *U.S. Silica* cases did not produce the conclusive results silica suppliers had hoped for, it is still encouraging that the Texas Supreme Court reversed these dramatic jury awards.

Another noteworthy Texas case, *Horton v. Lone Star Industries*,¹⁸ saw the plaintiff settle for \$650,000 with the defendant during jury deliberations. The significance of the case is that interviews with jurors after the settlement revealed that they had been planning to award \$12.8 million in damages (i.e., \$2.8 million for future medical costs and \$10 million for future pain, mental anguish, and future impairment). They also said that they were prepared to assess punitive damages against the defendant.

The Norfolk Southern Case

Another example of a positive judicial development occurred in Virginia in November 2005 when the State Supreme Court reversed a \$1.5 million jury award in *Norfolk Southern Railway Company v. Rodgers*.¹⁹ Mr. Rodgers brought an action under the Federal Employers' Liability Act (FELA),²⁰ alleging that during his employment with the railway during the 1980s and 1990s, he was exposed to asbestos and excessive silica dust when dumping granite ballast as a track bed. He maintained that his employer knew, or should have known, about this exposure and, as such, failed to provide him with a reasonably safe place to work. The Virginia Supreme Court held that the testimony of the plaintiff's expert witness that Mr. Rodgers was exposed to silica dust in an amount exceeding a reasonably safe level was founded upon assumptions that had no basis in fact. As such, that testimony was inadmissible. The expert was not aware that the ballast rock Mr. Rodgers was primarily exposed to was limestone—not granite with

high silica content. Without the expert's testimony, the Court concluded that the evidence presented by the plaintiff was insufficient—as a matter of law, on the issue of the railroad's negligence—to sustain the jury's verdict. In that regard, the decision stated:

... In reaching this conclusion, we agree with Rodgers that "specific dose evidence" is not required. Nevertheless, a plaintiff with silicosis seeking damages under FELA must present some type of evidence, such as silica content of the offending substance, from which a jury can reasonably infer that the plaintiff was exposed to levels of silica dust that exceeded reasonably safe levels . . .²¹

Comparing the Similarities/Differences of Silica and Asbestos Litigation

What direction will silica litigation take? Will it emerge as the successor to asbestos as the next major U.S. mass tort? To try to answer these questions, a closer comparison of the similarities and differences between the two types of litigation is necessary.

Similarities

As mentioned in the introduction to this report, there are many superficial similarities between asbestos and silica litigation. Both types of litigation involve injuries to industrial workers caused by the inhalation of dust containing minuscule particles of the relevant substances. These respirable particles, in both instances, can give rise to pulmonary afflictions that are detectable by chest x-rays. In each case, there can be long latency periods between exposure to the harmful particles and the manifestation of illness. In the case of asbestos, that latency period can be as long as 40 years, while with silica, the period is more typically between 10 years and 20 years.

Exposure to these dangerous substances occurred in numerous industrial settings in the United States and, often, the same classes of workers (e.g., those in shipyards) were exposed to both respirable crystalline silica and asbestos. Indeed, increasingly, the same plaintiffs are bringing both types of cases.

Claim filings for both types of cases have gone up significantly in recent years, although those in the asbestos context continue to dramatically outpace

¹⁸ No. 0104284-000H, Texas District Court, Nueces City.

¹⁹ 621 S.E.2d 59 (Va. 2005).

²⁰ 45 U.S.C. §§51-60 (2000).

²¹ 621 S.E.2d 59, p. 69.

silica filings. Certain of the theories of liability—such as failure to warn of the potentially harmful consequences of use and defective products—are used by both types of plaintiffs. Defendants in both categories of litigation often rely on the same defenses (e.g., the sophisticated-user and bulk-supplier defenses).

Although the use of asbestos as an insulating material has long since ceased, neither asbestos nor silica is banned from use in industrial settings in the United States. Historically, both substances were widely used in U.S. industry. The continued exposure to silica of between 1 million and more than 3 million U.S. workers each year is still a cause for concern, albeit a concern largely mitigated by preventative safety measures.

