Legal Sandstorm – Worker Protection, Product Liability, and Warnings

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Silica litigation has exploded over the last five years.

U.S. Silica, a major supplier of sand, has reported over 30,000 new claims between 2002 and 2004.

In Mississippi alone there were over 20,000 new claims filed between 2002 and 2004.
Silicosis Facts & Numbers

Mystery Epidemic

Silicosis has been rare since the 1960s, but in the past few years it’s become the basis for a mass tort.

Plaintiffs filing new suits against U.S. Silica

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Silicosis Facts and Numbers

- Center for Disease Control (CDC) states that the number of U. S. workers exposed to silica dust has steadily declined from 1970 to 2002.

- CDC also states that deaths from silicosis has also steadily declined.

- CDC reports that deaths due to silicosis in the U. S. has declined steadily each year from 1,157 in 1968 to only 148 in 2002.
Silicosis – Serious Health Concern or Phantom Epidemic?

- Both. Silica overexposure and silicosis remain serious health issues facing industry.

- Silica overexposure remains widespread. According to the CDC, an estimated 121,100 workers were exposed to equal to or greater than the NIOSH REL in 1993.
Phantom Epidemic

- The number of reported cases of silicosis and the reduction in the overall mortality rate due to silicosis, does not support the number of lawsuits being filed nationally.

- In Mississippi where there have been over 20,000 new claims, the OSHA field office in Jackson, Mississippi has had no reports of any silica problems in recent years and has had no requests for any silica-related investigations.

- All of which led Judge Janice Jack to find that the Mississippi filings appear to be a “phantom epidemic”, unnoticed by everyone other than those enmeshed in the legal system.
History of Silica Litigation
The Depression and Labor

- The Great Depression began in October 1929 with the crash of the stock market.
- Thousands of people were laid off from work.
- Ill workers were the first to be laid off, including those with silicosis.
The Problem

- There were no government benefits for the unemployed
- Silicosis was not compensable under worker compensation regulations
- Unemployed workers with silicosis had no remedy or means of support
Silicosis Lawsuits

- In New York state alone over $30,000,000 in silicosis lawsuits were brought in 1933.
- Nationwide it was estimated that silicosis claims in 1933 were $300,000,000.
Gauley Bridge

- In the early to mid-1930s, approximately 1,500 workers (1/4 of the work force) were reported to have died of silica dust exposure (silicosis) from working on the tunnel project in Gauley Bridge, West Virginia.

- In early 1936, the Committee on Labor of the House of Representatives authorized the Department of Labor to conduct a board of inquire into the Gauley Bridge incident.
National Silicosis Conference of 1936

After Gauley Bridge, Labor Secretary Francis Perkins and the Department of Labor sponsored the National Silicosis Conference, bringing together government, labor and industry to help resolve the silicosis crisis in the United States.
Subsequent to the National Silicosis Conference, silica litigation remained fairly dormant until the early to mid 1980s when the litigation reappeared in Texas. The Texas litigation arose out of the oil fields of west Texas. A number of oil field service companies used predominately illegal Mexican labor in their sandblasting operations. While a number of these companies were knowledgeable about the hazards of silica dust, the engineering controls and respiratory protection programs for workers were inadequate resulting in some workers being overexposed to respirable silica and developing silicosis.
From the mid 1980s until the mid to late 1990s, silica litigation remained fairly stable. Other than approximately 50 single plaintiff cases pending in west Texas, there was only occasional lawsuits filed around the state and country.
History of Silicosis Litigation

- Beginning in the mid to late 1990s, plaintiff law firms began to conduct mass litigation screenings in south Texas.
- These screenings produced hundreds of plaintiffs alleging silicosis.
- These lawsuits were filed in very plaintiff friendly venues in south Texas.
History of Silicosis Litigation

- While silica litigation continued to pick-up momentum in Texas, it remained fairly quite in other states until the early 2000s.
- Since 2002, we have seen an explosion of litigation with over 30,000 claimants filing law suits throughout the nation.
History of Silicosis Litigation

- What is the explanation for the explosion in industrial sand lawsuits?
Plaintiff Lawyers

- Plaintiff law firms specializing in asbestos litigation saw silicosis as a potential source of new revenues.
  - It was basically the same business model
    - Same basic medical
    - Same mass litigation screenings
    - Same multi-party filings
    - Same plaintiffs
Recycled Plaintiffs

