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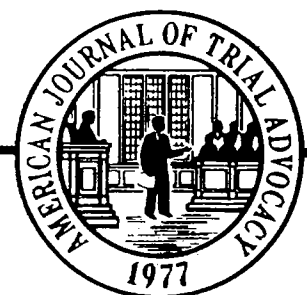
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CUMBERLAND SCHOOL OF LAW  
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# A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis

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## Abstract

*The authors discuss silica related illness, increased silica claims, and patterns of lawsuit filings. According to the authors, plaintiff recruitment and settlement conditions may result in increased numbers of silica claims. Encouragement is given to use legal principles to avoid quagmires in silica related litigation and problems that have arisen in asbestos litigation.*

Dear Trial Judges of America,

This is our second letter to you about managing complex tort litigation in your courts. In our first letter, “A Letter to the Nation’s Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases,”<sup>1</sup> we described how well-meaning judicial

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<sup>1</sup> Victor E. Schwartz & Leah Lorber, *A Letter to the Nation’s Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

control its use, or who are not in the best position to provide appropriate warnings to end-users of silica-containing products.

This letter describes silica litigation as it is today. We offer suggestions to allow the litigation to be properly managed, consistent with the law and sound public policy. We also describe the properties and use of industrial sand, the historical understanding of the health impacts of silica exposure, and the heavy governmental regulation to address occupational exposure to silica. Section II discusses and explains the recent surge in silica litigation. In Section III, we offer some suggestions to address this recent rise in the number and size of claims. We show that the faithful application of the sophisticated user, bulk supplier, and substantial change doctrines is equitable and will assign liability where it belongs. We also suggest that normal procedural rules will prevent meritless and unripe claims from clogging your courts, prevent unnecessary bankruptcies, and preserve resources needed to compensate those who are truly injured.

## **I. Silica Exposure: A Long-Recognized and -Regulated Problem**

### **A. Introducing . . . Silica, the Fuel of the Newest Toxic Tort Frenzy**

Silica—quartz in its most common form—is a ubiquitous mineral that covers beaches and fills children’s sandboxes.<sup>6</sup> All soil on every continent of the earth contains silica, because it is the major portion of all rocks, sands, and clays.<sup>7</sup> Silica is made up of oxygen and silicon atoms,<sup>8</sup> the first and second most abundant elements in the earth’s crust, respectively.<sup>9</sup>

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<sup>6</sup> See 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.

<sup>7</sup> See U.S. DEP’T OF THE INTERIOR & U.S. BUREAU OF MINES, CRYSTALLINE SILICA PRIMER, SPECIAL PUBLICATION 5 (1992) [hereinafter CRYSTALLINE SILICA PRIMER].

<sup>8</sup> Silica refers to the chemical compound silicon dioxide (SiO<sub>2</sub>) in its crystalline form.

<sup>9</sup> See CRYSTALLINE SILICA PRIMER, *supra* note 7, at 2.

## 1. Workers Are Exposed to Silica in Many Industries

Because silica is ubiquitous, workers in a wide range of industries may be exposed to it. Mining industries had the largest numbers of potentially exposed workers.<sup>10</sup> Non-mining industries with a high potential for exposure included masonry, stonework, tile setting, and plastering. Others included services to dwellings; concrete, gypsum, and plaster products; and general industrial machinery and equipment.<sup>11</sup>

## 2. Adverse Health Effects Can Occur from Prolonged or Intense Exposure to Industrial Sand Without Proper Workplace Safeguards

Plaintiffs in silica cases assert that they suffer from a disease—primarily silicosis, or scarring of the lungs<sup>12</sup>—as a result of exposure to silica dust through their occupations in various industries.<sup>13</sup> The health risks of silica are associated with excessive occupational exposure through inhalation of respirable silica in excess of certain levels for a prolonged period.<sup>14</sup>

There are three forms of silicosis, representing a range of severity, including “chronic” silicosis (which can be simple or complicated), “accelerated” silicosis, and “acute” silicosis.<sup>15</sup> Chronic simple silicosis

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<sup>10</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS., CENTERS FOR DISEASE CONTROL & PREVENTION, NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, HAZARD REVIEW: HEALTH EFFECTS OF OCCUPATIONAL EXPOSURE TO RESPIRABLE CRYSTALLINE SILICA v, Pub. No. 2002-129 (Apr. 2002) [hereinafter NIOSH HAZARD REVIEW], available at <http://www.cdc.gov/niosh/02-129pd.html>.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* at 23. Silicosis is a disease found in the upper node of the lung, unlike asbestosis, which is found in the lower lobe of the lung. See *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, 17:17 MEALEY’S LITIG. REP.: ASBESTOS 16 (Oct. 4, 2002).