While asbestos suits have migrated to a wide range of peripheral defendants (i.e., asbestos defendants fall within 75 of the 83 industrial categories listed by the U. S. Department of Commerce), such a trend has yet to manifest itself in the silica context. Most silica defendants have been producers of silica sand, manufacturers of equipment that uses silica as an abrasive material, and protective gear makers. It is important to note, however, that asbestos litigation began by targeting the major producers of asbestos products but spread throughout U.S. industry as those primary targets filed for bankruptcy. If this scenario plays out in the silica arena, many other industries could be dragged into the fray.

Finally in terms of similarities between asbestos and silica litigation, many of the entrepreneurial law firms that have prospered from asbestos litigation are diversifying their portfolios by branching out into silica. Moreover, they are employing the same tactics that have served them so well in the past; that is, mass x-ray screenings of potential plaintiffs using the same screening services and cooperative physicians, the filing of suits consolidating numerous plaintiffs and naming multiple defendants in an effort to coerce settlements, and the selective choice of friendly jurisdictions. As will be discussed at some length below, in relation to the Texas MDL proceeding, it is the allure of these time-tested tactics of the plaintiffs' bar that may go a long way toward preventing a silica litigation landslide.

Differences

The differences between asbestos and silica litigation are quite pronounced and might well preclude the latter from getting out of control. As alluded to earlier in this report, the specter of

corporate wrongdoing does not hang over the silica litigation landscape as it did with asbestos. The dangers of silica dust exposure have been well known since at least the early part of the 20th Century and have long been addressed through regulatory disciplines and responsible industrial safety precautions. This is a marked difference from the scenario with asbestos that played out in the 1930s when the president of Raybestos Manhattan conspired with the general counsel of Johns-Manville to conceal the results of research as to the potential harm asbestos dust posed for workers.

As a result of regulatory focus and practical industrial safety measures, the mortality rate for silicosis has decreased to approximately 200 people a year in the United States today. Contrast this to the continuing scourge of asbestos. Thousands still are dying today from asbestos-linked illnesses, including about 2,600 annually from mesothelioma. By some estimates, another 7,600 die each year from other asbestos-linked cancer.

These mortality figures emphasize another important distinction between these two types of cases. Exposure to asbestos dust and silica dust gives rise to very different medical conditions. Some experts continue to question the categorization of silica as a carcinogen. Indeed, even if one accepts that categorization, the current state of medical science is incapable of distinguishing cancer caused by exposure to silica from cancer relating to other causes. Asbestos, on the other hand, is inextricably linked to a horrific signature illness—mesothelioma, a rare cancer of the lining of the lungs and chest. It is 100 percent fatal and death usually occurs within 18 months after the disease manifests itself. With extraordinarily rare exceptions, asbestos is the only known cause of mesothelioma. The disease and substance are so uniquely associated with one another that juries presume a causal connection. So strong is this association that plaintiffs diagnosed with the disease have typically had to allege only possible exposure to prevail against a defendant, without clearly establishing that it was, in fact, the defendants' products to which they were exposed. Mesothelioma is such a dreaded disease that it can serve as plaintiffs' trump card to force settlement of consolidated cases where lesser asbestos-related illness claims are joined with one alleging that malady. Defendants are loathe to go to trial when a mesothelioma victim is one of the claimants.

In fact, it is commonly understood that mesothelioma can occur from relatively small levels of exposure to asbestos. Silica-related diseases are, by

contrast, generally believed to result from relatively high levels of exposure. Given these distinctions, juries are more apt to require proof of exposure circumstances and a direct connection to a particular defendant's product.

Perhaps the biggest difference between the asbestos litigation experience and the current environment for silica lawsuits is a changed public perception of the U.S. civil justice system. The staggering costs to the economy stemming from the asbestos litigation catastrophe are not lost on informed citizens.

