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### GETTING THE SAND OUT OF THE EYES OF THE LAW: THE NEED FOR A CLEAR RULE FOR SAND SUPPLIERS IN TEXAS AFTER *HUMBLE SAND & GRAVEL, INC. v. GOMEZ*

VICTOR E. SCHWARTZ\*

MARK A. BEHRENS\*\*

ANDREW W. CROUSE\*\*\*†

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\* Chairman of the Public Policy Group, Shook, Hardy & Bacon L.L.P., Washington, D.C. Mr. Schwartz coauthors the most widely used torts casebook in the United States, *Prosser, Wade and Schwartz's Torts*. He has served on the Advisory Committees of the American Law Institute's *Restatement of the Law of Torts: Products Liability, Apportionment of Liability, and General Principles* projects. Mr. Schwartz received his B.A. summa cum laude from Boston University and his J.D. magna cum laude from Columbia University.

\*\* Partner, Shook, Hardy & Bacon L.L.P., Washington, D.C. Mr. Behrens received his B.A. from the University of Wisconsin-Madison in 1987 and his J.D. from Vanderbilt University Law School in 1990. He served on the *Vanderbilt Law Review*.

\*\*\* Associate, Shook, Hardy & Bacon L.L.P., Washington, D.C. Mr. Crouse received his B.A. from the University of Kansas in 2001 and his J.D. from Georgetown University Law Center in 2004.

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I.	Introduction .....	285
II.	Legal Duties of Sand Suppliers.....	294
	A. Sophisticated User.....	295
	B. Bulk Supplier.....	299
	C. Substantial Change in Condition .....	300
III.	<i>Humble Sand &amp; Gravel, Inc. v. Gomez</i> .....	302
	A. Background.....	302
	B. Factor Balancing Test to Determine the Existence of a Duty to Warn.....	306
	1. The Likelihood of Serious Injury from a Supplier's Failure to Warn .....	307
	2. The Burden on a Supplier of Giving a Warning .....	308
	3. The Feasibility and Effectiveness of a Supplier's Warning .....	308
	4. The Reliability of Operators to Warn Their Employees.....	309
	5. The Existence and Efficacy of Other Protections .....	309
	6. The Social Utility of Requiring, or Not Requiring, Suppliers to Warn .....	310
	C. New Trial Ordered .....	310
IV.	Applying the <i>Gomez</i> Rule in Texas .....	311
	A. Bulk Suppliers.....	312
	B. Bag Sales .....	312
	1. The Likelihood of Serious Injury from a Supplier's Failure to Warn .....	313
	2. The Burden on a Supplier of Giving a Warning .....	314
	3. The Feasibility and Effectiveness of a Supplier's Warning .....	315
	4. The Reliability of Operators to Warn Their Employees.....	316
	5. The Existence and Efficacy of Other Protections .....	317
	6. The Social Utility of Requiring, or Not Requiring, Suppliers to Warn .....	318
V.	Suggestions for Courts Presented with the Next " <i>Gomez</i> " .....	320
VI.	Conclusion.....	323

## I. INTRODUCTION

Silica—quartz in its most common form—is a natural substance. It is the primary component of sand on the beach and “has many uses from filling gardens and lawns to mixing with concrete to filling sandboxes.”<sup>1</sup> Silica in its natural form is not harmful, but when fragmented into tiny particles it can be dangerous when inhaled.<sup>2</sup> For example, in abrasive blasting, commonly referred to as sandblasting, and in foundry operations, silica particles can be broken up and freely inhaled unless proper precautions are taken. Inhaled silica particles may be trapped in the lungs and lead to a disease called silicosis.<sup>3</sup> “[W]orkers in dusty trades are at the greatest risk of silicosis from [occupational] exposure to crystalline silica.”<sup>4</sup>

Health risks associated with the inhalation of “silica dust have been well known for a very long time.”<sup>5</sup> As early as the Fourth Century B.C., Hippocrates observed the link between respiratory disease and mining and stonemasonry work.<sup>6</sup> Agricola’s Sixteenth-Century treatise on mining demonstrated that scholars recognized that silica dust “penetrates into the windpipe and lungs, and produces difficulty breathing” after being “stirred and beaten up by

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1. *Damond v. Avondale Indus., Inc.*, 718 So. 2d 551, 552 (La. Ct. App. 1998). “[S]ilica comprises more than one quarter of the earth’s crust and is the major component in ninety-five percent of the earth’s rocks.” Linda Regis, Comment, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 207, 227 (1999); see also BRANCH OF INDUSTRIAL MINERALS, U.S. BUREAU OF MINES & U.S. DEP’T OF THE INTERIOR, CRYSTALLINE SILICA PRIMER 5 (Special Publication 1992) (explaining that silica is “one of the building blocks of our planet”).

2. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 173-74 (Tex. 2004).

3. See David Weill, *Silica and Asbestos: Similarities and Differences from a Medical Perspective*, 3-2 MEALEY’S LITIG. REP.: SILICA 21, Oct. 22, 2004 (“Silicosis results when sufficient amounts of respirable crystalline silica—generally particles of less than 10 micrometers in size—are inhaled and become deposited in the lungs after overwhelming the lung defense system.”).