<sup>13</sup> See Warren, *supra* note 6, at B5.

<sup>14</sup> See *id.*

<sup>15</sup> Compare NIOSH HAZARD REVIEW, *supra* note 10, at 23 (referring to “chronic,” “accelerated,” and “acute” silicosis) with U.S. Nat’l Library of Medicine & Nat’l Inst. of Health, MedLine Plus Health Information, *Silicosis*, available at <http://www.nlm.nih.gov/medlineplus/ency/article/000134.htm> (last modified July 19, 2005) (referring to “simple chronic,” “accelerated,” and “acute” silicosis) [hereinafter MedLine Plus

is the most common and mildest form of the disease. It can develop after at least ten to thirty years of exposure to excessive concentrations of respirable silica dust.<sup>16</sup> Basically, simple silicosis appears on chest radiographs as small rounded opacities in the upper and mid lung zones, which represent small areas of scarring in the lungs. These small scars have little or no effect on an individual's health.<sup>17</sup> Those with simple silicosis typically experience no symptoms as a result of the silicosis, and lung function is relatively preserved.<sup>18</sup> Simple silicosis "may go undetected for years in the early stages; in fact, a chest x-ray may not reveal an abnormality until after fifteen or twenty years of exposure."<sup>19</sup>

Fewer than five percent of simple silicosis cases develop into a more serious condition referred to as chronic complicated silicosis. Complicated silicosis results when the fibrotic process progresses and small silicotic lesions coalesce into lesions greater than one centimeter.<sup>20</sup> Symptoms range from minimal complaints to severe shortness of breath and rapidly occurring respiratory failure. The breathlessness is related to a loss in lung volume and can be progressive, ultimately disabling, and sometimes fatal.

A second form of the disease, accelerated silicosis, can develop five to ten years after initial exposure to silica.<sup>21</sup> Individuals with accelerated

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Health Information] and Am. Lung Ass'n of Ga., *Facts About Silicosis*, available at <http://abrannen.home.mindspring.com/alag/silica.htm> (Mar. 28, 2000) (referring to "simple," "complicated," and "acute" silicosis) [hereinafter *Facts About Silicosis*].

<sup>16</sup> Compare NIOSH HAZARD REVIEW, *supra* note 10, at 23 (stating that simple silicosis develops after ten or more years of exposure) with MedLine Plus Health Information, *supra* note 15 (stating that simple silicosis results from more than twenty years of exposure).

<sup>17</sup> See W. KEITH C. MORGAN ET AL., OCCUPATIONAL LUNG DISEASES (3d ed. 1995).

<sup>18</sup> See Ware G. Kushner & Paul Stark, *Discovering the Cause of Diffuse Parenchymal Lung Disease*, 113-4 POST GRADUATE MED. (Apr. 2003), at 81; *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12; U.S. DEP'T OF LABOR, NAT'L INST. FOR OCCUPATIONAL HEALTH & SAFETY, A GUIDE TO WORKING WITH SILICA: IF IT'S SILICA, IT'S NOT JUST DUST 5 (1997), at <http://www.msha.gov/S&HINFO/SILICO/SILICAX.pdf> (last visited Aug. 11, 2005) [hereinafter GUIDE TO WORKING WITH SILICA].

<sup>19</sup> GUIDE TO WORKING WITH SILICA, *supra* note 18, at 6.

<sup>20</sup> See MORGAN ET AL., *supra* note 17.