The sad story of the abuses inherent in the asbestos litigation business has been well chronicled. The viability of tens, if not hundreds, of companies still is being threatened as a result of activities that took place decades ago—activities with which, for the most part, they had nothing to do. As a consequence, the financial well-being of those who invested in the companies, as well as of their employees and retirees, is in jeopardy. So serious is the threat that it is weighing down almost every type of economic activity in the country. Actual asbestos victims are being denied compensation because healthy individuals are siphoning off dwindling funds. Greedy lawyers have been reaping fortunes while exacerbating the problem by funneling scores of unimpaired plaintiffs into the system.

This disgraceful episode in the nation's legal history has finally given rise to a climate in which serious consideration is being given to federal asbestos litigation reform legislation. Even if the trial bar and its allies succeed in blocking this legislative action, the mood in the country for tort reform generally, and asbestos litigation reform specifically, seems favorable. This sentiment is evinced by the state reforms mentioned earlier, such as the restriction on forum shopping and the cap on non-economic damages (e.g., pain and suffering) enacted in Mississippi and the asbestos/silica medical-criteria legislation passed in Ohio, Texas, Florida, and Georgia. These and other state tort reform initiatives can only be viewed as a positive that is creating an environment where silica litigation is unlikely to pick up momentum.

The Texas MDL Proceeding

If the need for meaningful civil justice reform was still lost upon some after the lamentable experience of decades of asbestos litigation, events that played out in Corpus Christi, Texas, over the course of the past several years should have served as their wake-up call.

Removal to Federal Court

On September 4, 2003, some 111 silica cases involving approximately 10,000 plaintiffs and over 250 corporate defendants were consolidated and removed to federal court for pretrial proceedings pursuant to the so-called MDL procedures.²² The removing defendants alleged diversity jurisdiction. One hundred and seven of the 111 cases were originally filed in Mississippi State Court. The remaining claims were filed in Kentucky, Texas, and Missouri. The Judicial Panel on MDL sent the cases to the Federal District Court for the Southern District of Texas where the proceedings were presided over by Justice Janis Graham Jack, a former nurse who was appointed to the bench by President Clinton.²³ While expressing doubt as to whether federal court had subject matter jurisdiction, she went forward with discovery to develop a factual record to aid her jurisdictional determination.

The Discovery Process

In February 2004, she granted a motion allowing for detailed scrutiny of the so-called screening practices of plaintiffs' experts,²⁴ ruling that if the diagnosis of a screening doctor was the basis for a claim, circumstances surrounding the practice should be discoverable.

In April 2002, the lead plaintiffs' lawyer offered to settle the cases for \$1 billion. He suggested in a letter that this was a bargain inasmuch as, in his opinion, litigating the silica MDL would collectively cost the defendants more than \$1.5 billion in the pretrial process alone. The offer was turned down

²² 28 U.S.C. §1407.

²³ The following resources provide a thorough examination of the relevant issues addressed in this MDL pretrial proceeding: Nathan Schachtman, "Screening, Scheming, & Suing," *Critical Legal Issues Working Paper Series No. 135* (Washington Legal Foundation, November 2005); Lorraine Woellert, "A Break for the Defense—As doctors who validate tort claims come under scrutiny, business is on the offense," *BusinessWeek*, November 7, 2005, p. 106; and Parloff, *op. cit.*, fn. 1.

²⁴ A large percentage of asbestos and silica claims result from chest x-rays conducted on a mass scale in portable medical trailers and vans set up in such locations as union halls, outside of plant gates, shopping malls, or parking lots. Often these mass screenings are sponsored by plaintiffs' lawyers and unions. Screening companies work closely with such sponsors and refer the x-rays and related medical documentation to physicians acceptable to the attorneys for diagnosis. In virtually all of these situations, the doctors detect an image on the plaintiff's lungs consistent with an asbestos- or silica-related disease regardless of whether the plaintiff is suffering other symptoms or physical impairment.

and the extensive coordinated discovery process, presided over by Judge Jack, moved forward.

In connection with this discovery process, plaintiffs were required to provide detailed medical information concerning their silica-related injuries. Also, information turned over by plaintiffs included their social security numbers, which enabled the defense to learn that some 60 percent of those parties diagnosed with silicosis were so-called asbestos retreads (i.e., they had previously filed claims for asbestos-related diseases). While suffering maladies caused by exposure to both substances is not clinically impossible, it is statistically highly improbable.