- Asbestos plaintiffs’ counsel looked to their database of existing asbestos clients and began having their chest x-rays re-examined or “Re-screened” for the possibility these clients may suffer from silicosis or mixed dust pneumoconiosis.
New Connected Diseases

- Lung Cancer – In 1997 silica was classified as a Group 1 carcinogen by IRAC
- Autoimmune Diseases
  - Rheumatoid arthritis
  - Lupus
  - Scleroderma (systemic sclerosis)
  - Renal disease
Civil Tort Reform

- The explosion of new filings in both Texas and Mississippi coincides with legislative tort reform in both states.
Mississippi - In response to criticism that Mississippi had become a haven for “jackpot justice,” the Mississippi legislature began drafting tort reform legislation in 2002 to rein in excessive jury verdicts. This legislation went into effect on January 1, 2003. Plaintiffs’ counsel filed as many of their cases as possible prior to the new law taking effect to avoid being controlled by the new legislation.
Texas - In 2002, the Texas legislature also began discussing tort reform legislation. This legislation was signed by the governor in December 2002 and became law on September 1, 2003. Plaintiffs’ counsel filed their existing inventory of lawsuits prior to September 1, 2003, to avoid these cases being controlled by the new rules.
Mississippi New Filings

- 2000 – 40 new plaintiffs filed silicosis cases
- 2001 – 76 new plaintiffs filed silicosis cases
- 2002 – 10,642 new plaintiffs filed silicosis cases
- 2003 – 7,228 new plaintiffs filed silicosis cases
- 2004 – 2,609 new plaintiffs filed silicosis cases
The Passing of the Storm

- Since the flood of new cases, numerous developments have stemmed the tide of new cases, and in some cases, reversed the tide.
Tort Reform

- A number of states passed legislation specifically addressing silica and asbestos lawsuits. While the legislation varied from state to state, it generally established medical criteria necessary before a silica or asbestos lawsuit could move forward. Specifically, the legislation requires a plaintiff to produce medical reports establishing a certain level of disease and pulmonary impairment before their case can move forward.
Tort Reform

- Ohio – House Bill 342 became effective September 2, 2004 and applies to all cases filed after that date.

- Texas – Senate Bill 15, now Chapter 90 of the Civil Practice and Remedies Code, became effective on September 1, 2005 and applies to all pending and future cases.

- Florida – House Bill 1019, codified as Florida Statute Title XLV, Chapter 774, became effective July 1, 2005
Tort Reform

- Georgia – House Bill 416 was codified into Georgia Code Ann. Chapter 51-14 became effective in 2005.

- Kansas – Kansas Statute Chapter 44, Artice 5a was passed and went to the governor two weeks ago.

- Tennessee – Silica Compensation Fairness Act, Tennessee Code Ann. Title 29, Chapter 34 was sent to the governor just last week.

- West Virginia – Senate Bill 543 is still in committee. It is unknown whether it has the votes necessary to get out of committee.
New Case Law

- Most of the cases against sand suppliers and abrasive blasting equipment are warnings cases.

- Section 338 of the Restatement (Second) of Torts provides that the supplier of a product for another use may be held liable to those whom the supplier expects to use the product if:
  - The supplier know or has reason to know the product is likely to be dangerous for the use for which it is supplied and
  - The supplier fails to exercise reasonable care to inform the product users of the product’s dangerous condition.
The Sophisticated User Doctrine states that a manufacturer or supplier has no duty to warn users when it supplies its product to a user who know or reasonably should know of a product’s dangers.

Because products often pass through one or more intermediary user (e.g. employers or distributors), numerous courts have recognized that if the intermediary user is sufficiently aware of the risks of the product, the supplier or manufacturer has no duty to warn the intermediary.
Sophisticated User

- Applying this doctrine puts the burden of warning those exposed to silica on those who have the best ability to prevent harm, the sophisticated intermediary employer, rather than on suppliers and manufacturers.
Sophisticated User/Bulk Supplier

- Texas

- Ohio

- Virginia
Sophisticated User/Bulk Supplier

The Attack on Plaintiffs’ Diagnosing Doctors
FEDERAL SILICA
MDL OPINION

MDL DOCKET 1553
Judge Janis Graham Jack
United States District Court
Southern District of Texas
Corpus Christi Division
Federal Silica MDL 1553

- In September 2003 a panel of federal judges created a Federal Silica Multi-district Litigation Court and transferred more than 10,000 plaintiffs who filed suit in Mississippi alleging silicosis to U.S. District Judge Janis Jack in Corpus Christi, Texas.
Federal Silica MDL 1553

- Through the course of discovery, it was learned that the more than 10,000 Mississippi claimants were diagnosed with silicosis by only 12 doctors.