<sup>21</sup> See *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12.

silicosis can experience breathlessness, weakness, chest pain, cough, and sputum production.<sup>22</sup> The radiographic appearance and symptoms of accelerated silicosis and acute silicosis are similar, but the clinical and radiographic progression of accelerated silicosis is rapid.<sup>23</sup> Unlike chronic silicosis, with accelerated silicosis, fibrosis may be irregular or not even apparent on a chest x-ray.<sup>24</sup> Accelerated silicosis can be serious. When death occurs from accelerated silicosis, it is usually caused by hypoxic respiratory failure.<sup>25</sup>

A third form of the disease, acute silicosis, which is sometimes known as "silicoproteinosis," can develop among those who are exposed to very high concentrations of silica dust in the workplace over a relatively short period of time, such as sandblasters and rock drillers.<sup>26</sup> Acute silicosis can occur after exposures ranging from a few weeks to up to five years after the initial exposure,<sup>27</sup> and symptoms can include breathing difficulty, weight loss, fever, and coughing. Pulmonary fibrosis is not always present in cases of acute silicosis.<sup>28</sup> Acute silicosis progresses rapidly and can lead to severe disability within five years of diagnosis.<sup>29</sup> When it is fatal, death normally occurs from hypoxic respiratory failure.<sup>30</sup>

As it progresses, silicosis is sometimes accompanied by other adverse health conditions. Some studies have found that silicosis may be complicated by mycobacterial or fungal infections, such as tuberculosis.<sup>31</sup> Since the 1980s, the scientific community has debated whether occupa-

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<sup>22</sup> See *Facts About Silicosis*, *supra* note 15.

<sup>23</sup> See NIOSH HAZARD REVIEW, *supra* note 10, at 23.

<sup>24</sup> See *id.*

<sup>25</sup> See *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12.

<sup>26</sup> NIOSH HAZARD REVIEW, *supra* note 10, at 23.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 24.

<sup>29</sup> See Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. TIMES, Sept. 6, 2003, at C1, available at 2003 WLNR 5662921; NIOSH HAZARD REVIEW, *supra* note 10, at 24, 79.

<sup>30</sup> *Renowned Epidemiologist Says Exposure to Silica Dust Causes Cancer, Other Diseases*, *supra* note 12.

<sup>31</sup> NIOSH HAZARD REVIEW, *supra* note 10, at 33.

tional exposure to crystalline silica is associated with an increased risk of lung cancer.<sup>32</sup>

Plaintiffs in almost all silica personal injury cases allege products liability failure-to-warn claims against sand suppliers and makers of equipment or machinery regarding the potential health risks of exposure to industrial sand.<sup>33</sup> They claim that such risks were known to the defendants before warnings or employer alerts were issued.<sup>34</sup> Plaintiffs also allege design defect claims against makers of respirators and other protective equipment. They claim that these devices did not adequately protect them from disease.

## B. Silica: Well-Known and Heavily Regulated for Decades

The health risks of working with silica have been long understood. As early as 460 B.C., for example, Hippocrates linked a metal digger's breathing problems to his work with dust.<sup>35</sup> Agricola's treatise on mining shows that scholars in the Sixteenth Century recognized that silica dust "penetrates into the windpipe and lungs, and produces difficulty breathing" after being "stirred and beaten up by digging."<sup>36</sup>

In the United States, silica's risks have been recognized for over a century.<sup>37</sup> The American Foundrymen's Society has distributed literature addressing silica exposure and other foundry hazards to its members for

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<sup>32</sup> *Id.* at 35-51. NIOSH believes that silica exposure can cause cancer and associates it with lung cancer. Some studies also associated exposure to silica with chronic bronchitis, emphysema, asthma, and peripheral airways disease. *See id.* at 51-52. Case reports also have suggested silica exposure may lead to renal diseases and autoimmune disorders, such as scleroderma, lupus, or rheumatoid arthritis. *See id.* at 67-68.

<sup>33</sup> *See* Warren, *supra* note 6, at B5.

<sup>34</sup> *See id.*

<sup>35</sup> *See* Gilligan, *supra* note 2, at 20. For a discussion of historical knowledge of health effects of exposure to silica dust, see MARTIN CHERNIAK, *THE HAWK'S NEST INCIDENT: AMERICA'S WORST INDUSTRIAL DISASTER* 35, 37-39 (Yale Univ. Press 1986).

<sup>36</sup> *See* Gilligan, *supra* note 2, at 20.