4. Linda Regis, Comment, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 201, 209 (1999).

5. *Gomez*, 146 S.W.3d at 174; accord *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 751 (Tex. 1993) (stating that the risk that silica exposure may cause respiratory disease “has been recognized for more than a century”); see also *Phillips v. A-Best Prods.*, 665 A.2d 1167, 1169-70 n.2 (Pa. 1995) (stating that “[f]or more than half a century, exposure to silica sand has been linked with the development of silicosis, a disease which causes scarring of the lungs”); *Tex. Employers’ Ins. Ass’n v. Etheredge*, 154 Tex. 1, 272 S.W.2d 869, 872-73 (1954) (describing silicosis and its development).

6. *Gomez*, 146 S.W.3d at 174.

digging.”<sup>7</sup> Furthermore, the first treatise on occupational disease, *De Morbis Artificum*, written in 1700, identified “silicosis as a pneumoconiosis (‘a disease of the lungs caused by the habitual inhalation of irritant . . . particles’) common to stonemasons.”<sup>8</sup>

In the United States, the American Foundrymen’s Society has distributed literature addressing silica exposure and other foundry hazards to its members for over 100 years.<sup>9</sup> In 1908, the U.S. Bureau of Labor recognized the health risks of dust for hard-rock miners, stonecutters, potters, glass workers, sandblasters, and foundry workers.<sup>10</sup> Then, in 1936, national awareness of the hazards of silica exposure increased dramatically when nearly 1,000 miners died near Gauley Bridge, West Virginia, after digging a tunnel “three miles through rock formations rich in silica” to build a hydroelectric facility.<sup>11</sup> The “Hawk’s Nest Tunnel” incident is still considered America’s worst industrial disaster.<sup>12</sup>

The Department of Labor’s first National Silicosis Conference featured the film “Stop Silicosis,” which described how to protect workers from overexposure to silica.<sup>13</sup> The Conference culminated in a 1937 report that “directly addressed silicosis prevention in industrial settings, recommending measures for employers to take on

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7. See Thomas A. Gilligan, Jr., *Silica Litigation from Both Sides of the Bar: Is Silica the Next Asbestos? The Defendants’ Perspective*, 1-5 MEALEY’S LITIG. REP.: SILICA 20, Jan. 2003 (discussing historically reported health hazards).

8. See *Gomez*, 146 S.W.3d at 174 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1746 (1961)).

9. See *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 557, 562 (W.D. Va. 1984) (stating that “[t]he American Foundrymen’s Society . . . is an international technical organization comprised of individuals and businesses that is dedicated to the creation and dissemination of technical information related to the foundry industry”), *aff’d sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

10. See Thomas A. Gilligan, Jr., *Silica Litigation from Both Sides of the Bar: Is Silica the Next Asbestos? The Defendants’ Perspective*, 1-5 MEALEY’S LITIG. REP.: SILICA 20, Jan. 2003 (citing U.S. BUREAU OF LABOR, BULL. NO. 79: THE MORTALITY FROM CONSUMPTION IN DUSTY TRADES 633-875 (1908)).

11. *Gomez*, 146 S.W.3d at 174.

12. See *id.* at 174 (describing the impact of the disaster); see also HENRY N. DOYLE, THE FEDERAL INDUSTRIAL HYGIENE AGENCY: A HISTORY OF THE DIVISION OF OCCUPATIONAL HEALTH, U.S. PUB. HEALTH SERV. (undated) (discussing other incidents including a 1910 investigation among lead miners near Joplin, Missouri, and a series of studies on Vermont granite workers from the 1920s to the 1950s) (on file with the *St. Mary’s Law Journal*).

13. See *Haase v. Badger Mining Corp.*, 669 N.W.2d 737, 744 n.2 (Wis. Ct. App. 2003) (describing the film and establishing other measures to prevent silicosis), *aff’d*, 682 N.W.2d 389 (Wis. 2004).

behalf of their workers.”<sup>14</sup> In 1938, the American National Standards Institute adopted safety standards “calling for the use of respirators in abrasive blasting.”<sup>15</sup> As far back as 1949, the United States Supreme Court noted that “[i]t is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust.”<sup>16</sup>

Since 1971, the Department of Labor’s Occupational Safety & Health Administration (OSHA) has set a permissible exposure limit (PEL) for occupational exposure to airborne silica.<sup>17</sup> In 1974, OSHA applied extensive abrasive blasting safety regulations enacted for government contractors in the 1960s under the Walsh-Healy Act<sup>18</sup> to all employers,<sup>19</sup> and adopted standards for working with silica in the construction and maritime industries.<sup>20</sup> OSHA

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14. *See id.* (noting that “[a]mong the recommendations were workplace surveys, compliance with laws and regulations, respiratory protection and employee safety training”).

15. *Gomez*, 146 S.W.3d at 175. The American National Standards Institute (ANSI) is a consensus group of various industry participants, including manufacturers, suppliers, employers, unions, and customers. *See* Abstract, Am. Nat’l Standards Inst., Am. Nat’l Standard for Respiratory Prot., ANSI Z88.2, <http://retail.ihc.com/abstracts/ansi/ansi-z882.jsp> (last visited Oct. 25, 2005) (showing that the current ANSI Standard Z88.2 sets forth accepted practices for employers regarding the proper selection and use of respirators to protect workers from airborne contaminants in the workplace) (on file with the *St. Mary’s Law Journal*).