Something Judge Jack called “remarkable” came to light in discovery. Some 9,000 plaintiffs disclosed the names of approximately 8,000 different doctors who had treated them. When it came to isolating the doctors who diagnosed plaintiffs with silicosis, however, the same handful of names kept appearing. These 9,000 plaintiffs were diagnosed with silicosis by only 12 doctors. In virtually every case, these doctors were not the plaintiffs’ treating physicians, did not work in the same city or even state where the plaintiffs resided, and did not otherwise have any obvious connection to the plaintiffs. Rather than being connected with the plaintiffs, these doctors were instead affiliated with a handful of law firms and mobile x-ray screening companies.²⁵

Judge Jack succinctly commented on this disturbing fact pattern:

... This small cadre of non-treating physicians, financially beholden to lawyers and screening companies rather than to patients, managed to notice a disease missed by approximately 8,000 other physicians—most of whom had the significant advantage of speaking to, examining, and treating the Plaintiffs.²⁶

The Deposition Bombshell

When depositions were held in October 2004, the first person deposed was a radiologist, Dr. George Martindale, who had provided diagnoses for 3,617 of the plaintiffs in the MDL. Although he

was listed as the diagnosing doctor by those plaintiffs’ counsels, he said that he had never intended to diagnose silicosis for any of them. Instead, he noted, he merely intended to provide a second opinion about x-rays previously read as positive by another doctor; that is, he was performing the role of a so-called “B-reader.” Dr. Martindale conceded that he could not diagnose silicosis on the basis of a chest x-ray and admitted not knowing the criteria for making such a diagnosis. Technically speaking, an x-ray reading is not by itself a diagnosis. A reliable clinical diagnosis requires proof of exposure to crystalline silica and the passage of an acceptable latency period, a positive x-ray reading, and the determination that there are no other likely causes of that reading. Between March 2001 and June 2002, Martindale read chest x-rays and prepared reports for about 4,000 plaintiffs in the MDL—3,617 of which he diagnosed with silicosis. These diagnoses were given on only 48 days (75 per day); he was paid \$125,000 for this work.

The next two physicians who were deposed also recanted their diagnoses. They both testified that clerical personnel at the screening companies had typed boilerplate diagnostic language into reports without their knowledge. One said that his signature was stamped on reports that he had not read.

The Daubert Hearing

In response to this testimony, a concerned Judge Jack ordered a three-day *Daubert*²⁷ hearing to scrutinize the methodology and reliability of the nine doctors and two screening firms that accounted for 99 percent of the diagnoses before the court. The hearings were held in February 2005.

In summing up the testimony of a representative of one of these two screening companies—Neatherland & Mason (N & M)—Judge Jack stated:

Overall, N & M—a small Mississippi company operated without medical over-

²⁵ Other interesting side notes revealed in discovery included the fact that many of the Mississippi claimants were diagnosed after a mass screening in a trailer set up in the parking lot of a Western Sizzlin’ restaurant in that state. The x-ray machine used was owned by a real estate broker. The attendant physician was not a radiologist, and no one present was licensed to take x-rays.

²⁶ 398 F. Supp.2d 563, p. 633.

²⁷ The Daubert Test of Reliability was established by the U.S. Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). The case provides the analytical framework for determining whether expert testimony is admissible under *Rule 702 of the Federal Rules of Evidence*. Many factors bear on the inquiry into the reliability of expert testimony, including, but not limited to: (1) whether the technique in question has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the error rate of the technique; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique has been generally accepted in the scientific community. *U.S. v. Hicks*, 389 F.3d 514, p. 525 (5th Cir. 2004) (citing *Daubert*).