<sup>37</sup> *See* Dresser Indus. v. Lee, 880 S.W.2d 750, 751 (Tex. 1993).

over one hundred years.<sup>38</sup> In 1908, the United States Bureau of Labor recognized the health risks of dust for hard-rock miners, stonemasons, potters, glass workers, sandblasters, and foundry workers.<sup>39</sup>

In the 1930s, medical reports discussed the “harmfulness of silica dust” and the “firmly established” link between silica and silicosis.<sup>40</sup> National awareness of silica’s health risks increased dramatically after a 1936 tragedy where nearly 1000 miners died near Gauley Bridge, West Virginia, after tunneling through a mountain of “almost pure silica” without using safety precautions.<sup>41</sup> Other notable silicosis outbreaks occurred earlier in the century; one set of incidents led to a 1910 investigation among lead miners near Joplin, Missouri, and another resulted in a series of studies from the 1920s to the 1950s of Vermont granite workers.<sup>42</sup> Silicosis was recognized as an industrial disease in the 1930s.<sup>43</sup> The Department of Labor’s first National Silicosis Conference<sup>44</sup> featured the film “Stop Silicosis,” which described how to protect workers from overexposure to silica.<sup>45</sup> The Conference culminated in a 1937

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<sup>38</sup> See *Haase v. Badger Mining Corp.*, 669 N.W.2d 737, 745 n.2 (Wis. Ct. App. 2003), *aff’d*, 682 N.W.2d 389 (Wis. 2004).

<sup>39</sup> See Gilligan, *supra* note 2, at 20 (citing U.S. BUREAU OF LABOR, BULL. NO. 79: THE MORTALITY FROM CONSUMPTION IN DUSTY TRADES 633-875 (1908)).

<sup>40</sup> W.J. McConnell & J.W. Fehnel, *Health Hazards in the Foundry*, 16 J. IND. HYG. 227-51 (1934).

<sup>41</sup> See *NIOSH Issues Nationwide Alert on Silicosis*, UPDATE (Nat’l Inst. for Occupational Safety & Health, U.S. Dep’t of Health & Human Servs.), at <http://www.cdc.gov/niosh/93-123.html> (Nov. 18, 1992).

<sup>42</sup> See HENRY N. DOYLE, THE FEDERAL INDUSTRIAL HYGIENE AGENCY: A HISTORY OF THE DIVISION OF OCCUPATIONAL HEALTH (U.S. Pub. Health Serv.). In 1910, Joseph Holmes, the first Director of the U.S. Bureau of Mines, persuaded Surgeon General Walter Wyman to assign a physician to the bureau to study silicosis among galena miners in the tri-state lead region of Missouri, Oklahoma, and Kansas. Dr Samuel Hotchkiss examined 720 miners and diagnosed 433, or 60%, as having “miner’s consumption” or silicosis. Vermont granite studies in the 1920s found that, among pneumatic tool workers, carvers, letterers, and tool grinders, there was 100% silicosis among workers with fifteen or more years of exposure. In the 1930s, a dust standard was established, engineering controls were initiated, and medical surveillance began. By 1956, of 1133 workers employed since 1937, the year in which engineering controls were implemented, only one worker had evidence of suspected silicosis.

<sup>43</sup> Gilligan, *supra* note 2, at 20.

<sup>44</sup> See *Haase*, 669 N.W.2d at 745 n.2.

<sup>45</sup> *Id.*



report that “directly addressed silicosis prevention in industrial settings, recommending measures for employers to take on behalf of their workers.”<sup>46</sup>

In response to this widespread knowledge of the health risks of silica inhalation, federal and state governments began to regulate silica workplace safety. By the 1930s, the federal government had launched a silica awareness campaign<sup>47</sup> after investigating, testing, and certifying respiratory protection equipment for abrasive blasting. In the 1940s, 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, a fact which [a] defendant [is] bound to know.”<sup>48</sup> Today, public awareness of silica’s potential health risks is so universal that courts observe that these risks are common knowledge.<sup>49</sup>

In 1971, federal regulations set permissible exposure limits (PELs) for occupational exposure to airborne silica.<sup>50</sup> In 1974, the Department of Labor’s Occupational Safety & Health Administration (OSHA) applied extensive abrasive blasting safety regulations enacted for government contractors in the 1960s under the Walsh-Healy Act<sup>51</sup> to all employers,<sup>52</sup> and adopted standards for working with silica in the construction and maritime industries.<sup>53</sup> Currently, OSHA provides detailed regulations requiring employers to protect employees from overexposure to silica through the enforcement of PELs and the OSHA Hazard Communications Standard. OSHA also addresses the use of protective equipment.<sup>54</sup> The

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<sup>46</sup> *Id.* (noting that “[a]mong the recommendations were workplace surveys, compliance with laws and regulations, respiratory protection and employee safety training”).