16. *Urie v. Thompson*, 337 U.S. 163, 180 (1949) (quoting *Sadowski v. Long Island R.R.*, 55 N.E.2d 497, 500-01 (N.Y. 1944)).

17. *See Bergfeld v. Unimin Corp.*, 226 F. Supp. 2d 970, 975 n.6 (N.D. Iowa 2002) (citing 29 C.F.R. § 1910.1000 (2001)) (stating that OSHA established in 1972 the PEL of “1 milligrams per cubic meter over a time weighted average of eight hours” for silica), *aff’d*, 319 F.3d 350 (8th Cir. 2003). The National Institute for Occupational Safety and Health (NIOSH) and the American Conference of Governmental Industrial Hygienists (ACGIH) have proposed even more stringent recommended exposure limits (REL) for silica. *See* Linda Regis, Comment, *From the Sandbox to Sandblasting: Regulation of Crystalline Silica*, 17 PACE ENVTL. L. REV. 207, 210-11 (1999) (citing U.S.C.A. § 655(b)(1) (West 1998)) (comparing the more stringent exposure limit established by NIOSH of .05 milligrams per cubic meter over a time weighted average of eight hours with the PEL of .1 milligrams per cubic meter over a time weighted average of eight hours that OSHA promulgated); *see also* NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., PUBL’N NO. 2001-129, HEALTH EFFECTS OF OCCUPATIONAL EXPOSURE TO RESPIRABLE CRYSTALLINE SILICA app. at tbl. A-1 (2002), available at <http://www.cdc.gov/niosh-02-129pd.html> (providing a comparison of PEL and REL for crystalline silica).

18. 41 U.S.C. §§ 35-45 (1936).

19. *See Gomez*, 146 S.W.3d at 175 (noting the codification of 29 C.F.R. § 1910.94(a)(5)(ii) (1974) and other regulations imposed by OSHA in the 1970s).

20. *See* 29 C.F.R. § 1910.1000(c) (2004) (establishing the PEL of silica for occupational contact and creating a table outlining the limits for silica exposure).

regulations for abrasive blasting require employers to properly select, use, clean, store, inspect, and maintain respirators; to instruct employees in their proper use and limitations; to conduct frequent random inspections to assure their proper selection, use, cleaning, and maintenance; and to provide high-purity breathing air in air-fed hood respirators.<sup>21</sup> OSHA regulations also require employers to develop and implement comprehensive hazard communication programs that include material safety data sheets, labels, and training to inform employees about hazardous substances in the workplace and the means of avoiding those hazards.<sup>22</sup> The purpose of hazard communication training is to explain and reinforce the information presented to employees through the written labels and material safety data sheets, and to apply this information in the workplace.<sup>23</sup> In addition, the Federal Occupational Safety and Health Act specifically requires each employer to furnish its employees with a place of employment that is free from recognized hazards that cause, or are likely to cause, death or serious physical harm.<sup>24</sup>

For years, litigation against industrial sand manufacturers and other industrial mineral companies, respirator (dust mask) makers, and related safety equipment manufacturers concerning silica exposure was stable, "with only a low number of people pursuing silica claims" each year.<sup>25</sup> Recently, however, there has been a marked increase in the number of silica lawsuits.<sup>26</sup> "One large in-

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21. See *id.* § 1910.134(c)(1) (2004) (listing the specific procedures that employers must establish and implement as part of their required respiratory protection programs).

22. See *id.* § 1910.1200(a) (2004) (defining the purpose of development and implementation of hazard communication programs). Federal regulations also require sand suppliers to provide their customers with a Material Safety Data Sheet that includes "[a]ny generally applicable precautions for safe handling and use which are known to the chemical manufacturer" and "[a]ny generally applicable control measures which are known to the chemical manufacturer, . . . such as appropriate engineering controls, work practices, or personal protective equipment." *Id.* § 1910.1200(g)(2)(viii)-(ix) (2004).

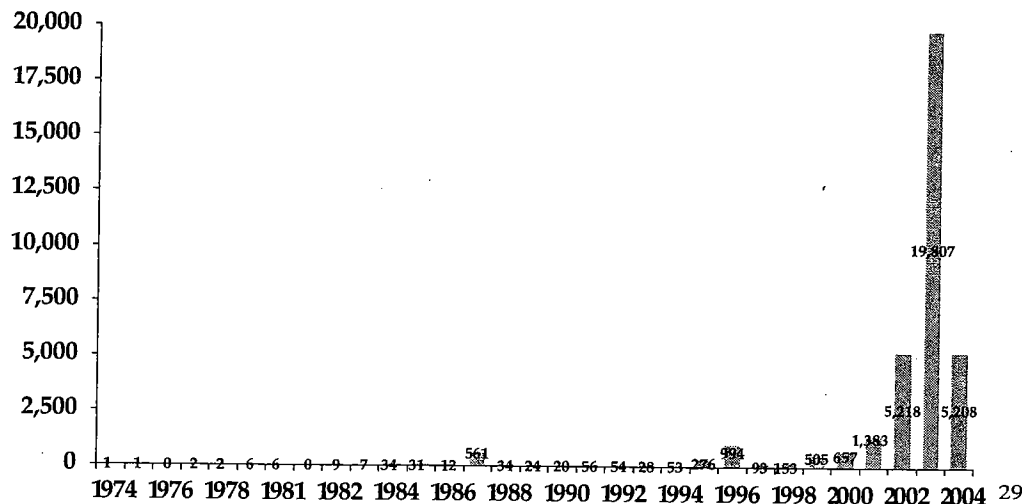
23. See *id.* § 1910.1200(h) (2004) (requiring specific employee information and training guidelines to be used by employers when hazardous chemicals are involved in the workplace).