sight—managed to generate the diagnoses for approximately 6,757 MDL Plaintiffs. To place this accomplishment in perspective, in just over two years, N & M found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period. . . . Furthermore, when comparing the names of the approximately 6,757 N & M-generated MDL Plaintiffs with the names in the Manville Personal Injury Settlement Trust (a trust established for asbestos claims after the Johns-Manville Corporation bankruptcy), at least 4,031 N & M-generated Plaintiffs have also made asbestos claims. . . . The magnitude of this feat becomes evident when one considers that many pulmonologists, pathologists and B-readers go their entire careers without encountering a single patient with both silicosis and asbestosis [resource citations supporting this assertion omitted]. Stated differently, a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis. N & M parked a van in some parking lots and found over 4,000 such cases. [Footnote omitted.]²⁸

The representative from N & M also testified that his firm was only paid by plaintiffs' lawyers for rendering positive diagnoses, thus establishing a strong economic incentive for screening firms and the physicians to whom they referred x-rays to diagnose silicosis.

The testimony of Dr. Ray Harron at the hearing was equally troubling. He noted that in 1995 he gave up "real medicine" and began doing "pneumoconiosis work"; that is to say, he worked exclusively for plaintiffs' lawyers, reading x-rays and diagnosing asbestosis and silicosis for use in litigation. In fact, the court in the MDL opinion noted that all of his work had been done for N & M. Until 2001, all of his focus was on asbestosis cases, at which time he turned to silicosis. He testified that if a person has a history of exposure and he then sees signs of silicosis on an x-ray, he could "tie it together" and say within a reasonable degree of medical certainty that the subject has silicosis. He was quick to add, however, that a reasonable degree of medical certainty is a legal standard and not a real diagnosis. He also said that he did not take plaintiffs' history—it was given to him. The people

who took those histories for him were lawyers, secretaries, and clerks. If the histories turned out to be unreliable, he said that he would have to retract the diagnosis. Moreover, he opined that he did not agree that one of the criteria for the diagnosis of silicosis is the absence of any good reason to believe that the positive radiographic findings are the result of some other condition.

Dr. Harron also admitted that he directed others to produce form letters of diagnoses onto which they stamped his name. He did not review these letters with respect to his diagnosis of some 6,300 MDL plaintiffs before they were sent to those parties' counsels (he was involved in these diagnoses by performing a B-read and/or producing diagnostic reports).

In addition to the fact that many of the MDL plaintiffs had previously been diagnosed with asbestosis, many of those earlier diagnoses were made by the *same* physician now diagnosing silicosis. In the case of Dr. Harron, Judge Jack pointed out:

. . . In short, when Dr. Harron first examined 1,807 Plaintiffs' x-rays for asbestos litigation (virtually all done prior to 2000, when mass silica litigation was just a gleam in a lawyer's eye), he found them all to be consistent only with asbestosis and not with silicosis. But upon re-examining these 1,807 MDL Plaintiffs' x-rays for silica litigation, Dr. Harron found evidence of silicosis in every case. This volume of reversals . . . simply cannot be explained as intra-reader variability. [Footnotes omitted.]²⁹

When presented with this damning evidence, Dr. Harron said to a defense attorney: "If you're accusing me of fabricating these things, I think that's a serious charge."³⁰ Judge Jack interjected that this was exactly the charge being made and the defense attorney said that she was correct. At that point in time, Dr. Harron's testimony ended abruptly

²⁹ *Ibid*, p. 608. According to the Manville Trust, the prolific Dr. Harron had a hand in reading 52,600 asbestos claims. Indeed, of the nearly 700,000 asbestos claims fielded by the Trust, a mere 15 doctors were responsible for diagnosing nearly 30 percent of its claimants. Dr. Harron topped the list. Other doctors involved in the MDL were also prominent in diagnosing asbestosis claimants filing with the Trust; that is, Dr. James Ballard (more than 11,000 claims), Dr. Martindale (3,200 claims), and Dr. Walter Allen Oaks (1,700 claims).

³⁰ *Ibid*, p. 607.

²⁸ *Ibid*, p. 603.

when the court granted his request for time to obtain counsel. Although the parties said that they expected to recall him the next day, the then lawyered-up doctor did not retake the witness stand.