<sup>47</sup> Warren, *supra* note 6, at B5.

<sup>48</sup> *Urie v. Thompson*, 337 U.S. 163, 180, 69 S. Ct. 1018, 1029, 93 L. Ed. 1282, 1298 (1949) (quoting *Sadowski v. Long Island R.R. Co.*, 292 N.Y. 448, 456, 55 N.E.2d 497, 500, *remanded to* 268 A.D. 777 (N.Y. App. Div. 1944)).

<sup>49</sup> *See id.*

<sup>50</sup> *See* 41 C.F.R. § 50-204.50 (2004).

<sup>51</sup> 41 U.S.C. §§ 35-45 (2000).

<sup>52</sup> *See* 29 C.F.R. § 1910.94(a)(5)(ii) (2004).

<sup>53</sup> *See* 29 C.F.R. § 1910.1000 tbl. Z-3 (2004).

<sup>54</sup> *See, e.g.*, 29 C.F.R. §§ 191001.94, 1910.1000, 1910.134, 1915.34, 1915.1000, 1926.55, 1926.57, 1926.103 (2004); 29 C.F.R. §§ 1915.34, 1915.1000 (2003). OSHA’s standards for personal protective equipment are also available online. *See* U.S. Dep’t

National Institute for Occupational Safety and Health (NIOSH) has provided even more stringent “recommended exposure limits” (RELs),<sup>55</sup> proposed that blast media containing more than one percent silica not be used, and issued safety standards for the use of respirators.<sup>56</sup>

Silica exposure can be minimized when employers and workers take the proper precautions. NIOSH provides numerous suggestions,<sup>57</sup> such as encouraging employers and workers to use engineering controls to reduce respirable silica levels, including exhaust ventilation and dust collection systems, water sprays, wet drilling, enclosed cabs, and drill platform skirts.<sup>58</sup> Employers can monitor the air for silica levels and also post warning signs that identify work areas containing respirable silica. In addition, employers and workers can make available and use respiratory protection programs and clothing and respirators to reduce silica exposure.<sup>59</sup> States have also closely regulated work with silica sand. During the early twentieth century, state governments enacted legislation regarding workplace ventilation and recognizing respiratory diseases as a compensable occupational disease under Workers’ Compensation statutes.<sup>60</sup>

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of Labor, Occupational Safety & Health Admin., *Safety and Health Topics: Personal Protective Equipment (PPE)*, at <http://www.osha.gov/SLTC/personalprotectiveequipment/index.html> (July 17, 2004).

<sup>55</sup> See NIOSH HAZARD REVIEW, *supra* note 10, at 127 app. tbl. A-1 (providing comparison of PELs and RELs for crystalline silica).

<sup>56</sup> See NIOSH Respirator Users’ Notices, *available at* <http://www.cdc.gov/niosh/npptl/usernotices> (last visited Aug. 11, 2005).

<sup>57</sup> See *In re Silica Prods. Liab. Litig.* (No. MDL 1553), 2005 WL 1593936, \*4 (S.D. Tex. June 30, 2005) (“There are well-known steps employers, workers, and/or government regulators could take to drastically reduce worker exposure to respirable silica.”).

<sup>58</sup> GUIDE TO WORKING WITH SILICA, *supra* note 18, at 6-10.

<sup>59</sup> See *id.* at 6-8, 10-11.