24. See 29 U.S.C. § 651(b) (2004) (mandating the creation of occupational health and safety standards and providing for medical criteria to ensure safe and healthy working conditions).

25. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY'S LITIG. REP.: ASBESTOS 4, Feb. 21, 2005.

26. See Kelly Barron, *Bonanza or Boondoggle? Plaintiffs' Lawyers Hope Silica Dust Could Be the Next Asbestos*, CRAIN'S CHI. BUS., Feb. 28, 2005, at 35, available at 2005

insurance company is handling more than 25,000 silica claims in twenty-eight states—a tenfold rise from August of 2002.”<sup>27</sup> E.D. Bullard Company, the inventor of the hard hat and a maker of respirators, has seen a similar jump in claims since 2002: 62 cases with 200 plaintiffs in 1999; 156 cases with 4305 plaintiffs in 2002; and 643 cases with 17,288 plaintiffs in 2003.<sup>28</sup> Sand suppliers are experiencing the same trend, as illustrated in the chart below.



WLNR 3322581 (explaining that the inhalation of silica dust particles has led to explosive silica litigation and approximately 17,000 silica suits were filed in the first half of 2003); Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. TIMES, Sept. 6, 2003, at C1, available at 2003 WLNR 5662921 (reporting that the recent increase in the number of silica related lawsuits has begun to cause concern among insurance companies); Patti Waldmeir, *The Americas: Business Fears Silica Lawsuits Could Wreak Same Havoc As Asbestosis*, FIN. TIMES U.S.A., Feb. 2, 2005, at 3, available at 2005 WLNR 1400086 (noting that “silica suits have skyrocketed recently in response to tort reform measures at the state and federal level”).

27. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY’S LITIG. REP.: ASBESTOS 4, Feb. 21, 2005; see also Susan Warren, *Silicosis Suits Rise Like Dust/Lawyers in Asbestos Cases Target Many of the Same Companies*, WALL ST. J., Sept. 4, 2003, at B5 (asserting that insurance companies are beginning to see large increases in the number of silica claims).

28. See Susanne Sclafane, *Silica Dust: The Next Asbestos? Hard Hat Maker with Former RIMS President Among 160 Defendants Facing Dust Claims*, 108-18 NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., May 10, 2004, available at 2004 WLNR 14746125 (discussing the noted increase in the number of silica suits filed by plaintiffs in 2003); see also Bob Sherwood, *Weighing the Risk from Food and Phones*, FIN. TIMES LONDON, Apr. 28, 2003, at 12, available at 2003 WLNR 8136508 (stating that “[s]ilicosis claims [in the United States] are climbing at such a rate that one company has 17,000 suits against it—and it just makes masks designed to protect people from silica dust”).

29. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY’S LITIG. REP.: ASBESTOS 4, Feb. 21, 2005.

It appears that plaintiffs' attorneys are manufacturing silica claims by using the same lawsuit-generating devices developed in the asbestos context.<sup>30</sup> These tactics "include plaintiff recruitment through direct mailings, the use of marketing firms to develop 'inventories', free mass screenings, mobile x-ray vans, and Internet websites."<sup>31</sup> "Screenings of potential silica plaintiffs by plaintiffs' law firms and their agents have increased 'immeasurably' during the past few years."<sup>32</sup>

"Most commentators point to pending legislative efforts relating to asbestos litigation, tort-reform initiatives in Mississippi and Texas, and the use of mass screenings as the reason silicosis 'victims' have seemingly emerged from the woodwork."<sup>33</sup> Some law-

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30. *Id.*; accord Thomas A. Gilligan, Jr., *Silica Litigation from Both Sides of the Bar: Is Silica the Next Asbestos? The Defendants' Perspective*, 1-5 MEALEY'S LITIG. REP.: SILICA 19, Jan. 2003 (cautioning that plaintiffs' attorneys may effortlessly transform asbestos litigation trends into silica litigation due to the marked similarities between the two); see also Jonathan D. Glater, *The Tort Wars, at a Turning Point*, N.Y. TIMES, Oct. 9, 2005, at C1, available at 2005 WLNR 16361092 (analogizing silica litigation with traditional asbestos wisdom); Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, (AEI-Brookings Joint Center for Regulatory Studies), Sept. 2005, at 3, available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1193> (explaining the link between increases in silica and abestosis cases to attorney-funded mass screenings).

31. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY'S LITIG. REP.: ASBESTOS 6, Feb. 21, 2005; see also Sue Reisinger, *Mounting Silica Suits Pose New Threat to Industrial Companies*, CORP. LEGAL TIMES, at 64, Mar. 2003 (explaining "potential plaintiffs could include families of workers and people who lived or worked near silica sites"); Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, (AEI-Brookings Joint Center for Regulatory Studies) Sept. 2005, at 5-7, available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1193> (discussing the tactics employed by plaintiffs' attorneys).