Judge Jack's Decision

These hearings resulted in Judge Jack's June 30, 2005 decision, in which she concluded that there was simply no rational medical explanation for the number of alleged diagnoses of silicosis in this MDL. She excoriated all of the participants in what she characterized as a scheme, noting that this is the kind of "mess" that occurs when lawyers practice medicine and doctors practice law. In almost all of these cases, a critical feature of diagnosing silicosis was missing—the taking of occupational histories. This task was performed, without medical oversight, by the lawyers, their agents, or contractors. Lawyers first determined what disease would be searched for and then what criteria would be used for its diagnosis. The lawyers also controlled what information reached the diagnosing physicians, impeding their normal ability to ask targeted follow-up questions and conduct follow-up exams. The lawyers also controlled the information that reached patients, precluding the patient's normal ability to learn from a medical professional details about their diagnosis, their prognosis, and what, if any, follow care they should receive. Conversely, doctors appeared to be practicing law rather than medicine, referring to plaintiffs as "clients" rather than "patients." These doctors used shockingly relaxed standards of diagnosing that they would never have employed on themselves, their families, or patients in their clinical practices.

As Judge Jack stated:

Instead, these diagnoses were about litigation rather than health care . . . [I]t is apparent that truth and justice had very little to do with these diagnoses—otherwise more effort would have been devoted to ensuring they were accurate. Instead, these diagnoses were driven by neither health nor justice: they were manufactured for money. The record does not reveal who originally devised this scheme, but it is clear that lawyers, doctors, and screening companies were willing participants. . . . Each lawyer had to know that he or she was filing at least some claims that falsely alleged silicosis. The fact that some claims are likely legitimate, and the fact that the lawyers could not precisely identify which claims were false, cannot absolve them of responsibility for

these mass misdiagnoses which they have dumped into the judicial system.³¹

On the basis of these findings, the judge imposed sanctions on the one plaintiffs' law firm that had filed suits directly in federal court. An attorney from that firm had argued that its inability to comply with the court's discovery order was due to the fundamental difference between mass torts and personal injury torts. That difference, he maintained, made compliance with those orders relating to thousands of plaintiffs an overwhelming task. Judge Jack rejected this nonsense out of hand:

. . . the reason it is overwhelming is that Plaintiffs' counsel, and the screening companies and physicians they employ, have taken steps to inflate the number of silicosis claims beyond the true number of people with silicosis. In other words, at the root of the unwieldy nature of this MDL, including the difficulty in responding fully to discovery, is the fact that Plaintiffs' counsel . . . filed scores of claims without a reliable basis for believing that their clients had a compensable injury, thereby "multiply[ing] the proceedings . . . unreasonably and vexatiously." 28 U.S.C. §1927. Thus, even though the . . . Plaintiffs [in one of the consolidated cases] may have failed to fully comply with all of the Court's discovery orders, the underlying cause of this is addressed by §1927, and that is why §1927 forms the basis of the Court's sanction.³²

On the jurisdictional issue, Judge Jack remanded all but one of the consolidated cases to state court. In the one case that had been filed in federal court originally, over which she retained jurisdiction, she granted defendants' motion to exclude the testimony of the plaintiffs' experts. As to the remanded cases, she strongly advised that the state courts also throw out the experts' testimony.

Fallout From the Texas MDL

To be sure, Justice Jack's exposé is not the first time a federal court has identified bogus mass tort claims or that neutral experts have questioned the accuracy of litigation-related pneumoconiosis diagnoses. In 1990, the federal district court in Kansas exposed the fraudulent diagnoses of asbestos-related illness in a case involving the

³¹ *Ibid*, pp. 635-636.