<sup>60</sup> See Gilligan, *supra* note 2, at 20 (citing *Applequist v. Oliver Iron Mining Co.*, 296 N.W. 13 (Minn. 1941); *Golder v. Lerch Bros.*, 281 N.W. 249 (Minn. 1938)); *see, e.g.*, ARIZ. REV. STAT. § 23-901.02 (2003); ARK. CODE ANN. § 11-9-602 (Michie 2003); CAL. LAB. CODE § 5500.5 (West 2003); COLO. REV. STAT. § 8-43-103 (2003); D.C. CODE ANN. § 32-1510 (2003); IDAHO CODE § 72-438 (Michie 2003); 820 ILL. COMP. STAT. § 310/1 (2002); IND. CODE § 22-3-7-9 (2003); KAN. STAT. ANN. § 44-5a10 (2002); ME. REV. STAT. ANN. tit. 39-A, § 1491 (West 2003); MICH. COMP. LAWS § 418.501 (2003); NEV. REV. STAT. § 617.460 (2003); N.J. STAT. ANN. § 34:15-34 (West 2003); N.M. STAT. ANN. § 52-3-10 (Michie 2003); N.Y. WORKERS’ COMP. LAW § 3 (McKinney 2003); N.C. GEN. STAT. § 97-53 (2002); OHIO REV. CODE ANN. § 4123.68 (West 2003); OKLA. STAT. tit. 85, § 11 (2002); 77 PA. CONS. STAT. § 1208 (2002); R.I. GEN. LAWS

Laws in many states set threshold levels for silica dust in the workplace,<sup>61</sup> prohibit minors from working with silica refractory products,<sup>62</sup> and offer many other worker protections.<sup>63</sup> With such widespread regulation, the public—particularly people who work in industries that use silica—has long been aware of the potential adverse health effects of silica exposure.

## II. Silica Litigation Surge

### A. Years of Stability, Then an Exponential Increase in Suits

For years, silica litigation was stable, with only a relatively low number of people pursuing silica claims in any given year.<sup>64</sup> Recently, however,

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§ 28-34-2 (2002); S.D. CODIFIED LAWS § 62-8-14 (Michie 2002); TEX. HEALTH & SAFETY CODE ANN. § 84.003 (Vernon 2003); VA. CODE ANN. § 65.2-503 (Michie 2003); W. VA. CODE ANN. § 23-4-1 (Michie 2003).

<sup>61</sup> See, e.g., ALA. CODE § 25-9-111 (2003); 225 ILL. COMP. STAT. § 705/24.06 (2003); W. VA. CODE § 22A-2-24 (2003) (setting silica dust exposure threshold levels).

<sup>62</sup> See, e.g., ARIZ. REV. STAT. § 23-231(A)(12) (2003); COLO. REV. STAT. § 8-12-110 (2003); N.Y. LAB. LAW § 133 (McKinney 2003).

<sup>63</sup> See, e.g., MINN. STAT. § 144.34 (2002) (requiring physicians to report suspected silica exposure to the Michigan Department of Health); MONT. CODE ANN. § 39-73-104 (2002) (establishing eligibility for those with silicosis who cannot continue employment to receive special silicosis benefits); NEV. REV. STAT. § 617.168 (2003) (creating a state general fund for silicosis pensions); N.C. GEN. STAT. §§ 97-60 (2002) (requiring employers in industries that pose risks of silica exposure to give workers medical examinations in certain circumstances), 97-61.5 (authorizing the Industrial Commission to remove employees with silicosis from their employment), 97-76 (2003) (authorizing the Industrial Commission to make inspections of employers' workplaces where there is risk of silica exposure); 52 PA. CONS. STAT. § 701-251 (2002) (creating setback requirements for accumulation of silica dust in mines; maintenance of work area specifications; silica dust exposure threshold levels); S.D. CODIFIED LAWS § 45-6B-7 (Michie 2003) (authorizing the Department of Game, Fish, and Park to regulate silica's impact on water quality), § 62-8-27 (allowing discharge and compensation for those with non-disabling silicosis), § 62-8-28 (providing that employees may petition the state for examination for silicosis); VA. CODE ANN. § 65.2-407 (Michie 2004) (making it more difficult for employees who suffer from preexisting silicosis to sign waiver of added compensation for aggravation of preexisting condition).