32. Mark A. Behrens et al., Commentary, *Silica: An Overview of Exposure and Litigation in the United States*, 20-2 MEALEY'S LITIG. REP.: ASBESTOS, 6, Feb. 21, 2005; accord Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 62-97 (2003) (describing mass screening procedures used by plaintiffs' lawyers to generate clients and the related financial incentives).

33. Roy T. Atwood et al., Commentary, *In Silica Litigation, The Numbers Alone Dictate Careful Scrutiny of Injury and Causation*, 26-2 ANDREWS ASBESTOS LITIG. REP. 12, Dec. 4, 2003; see also *Asbestos: The Mixed Dust and FELA Issues: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Lester Brickman, Professor, Benjamin N. Cardozo School of Law of Yeshiva University), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1362&wit\\_id=3963](http://judiciary.senate.gov/print_testimony.cfm?id=1362&wit_id=3963) (describing mass screenings in asbestos and silica cases); Gilbert S. Keteltas, *Learning the Lessons of Asbestos: Courts and Defendants Can Do Better in the Case of Silica*, 26-6 ANDREWS ASBESTOS LITIG. REP. 9,



yers are even filing asbestos “re-tread” cases—bringing silica lawsuits on behalf of people who have already received an asbestos-related recovery.<sup>34</sup> As the *National Law Journal* reported in February 2005: “One of the most explosive revelations that has emerged from the [federal silica multidistrict litigation (MDL) proceeding] is that at least half of the approximately 10,000 plaintiffs in the silica MDL had previously filed asbestos claims.”<sup>35</sup>

In June 2005, the manager of the federal silica docket, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, issued a scathing, lengthy opinion in which she recommended that all but one of the 10,000 claims on the MDL docket should be dismissed on remand because the diagnoses were fraudulently prepared.<sup>36</sup> “[T]hese diagnoses were driven by neither

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Jan. 15, 2004 (stating that limits on asbestos litigation have led to screening and recruiting of silica claimants); Susan Warren, *Silicosis Suits Rise Like Dust: Lawyers in Asbestos Cases Target Many of the Same Companies*, WALL ST. J., Sept. 4, 2003, at B5 (indicating that silica plaintiffs’ attorneys are mapping out litigation plans similar to those used in asbestos cases).

34. See Jonathan D. Glater, *Asbestos Claims Decline, but Questions Rise*, N.Y. TIMES, Apr. 6, 2005, at C1, available at 2005 WLNR 5343368 (“The details of the diagnoses underlying some silica claimants are striking. Some of the same doctors who diagnosed silicosis in claimants had previously found asbestosis—another disease, which doctors said was typically characterized by different scarring of a different part of the lungs in the people they examined.”). “Suffering from both asbestosis and silicosis is, statistically speaking, nearly impossible.” Carolyn Kolker, *Spreading the Blame*, AM. LAW., Oct. 2005, at 24, 25. Responding to an accusation by a federal judge that silica claims were brought on behalf of previous asbestosis claimants, one lawyer asserted that he “‘doubt[ed]’ his clients’ asbestosis diagnoses.” *Id.* at 25.

35. David Hechler, *Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations*, NAT’L L.J., Feb. 28, 2005, at 18; see also Jonathan D. Glater, *Companies Get Weapon in Injury Suits; Many Silica-Damage Plaintiffs Also Filed Claims over Asbestos*, N.Y. TIMES, Feb. 2, 2005, at C1, available at 2005 WLNR 1415209 (reporting that of the 8629 silicosis plaintiffs, 5174 had already filed asbestos claims); Jerry Mitchell, *Silicosis Screening Process Irks Judge*, CLARION-LEDGER, Mar. 6, 2005, at A1, available at 2005 WLNR 3546204 (explaining that U.S. District Judge Janis Graham Jack used the word “fraudulent” to describe the process that led to the diagnosis of many of the MDL plaintiffs); Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 96 (stating that nearly 60% of people in federal silica MDL proceedings have previously filed asbestos-related claims). Furthermore, asbestos personal injury lawyer Steve Kazan of Oakland, California, has said, “[t]he whole thing is somewhere between shameless and shameful.” Justin Scheck, *Critics Sandblast Local Silicosis Suits*, RECORDER, Apr. 1, 2005, at 1, 7.

36. *In re Silica Prods. Liab. Litig.*, No. MDL 1553, 2005 WL 1593936, at \*60 (S.D. Tex. June 30, 2005) (addressing subject matter jurisdiction, expert testimony, and sanctions).

health nor justice," Judge Jack said in her opinion.<sup>37</sup> "[T]hey were manufactured for money."<sup>38</sup> As Judge Jack appreciated:

This explosion in the number of silicosis claims in Mississippi suggests . . . perhaps the worst industrial disaster in recorded world history.

And yet, these claims do not look anything like what one would expect from an industrial disaster. . . . The claims do not involve a single worksite or area, but instead represent hundreds of worksites scattered throughout the state of Mississippi, a state whose silicosis mortality rate is among the lowest in the nation.

Moreover, given the sheer volume of claims—each supported by a silicosis diagnosis by a physician—one would expect the CDC or NIOSH to be involved. . . . One would expect local health departments and physicians groups to be mobilized. One would expect a flurry of articles and attention from the media, such as what occurred in 2003 with SARS.

But none of these things have happened. There has been no response from OSHA, the CDC, NIOSH or the American Medical Association to this sudden, unprecedented onslaught of silicosis cases. . . . Likewise, Mississippi's silicosis epidemic has been greeted with silence by the media, the public, Congress and the scientific communities.