³² *Ibid*, p. 677.

claims of thousands of tire workers.³³ The court found that the mass production of claims by plaintiffs' lawyers in this case involved a "steady flow of faulty claims" based on a "professional farce" and was a "fraud on the court."³⁴ In a related study that same year, a group of independent public researchers examined the x-rays taken of hundreds of tire makers who were screened earlier. These workers had filed claims against an asbestos defendant that was forced into bankruptcy. The researchers concluded that no more than 16 of the 439 workers diagnosed with asbestos-related illnesses, and possibly as few as 11, had conditions consistent with the findings of the plaintiffs' medical experts.³⁵

Most recently, many of the MDL plaintiffs' B-readers were the subject of a published, peer-reviewed study that demonstrated that their x-ray interpretations were highly discordant with those of the same film by leading radiologists and pulmonary physicians who are responsible for the testing and teaching of the B-read system.³⁶ At the behest of defense lawyers, Dr. Joseph Gitlin, a radiology professor at the Johns Hopkins School of Medicine, brought together a team of six recognized outside experts to reevaluate some 378 x-rays which had previously been read by doctors working for plaintiffs' lawyers who diagnosed asbestosis. The six experts had not been told the purpose of the study or the identity of the sponsors. One of the six experts had previously worked for plaintiffs' lawyers, two for defense lawyers, one for both plaintiffs and defendants, and two for neither. All six agreed that 322 of the x-rays (85 percent) showed no signs of asbestosis. Dr. Gitlin calculated that the plaintiffs' doctors were 2,227 times more likely than outside readers to see compensable asbestosis.

While evidence of dubious claims filings has long been accumulating, Judge Jack's decision in the MDL documented the amazing scope of these scams with incredibly convincing detailed evidence. Moreover, the Texas MDL has received nationwide attention in the press at a time when there are clear signs that the public is in the mood to clean up the

mess that the U.S. civil justice system has become. In a sense, this case has become the poster child for civil justice reform.

Judge Jack's comprehensive findings of lawsuit abuse and medical fraud in the MDL will go a long way toward reining in the smarmy activities of the plaintiffs' lawyer-driven mass screening companies who have been responsible for generating so many questionable asbestos and silica claims for the last decade. The spotlight Judge Jack's findings has thrown on the activities of plaintiffs' lawyers, screeners, and doctors playing the mass tort game has also caught the attention of state and federal prosecutors.³⁷ Most notably, prompted by the Texas MDL, the U.S. Attorney for the Southern District of New York convened a grand jury in Manhattan to consider possible criminal charges arising out of specious claiming practices in civil litigation over exposure to both silica and asbestos. Evidence from the Texas MDL has been subpoenaed in the New York proceeding as have the records of the screening companies in the silica case. Also subpoenaed in the grand jury proceeding are certain asbestos claim records of the Claims Resolution Management Corporation (CRMC—a wholly owned subsidiary of the Manville Trust). Further fallout from the MDL is seen in that the CRMC has barred future payment to claimants who rely on reports from the nine doctors and the screening firms implicated in the bogus practices Judge Jack uncovered.

Progress is also being made on several other fronts in the war on mass tort abuse. In Mississippi, a U.S. Attorney has won more than one dozen convictions stemming from medical fraud (i.e., tampering with echocardiograms) in cases alleging harm from use of the diet supplement fen-phen. Dubious claiming practices involving plaintiffs' lawyers, doctors, and medical technicians in mass torts are also said to be under investigation in Philadelphia.

At a minimum, the indisputable evidence of lawsuit abuse brought to light by Judge Jack's painstaking work in the MDL should reduce the volume of misdiagnoses in future asbestos- and silica-related injury claims and the number of cases being filed by asymptomatic and unimpaired plaintiffs—cases that have clogged the courts and wreaked havoc on the U.S. economy. At best, the Texas MDL could represent a watershed moment in

³³ *Raymark Industries, Inc. v. Stemple*, No. 88-1014-k, 1990 WL 72588 (D. Kan., May 30, 1990).

³⁴ *Ibid.*, pp. 2 and 18.

³⁵ "The Best of Asbestos: Looking for some million dollar lungs," *U.S. News & World Report*, December 17, 2001, p. 36.

³⁶ Joseph Gitlin, *et al.*, "Comparison of 'B' Readers' Interpretations of Chest Radiographs for Asbestos-Related Changes," 11 *Academic Radiology* 843 (2004).