<sup>64</sup> See John M. Black, *Silicosis Is Still a Problem: Recognized as an Occupational Threat to Health Since the 1930's, Exposures to Silica Continue Today*, 170 N.J. L.J. 824, 824 (2002).

the number of silica lawsuits has increased, with many cases brought by the same lawyers and law firms who for years specialized in bringing asbestos personal injury lawsuits.<sup>65</sup> Mississippi provides an example. In 2000, about forty plaintiffs filed silicosis claims in Mississippi courts; about seventy-six plaintiffs did so in 2001.<sup>66</sup> In 2002, however, the number of new Mississippi silicosis claims “skyrocketed” to approximately 10,642 and continued to be “shockingly high” thereafter, at 7228 claims in 2003 and 2609 claims in 2004.<sup>67</sup> “By way of comparison, in 2002, on average, more silicosis claims were filed per *day* in Mississippi courts than had been filed for the entire *year* only two years earlier,” according to the federal district court handling the federal silica multi-district litigation (MDL).<sup>68</sup>

The increase in silica claims are against major and minor players alike. U.S. Silica Company, one of America’s largest suppliers of industrial sand, had about 19,000 new claims filed against it in 2003, up from about 5000 claims for all of 2002 and roughly 1400 claims in 2001.<sup>69</sup> By 2005, more than 650 different entities from more than fifty classes of business were named as defendants in silica litigation, including power tool and power tool component manufacturers and jewelry manufacturing and buffing equipment manufacturers.<sup>70</sup>

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<sup>65</sup> See *Ingredients Might Be in Place to Make Silica the New Asbestos*, BEST’S INS. NEWS, Sept. 10, 2003.

<sup>66</sup> See *In re Silica Prods.*, 2005 WL 1593936, at \*5 (discussing incidence of silicosis in various regions in the United States).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.* Over 10,000 individual claims from Mississippi state courts were consolidated in the federal silica MDL, along with claims from Kentucky, Texas and Missouri. See *id.* at \*6.

<sup>69</sup> See Glater, *supra* note 29, at C1. Pending silica claims against certain Halliburton subsidiaries jumped from 275 in 2000 to 1091 in 2002—then jumped to 2812 just three months later in March 2003, and, in another three months, reached 4269. See Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 MEALEY’S LITIG. REP: ASBESTOS 33 (Feb. 21, 2005).

<sup>70</sup> See Charlie Kingdollar, *Shifting Sands—Recent Silica Developments*, HAZARDOUS TIMES, 2 (Gen Re Apr. 2005); see also Bob Sherwood, *Weighing the Risk From Food and Phones*, FIN. TIMES, Apr. 28, 2003, at 12 (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”).

## B. What is the Explanation for the Rise in Industrial Sand Lawsuits?

One would expect that such an explosion in lawsuit filings would correspond to a dramatic rise in the incidence of silica-related diseases. Indeed, one court said that “these claims suggest perhaps the worst industrial disaster in recorded world history.”<sup>71</sup> Yet there is no evidence of a burgeoning silica medical crisis; to the contrary, silicosis fatalities are steadily falling. For example, NIOSH and its predecessor public health organizations have studied silica-related injuries since 1910; NIOSH reports in its most recent estimates that over the past thirty years, silica-related deaths have declined dramatically.<sup>72</sup> In fact, the annual number of silica-related deaths has dropped over eighty-seven percent, from 1157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999, and to 148 in 2002.<sup>73</sup> To put these figures into context, on average 400 people in the United States die each year from extreme heat,<sup>74</sup> and 696 workers died in 2003 from falls.<sup>75</sup>

One might expect that a true health crisis would also reveal a national pattern of lawsuit filings in large and populous states, such as California,

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<sup>71</sup> See *In re Silica Prods.*, 2005 WL 1593936, at \*5.

<sup>72</sup> See NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., WORKER HEALTH CHARTBOOK, 2004: FATAL AND NONFATAL INJURIES, AND SELECTED ILLNESSES AND CONDITIONS: SILICOSIS (Pub. No. 2004-146), available at <http://www2a.cdc.gov/niosh-Chartbook/ch2/ch2-10-3-5.asp> (last visited Aug. 17, 2005) [hereinafter *Worker Health Chartbook, 2004*]; Centers for Disease Control & Prevention, Dep't of Health & Human Servs., *Silicosis Mortality, Prevention, and Control—United States, 1968-2002*, MMWR WKLY., Apr. 29, 2005, at 1, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>, printed in 29:21 J. AM. MED. ASS'N 2585 (June 1, 2005) [hereinafter *Silicosis Mortality, Prevention, and Control—United States, 1968-2002*].

<sup>73</sup> See *Worker Health Chartbook, 2004*, *supra* note 72, at 169; *Silicosis Mortality, Prevention, and Control—United States, 1968-2002*, *supra* note 72, at 1.