In short, this appears to be a phantom epidemic. . . .<sup>39</sup>

Indeed, the federal government reports that silica-related deaths have declined dramatically.<sup>40</sup> According to the National Institute for Occupational Safety and Health (NIOSH) and the U.S. Centers

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37. *Id.*

38. *Id.*

39. *Id.* at \*5; see also Mike Tolson, *Attorneys Behind Silicosis Suits Draw U.S. Judge's Wrath; Houston Legal Firm Fined; Order from Bench Says Diagnoses Made for the Money*, HOUS. CHRON., July 2, 2005, at A1 (reporting on the stunning rebuke given by a Corpus Christi federal judge to the plaintiffs' lawyers); Editorial, *The Silicosis Sheriff*, WALL ST. J., July 14, 2005, at A10 (supporting Judge Jack's decision to "put the brakes on the silicosis machine"). The U.S. Attorney's Office in the Southern District of New York has convened a federal grand jury to consider possible criminal charges arising out of the federal silica litigation. See Jonathan D. Glater, *Civil Suits over Silica in Texas Become a Criminal Matter in New York*, N.Y. TIMES, May 18, 2005, at C5, available at 2005 WLNR 7826957 (describing federal criminal charges before a Manhattan federal grand jury).

40. See NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUBL'N No. 2003-111, WORK RELATED LUNG DISEASE SURVEILLANCE REPORT 54 tbl. 3-1 (2002) (displaying the number of silicosis deaths from 1990 to 1999).

for Disease Control and Prevention (CDC), the number of silica-related deaths dropped from 1,157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999, and to 148 in 2002.<sup>41</sup> To put these figures into context, the CDC reports that, on average, 400 people in the United States die each year from extreme heat,<sup>42</sup> and the Bureau of Labor Statistics reports that 671 workers die annually from falls “to [a] lower level.”<sup>43</sup> A recent study by OSHA staff found that “a downward trend in the airborne silica exposure levels was observed during 1988-2003.”<sup>44</sup>

Notwithstanding the suspect nature of many current silica claims, the dramatic increase in silica lawsuits will mean that more courts will be asked to decide silica cases. In fact, several state supreme courts have recently issued such opinions.<sup>45</sup> This Article will focus on one of those opinions, the Texas Supreme Court’s 2004 decision in *Humble Sand & Gravel, Inc. v. Gomez*,<sup>46</sup> where the court considered whether industrial sand suppliers have a duty to warn their

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41. See NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., PUBL’N NO. 2004-146, WORKER HEALTH CHARTBOOK 169 (2004), available at <http://www.cdc.gov/niosh/docs/chartbook/> (reporting the number of silicosis deaths); CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., *Silicosis Mortality, Prevention, and Control – United States, 1968-2002*, MMWR WKLY. 401, 401-05 (Apr. 29, 2005), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm> (addressing the trends of silicosis) (on file with the *St. Mary’s Law Journal*).

42. See CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., EXTREME HEAT, <http://www.bt.cdc.gov/disasters/extremeheat/about.asp> (last visited Oct. 25, 2005) (reporting extreme heat deaths in the United States) (on file with the *St. Mary’s Law Journal*).

43. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES DATA 1992-2002, <http://data.bls.gov/cgi-bin/surveymost?cf> (outlining fatal occupational injuries and stating the number of fatal lower level falls) (on file with the *St. Mary’s Law Journal*).

44. See A.S. Yassin et al., *Occupational Exposure to Crystalline Silica Dust in the United States, 1988-2003*, 113 ENVTL. HEALTH PERSPS. 3255 (2005), available at 2005 WLNR 5475971 (researching the trend of silica exposure throughout several years).

45. See, e.g., *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 280 (Minn. 2004) (holding that genuine issues of material fact existed as to whether a bulk supplier’s warning was adequate); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 174 (Tex. 2004) (addressing a silica flint supplier’s duty to warn abrasive blasting operators); *Haase v. Badger Mining Corp.*, 682 N.W.2d 389, 398 (Wis. 2004) (holding that a supplier of silica sand was not strictly liable based on the facts of the case).

46. 146 S.W.3d 170 (Tex. 2004).

customers' employees about the hazards of occupational exposure to silica.<sup>47</sup>

This Article first discusses traditional tort law principles applicable to sand suppliers. It then considers the Texas Supreme Court's holding in *Gomez* and demonstrates that, under the factors outlined by the court, sand suppliers should not be found liable in Texas for harm to their customers' employees. Finally, this Article suggests that courts in other states should decline to adopt *Gomez*, because the Texas Supreme Court's holding is unsound in that it undermines incentives for safety in the workplace and creates the potential for needless and costly litigation. This Article argues that courts in other states should instead adopt a bright-line rule and hold that suppliers do not have a duty to warn their customers' employees about the well-known hazards of silica exposure.

## II. LEGAL DUTIES OF SAND SUPPLIERS

Tort law recognizes several potential defenses that may obviate or discharge a sand supplier's duty to warn about the well-known risks of silica exposure. Among these are the "sophisticated user" and "bulk supplier" doctrines and the "substantial change in condition" defense.<sup>48</sup> Each defense has slightly different features, and there is considerable overlap between them, but all are consistent with one of the cornerstone principles of product liability law: "to place the incentive for loss prevention on the party or parties who are best able to accomplish [the] goal."<sup>49</sup>

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47. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 172-73 (Tex. 2004); see also *U.S. Silica Co. v. Tompkins*, 156 S.W.3d 578, 579 (Tex. 2005) (remanding the case to the trial court for further proceedings in light of *Gomez*).