³⁷ Jonathan Glater, "Lawyers Challenged on Asbestosis," *New York Times*, July 20, 2005, and Timothy Aepfel, "Plaintiffs in Welding Fume Case Win a Skirmish in Federal Court," *The Wall Street Journal*, July 26, 2005.

the movement for civil justice reform in the United States, changing the way the public looks at not just silica cases, but all mass tort litigation.

Conclusion

The fact that millions of American workers are still exposed to crystalline silica annually, coupled with the relatively long latency period of silica-related disease, means that tort litigation surrounding exposure to this material will be with us for years to come. But because of the declining silicosis mortality rate—and the pronounced differences that exist between asbestos litigation and silica litigation (which we have gone to great lengths to highlight in this report)—we do not think it likely that silica will succeed asbestos as the next significant U.S. mass tort.

There are several contingencies that could serve to fuel the silica litigation bandwagon.³⁸ First, if changes in the criteria used to diagnose lung disease begin to blur the distinction between the harm caused by silica and that caused by asbestos, there is a possibility that we will see a growing number of “mixed dust” claims. Also, if OSHA (or another appropriate entity) would act to lower permissible exposure limits to silica, doubts would be raised as to the adequacy of the previous standards. Such an action would buttress the argument of plaintiffs’ lawyers as to defendants’ inadequate warnings. Finally on this point, any advances in medical science that draw a more conclusive link between exposure to silica and cancer or other serious diseases could tilt the litigation scale in plaintiffs’ favor.

Even assuming these worst case scenarios, it is difficult to see an explosion of silica litigation amounting to a mass tort nightmare. The public seems to have grown tired of lawsuit abuse. The lessons of several decades of asbestos litigation have been painfully learned. Moreover, the conclusive evidence of the duplicity of plaintiffs’ lawyers developed in the Texas MDL gives new support and momentum for defendants’ challenges to bogus claims. Judge Jack has exposed certain elements of the plaintiffs’ bar, and their financially

beholden cohorts, as scam artists who are devoid of professional ethics and have a callous disregard for the law. Her findings give defendants in mass tort actions ammunition to challenge the relaxed medical and legal standards that plaintiffs have previously exploited so effectively in these cases. If the New York investigations lead to the conviction of the perpetrators of these scams, this would obviously serve to deter other abuses even further. As the number of states that pass civil justice reform increases, the possibility of a recurrence of an asbestos-type train wreck is reduced. These necessary changes have been a long time coming but, hopefully, will offer some lasting solutions to a serious national problem.

There is a caveat. It would not be wise to underestimate the power and influence of the trial bar. Their lobbying efforts at the state and federal level have served them well in the past. They will challenge the constitutionality of all state tort reform laws. Throughout the country, the trial bar is actively recruiting and funding political candidates for governor, attorney general, the state legislature, and, most importantly, the state courts (including Supreme Courts). The well-heeled plaintiffs’ bar knows that effective state tort reform laws can be undone by a friendly judiciary. In every state where they are politically active, the trial bar is outspending civil justice reform advocates and the business community by wide margins of up to three to one.

It can also be expected that the plaintiffs’ attorneys will continue to repeat the mantra that business interests in this country are covering up an epidemic of silicosis and that they are the last line of protection the public has against corporate misconduct. As hollow as this argument rings at present, the business community needs constantly to be prepared to rebut it. The lessons of the Texas MDL must not be forgotten and it behooves the business community to communicate them to as broad an audience as possible.

Failure to learn from the past could have serious consequences for the next mass tort threat, however slight that threat might seem at first. Remember, in 1988 when the Manville Trust first began paying claims it was predicted that it would receive between 83,000 and 100,000 such claims over the course of its existence. That estimate today is as high as 2.5 million claims.

The Manufacturers Alliance/MAPI will continue to follow issues associated with U.S. civil justice system reform and report on them to our membership.

³⁸ These contingencies are discussed in some detail in: Mark Roffman, “Where Will Silica Litigation Go?” *Silica Legal News Report* (Law Journal Newsletters, Vol. 1, No. 1, July 2005).