- These doctors were not the plaintiffs’ treating physicians.
Diagnosed 3,617 cases of silicosis in the Mississippi claimants.

Each diagnosis contained the exact same language: “On the basis of the medical history review, which is inclusive of the significant occupational exposure to silica dust, physical exam and the chest radiograph, the diagnosis of silicosis is established within a reasonable degree of medical certainty.”

Martindale retracted all 3,617 diagnosis because he testified he did not see a single plaintiff and admitted he did not even know the criteria for making a diagnosis of silicosis.
Dr. Glynn Hilbun & Dr. Kevin Cooper

They were paid $5,000 per day for performing abbreviated exams for 5 days ($25,000).

Hilbun testified he did it for “easy money.”
Dr. Glynn Hilbun & Dr. Kevin Cooper

Both doctors signed forms that stated: “On the basis of this client’s history of occupational exposure to silica and a B-reading of the clients chest X-ray, then within a reasonable degree of medical certainty, plaintiff has silicosis.”

Both doctors testified that, contrary to the language in the typed forms, they didn’t read them before signing and that they did not see any X-rays, X-ray reports or pulmonary function tests, and they did not diagnose any plaintiff with silicosis.
Dr. Ray Harron

- Dr. Harron had been previously used by plaintiff lawyers in asbestos litigation.
  - First he diagnosed only asbestosis, with no mention of silicosis, in 1,807 x-rays.
  - Later, on the same 1,807 x-rays, he found only silicosis, without any mention of asbestosis.
  - Harron’s testimony abruptly ended when Harron asked for time to obtain legal counsel.
A federal grand jury has been convened in New York to consider possible criminal charges arising out of the silica litigation. The grand jury has subpoenaed records from some physicians who diagnosed silicosis through the screening process and investigating whether to pursue criminal charges against a number of doctors involved in the process.
On March 8, 2006, the Committee on Energy and Commerce held Congressional Hearings on The Silicosis Story: Mass Tort Screening and the Public Health. This hearing included the testimony of a number of doctors identified by Judge Jack, including Dr. James Ballard, Dr. Ray Harron, Dr. Andrew Harron, and Dr. George Martindale. The hearing also included Mr. Heath Mason of N & M, Inc., one of the screening companies that set up the mass litigation screenings.
Congressional Hearings

- This testimony of Dr. James Ballard, Dr. Ray Harron, and Dr. Andrew Harron was limited to asserting their right against self incrimination as provided to them under the 5th Amendment of the United States Constitution.
Media Coverage


- In June 2005, Fortune Magazine published an article entitled “Diagnosing For Dollars” which outlined the alleged fraud behind many of the lawsuits being filed around the county.

- A local news channel in Houston did an investigative report on Judge Jack’s opinion and the alleged medical fraud she uncovered.

- Just last week, the Houston Chronicle published a two part story entitled: “Exposing the Truth behind silicosis . . .”
What is the significance to the Industrial Hygienist?

- The allegations of fraud against the diagnosing doctors, screening companies and plaintiffs’ lawyers raise significant concern that corporate America will view silicosis as nothing more than a phantom epidemic or fraud and put less emphasis on silicosis and other industrial health issues.
What is the significance to the Industrial Hygienist?

- Corporate Industrial Hygienist or consultant
  - In light of the sophisticated user/learned intermediary defense, there will be increased attention given to the conduct of the plaintiff’s employer. Specifically, how they comply with OSHA rules and regulations relating to providing a safe work place.
The Good Corporate Citizen

- What is the defendant corporation’s attitude toward warning purchasers and users of its products of the potential health hazards which may exist with its products?
The End of Silicosis

- Good answers to these questions generally lead to:
  - A safer work place for your own employees
  - Less potential liability for your company from lawsuits
  - The end of silicosis and silica litigation
THE END