48. Support also exists for application of the "learned intermediary" doctrine to industrial environments. See Carole A. Cheney, Comment, *Not Just for Doctors: Applying the Learned Intermediary Doctrine to the Relationship Between Chemical Manufacturers, Industrial Employers, and Employees*, 85 Nw. U. L. REV. 562, 588-606 (1991) (supporting the application of the "learned intermediary" doctrine to industrial environments). In addition, the Restatement (Third) of Torts: Products Liability provides a defense for risks posed by the integration of raw materials such as sand into products. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 5 cmt. c (1998) (illustrating that a sand supplier has no duty to warn purchasers about the risks of improperly mixing sand for use in cement).

49. Model Uniform Products Liability Act, 44 Fed. Reg. 62,714, 62,714-15 (Oct. 31, 1979).

### A. *Sophisticated User*

The “sophisticated user” doctrine is embodied in section 388(b) of the Restatement (Second) of Torts.<sup>50</sup> Section 388 states:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel . . . for physical harm caused by the use of the chattel . . . if the supplier

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.<sup>51</sup>

Under the “sophisticated user” doctrine, “there is no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product.”<sup>52</sup> As the United States Court of Appeals for the Eighth Circuit recognized, the “sophisticated user [doctrine] is no more than an expression of common sense as to why a party should not be liable when no warnings or inadequate warnings are given to one who already knows or could reasonably have been expected to know of [a product’s] dangers.”<sup>53</sup>

Section 388 acknowledges that products often do not pass directly from the supplier to the end user, but, instead, pass through one or more intermediary users (e.g., wholesalers, distributors, re-

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50. See Richard C. Ausness, *Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information*, 46 SYRACUSE L. REV. 1185, 1200-24 (1996) (explaining the “sophisticated user” doctrine).

51. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

52. *Bergfeld v. Unimin Corp.*, 226 F. Supp. 2d 970, 977 (N.D. Iowa 2002) (quoting *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981)), *aff’d*, 319 F.3d 350 (8th Cir. 2003); see also Kenneth M. Willner, Note, *Failures to Warn and the Sophisticated User Defense*, 74 VA. L. REV. 579, 587-96 (1988) (discussing the “sophisticated user” defense and the different approaches taken by courts when applying this defense).

53. *Crook v. Kanab Pipe Line Operating P’ship*, 231 F.3d 1098, 1102 (8th Cir. 2002) (applying Nebraska law); see also *O’Neal v. Celanese Corp.*, 10 F.3d 249, 251 (4th Cir. 1993) (applying Maryland law and stating that “if the danger . . . is clearly known to the purchaser/employer, then there will be no obligation to warn placed upon the supplier. . . . Stated another way, when the supplier has reason to believe that the purchaser . . . will recognize the danger[s] associated with the product, no warnings are mandated.” (quoting *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1196 (Md. Ct. Spec. App. 1990))).

tailers, and employers) before reaching the end user.<sup>54</sup> Comment n to section 388 and its companion, comment i to section 2(c) of the Restatement (Third) of Torts: Products Liability, delineate the circumstances in which a seller is justified in relying on an intermediary to communicate potential hazards to end users.<sup>55</sup> These factors include:

- (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed on the supplier by requiring that he directly warn all users.<sup>56</sup>

Many courts have focused on other language in Comment n which states: "Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so."<sup>57</sup> These courts have recognized that the well-known risks of silica exposure obviate a sand supplier's duty to warn about those risks.<sup>58</sup>

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54. See *Singleton v. Manitowoc Co.*, 727 F. Supp. 217, 226 (D. Md. 1989) (concluding that a crane manufacturer could rely on the plaintiff's employer to recognize the risks of operating a crane and warn employees about those risks because the employer was "a knowledgeable, industrial user of cranes").

55. See RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965) (describing the factors to be considered in a seller's reliance on a third party to advise the end user of possible dangers). "The Restatement, Second, of Torts § 388, Comment n, utilizes the same factors set forth in Comment i [to section 2(c) of the Restatement (Third) of Torts: Products Liability § 2(c)] in deciding whether a warning should be given directly to third persons." RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2(c) cmt. i.5 (1998).

56. *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 557 (W.D. Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985); see also RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965) (explaining when a seller may rely on an intermediary to warn end users).

57. RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965).

58. See *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 741 (3d Cir. 1990) (holding that under Ohio law a supplier of sand could rely on the buyer, as a sophisticated user, to warn the buyer's employees about the hazards of working with sand); *Bergfeld v. Unimin Corp.*, 226 F. Supp. 2d 970, 979-80 (N.D. Iowa 2002) (dismissing the complaint of a worker against the corporation which supplied the sand to the worker's employer because the employer was a sophisticated user; therefore the supplier owed no duty to warn the worker), *aff'd*, 319 F.3d 350 (8th Cir. 2003); *Goodbar*, 591 F. Supp. at 567 (applying Virginia law to determine that suppliers of silica products did not have a duty to warn the purchaser's employees about the occupational hazards of working with silica products); *Cowart v. Avondale Indus.*, 792 So. 2d 73, 77 (La. Ct. App. 2001) (asserting that a supplier had issued adequate warnings to the purchaser and had no further duty to advise because the buyer was a

For example, in *Goodbar v. Whitehead Bros.*,<sup>59</sup> a federal district court applying Virginia law granted summary judgment in favor of sand suppliers in consolidated product liability actions brought by 132 foundry workers who allegedly contracted silicosis through exposure to silica at their worksite.<sup>60</sup> The court held that “there was a reasonable basis for Defendants . . . to rely upon the Foundry to give appropriate information of all the hazards of working with silica sand and related products to its employees.”<sup>61</sup> The court found that the foundry: “(1) was a knowledgeable industrial purchaser of silica sand and related products; (2) had intimate knowledge of the dangerous properties of silica products since at least the 1950s; and (3) had every reason to try to protect its employees from these hazards by communicating to them information on harmful properties of silica.”<sup>62</sup>

In addition, the *Goodbar* court held that the sand suppliers had no duty to warn the foundry workers of the risks of silica exposure because the foundry was in a better position than the suppliers to warn workers of the hazards inherent in the use of sand in a foun-

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sophisticated user); *Damond v. Avondale Indus. Inc.*, 718 So. 2d 551, 553 (La. Ct. App. 1998) (holding that a supplier of sand owed no duty to warn to an individual worker whose employer had purchased the sand); *see also Baker v. Monsanto Co.*, 962 F. Supp. 1143, 1149 (S.D. Ind. 1997) (allowing the manufacturer of polychlorinated biphenyls (PCBs) to rely on the sophisticated user defense under Indiana law), *aff'd sub nom. Taylor v. Monsanto Co.*, 150 F.3d 806 (7th Cir. 1998); *Newson v. Monsanto Co.*, 869 F. Supp. 1255, 1259 (E.D. Mich. 1994) (applying Michigan law and granting summary judgment for the manufacturer of polyvinyl butyryl (PVB) used in automobile windshields because the automobile manufacturer who purchased the products was a sophisticated user); *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1199-1200 (Md. Ct. Spec. App. 1990) (establishing that the sophisticated user defense precluded manufacturer liability to employees of a purchaser of Diak 2 and toluene diisocyanate (TDI) products for injuries resulting from exposure to those products), *aff'd*, 601 A.2d 123 (Md. 1992); *Jodway v. Kennametal, Inc.*, 525 N.W.2d 883, 889 (Mich. Ct. App. 1994) (approving the use of the sophisticated user defense for a supplier of cobalt where the purchaser was a manufacturer who regularly used cobalt); *Whitehead v. Dycho Co.*, 775 S.W.2d 593, 598 (Tenn. 1989) (concluding that manufacturers and distributors of the chemical naphtha could reasonably rely on the plaintiff's employer to warn its employees about the hazards of the product); *Bean v. Asbestos Corp.*, Nos. 95-52, 71, 234, 366-426, 1998 WL 972122, at \*29-30 (Va. Cir. Ct. Feb. 26, 1998) (allowing an asbestos supplier to assert the sophisticated user defense to preclude liability to employees of a brake shoe plant).

59. 591 F. Supp. 552 (W.D. Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

60. *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 557 (W.D. Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

61. *Id.*

62. *Id.* at 558.

dry setting.<sup>63</sup> The court listed a number of the difficulties that suppliers would face in attempting to provide such warnings on their own:

(1) the identification of the users or those exposed to its products would require a constant monitoring by the suppliers in view of the constant turnover of the Foundry's large work force; (2) the manner in which the sand products are delivered in bulk (i.e., unpackaged railroad car lots or truck); (3) no written product warnings placed on the railroad cars would ever reach the workers involved in casting or those in the immediate vicinity due to the way the loose sand is unloaded, conveyed, and kept in storage bins until needed; (4) only the Foundry itself would be in a position to provide the good housekeeping measures, training and warnings to its workers on a continuous and systematic basis necessary to reduce the risk of silicosis; (5) the sand suppliers must rely on the Foundry to convey any safety information to its employees; (6) the confusion arising when twelve different suppliers and the Foundry each try to cope with the awesome task of instructing the Foundry workers; and (7) in a commercial setting, it would be totally unrealistic to assume that the suppliers would be able to exert pressure on a large, industrial customer such as the Foundry to allow the suppliers to come in and educate its workers about the hazards of silicosis.<sup>64</sup>

The *Goodbar* court concluded that the foundry, not the sand suppliers, should bear the responsibility of providing a safe workplace and giving warnings of employment-related dangers to workers.<sup>65</sup> In reaching its conclusion, the court stated:

The extension of workplace warnings liability unguided by practical consideration has the unreasonable potential to impose absolute liability in those situations where it is impossible for the manufacturer to warn the product user directly. In the workplace setting, the product manufacturer often cannot communicate the necessary safety information to product users in a manner that will result in reduction of risk. Only the employer is in a position to ensure workplace safety by training, supervision and use of proper safety equipment. Designating the manufacturer an absolute insurer of its product

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63. See *id.* at 566 (noting the difficulties of requiring a supplier to warn of employment-related hazards).

64. *Id.*

65. See *Goodbar*, 591 F. Supp. at 566 (comparing the ability of the employer and the supplier to adequately warn employees of the risk of silica exposure).