<sup>74</sup> See *Extreme Heat* (Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., (Washington, D.C.), available at <http://www.bt.cdc.gov/disasters/extremeheat/about.asp> (last visited Aug. 17, 2005).

<sup>75</sup> See Bureau of Labor Statistics, U.S. Dep't of Labor, *Census of Fatal Occupational Injuries Data (CFOI) Current and Revised Data*, available at <http://www.bls.gov/iif/> (last visited Apr. 29, 2005).

New York, and Illinois. But most recent silica lawsuits have been filed in Mississippi and Texas,<sup>76</sup> which rank forty-third and thirty-third lowest respectively in the United States for age-adjusted silicosis mortality rates.<sup>77</sup> Certain counties in these states are aptly described by well-known and experienced Mississippi plaintiffs' lawyer Richard Scruggs as "magic jurisdictions," where plaintiffs are likely to obtain more favorable settlements and judgments than they might at home.<sup>78</sup> In fact, the number of new silicosis claims filed in Mississippi during 2002 to 2004 (20,479 new claims) is more than five times greater than the total number of silicosis cases one would expect over the same period in the entire United States.<sup>79</sup> Rather than a true health crisis, "this appears to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system."<sup>80</sup>

Why, then, this explosion in silica lawsuits when silica deaths are on the decline and suits are appearing in plaintiff-friendly jurisdictions? Some propose that the surge in silica lawsuits in Mississippi and Texas is a result of plaintiffs' counsel attempts to beat the clock on the passage of civil justice reform legislation at the state and federal levels.<sup>81</sup> Others

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<sup>76</sup> See Glater, *supra* note 29, at C1; James Doran & Helen Leonard, *Claims Surge as U.S. Lawyers See Silica as the New Asbestos*, THE TIMES (LONDON), Sept. 10, 2003 at 4M.

<sup>77</sup> See DIVISION OF RESPIRATORY DISEASE STUDIES, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE WORK-RELATED LUNG DISEASE SURVEILLANCE REPORT, 2002 54 tbl. 3-5 (Pub. No. 2003-111, 2003), available at <http://www.cdc.gov/niosh/docs/2003-111/2003-111.html> (last visited Aug. 17, 2005) [hereinafter LUNG DISEASE SURVEILLANCE REPORT].

<sup>78</sup> 'Medical Monitoring and Asbestos Litigation'—A Discussion With Richard Scruggs and Victor Schwartz, 17:3 MEALEY'S LITIG. REP.: ASBESTOS 19 (Mar. 1, 2002). The American Tort Reform Association has labeled these forums "judicial hellholes." See Am. Tort Reform Ass'n, *Bringing Justice to Judicial Hellholes* (2004), available at <http://www.atra.org/reports/hellholes> (last visited Aug. 17, 2005).

<sup>79</sup> See *In re Silica Prods.*, 2005 WL 1593936, at \*5.

<sup>80</sup> *Id.* at \*6.

<sup>81</sup> See *id.* at \*45 ("If searching for an explanation in the legal field, one might focus on the fact that most of the cases were filed just prior to the effective dates of a series of recent legislative 'tort reform' measures in Mississippi."); Susanne Sclafane, *Silica Dust: The Next Asbestos? Hard Hat Maker With Former Rims President Among 160 Defendants Facing Dust Claims*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BEN. MGMT., May 10, 2004, at 10, available at 2004 WLNR 14746125 (According to

suggest that “the decline in asbestosis lawsuits” may have left “a network of plaintiffs’ lawyers and screening companies scouting for a new means of support.”<sup>82</sup>

### C. Industrial Sand Litigation, If Left Unchecked, May Run Wild

The same lawsuit-generating tactics and mechanisms that worked to generate claims for the asbestos plaintiffs’ bar now are increasingly being exploited in the silica context.<sup>83</sup> Such tactics include plaintiff recruitment through free mass litigation screenings (often held in mobile x-ray vans in hotel or restaurant parking lots), direct mailings to plaintiffs, and Internet websites.<sup>84</sup> The problems associated with mass litigation

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assessments from “many observers . . . there are two reasons for the upsurge. One is that plaintiffs’ lawyers have filed to try to beat tort reforms that were enacted in Mississippi and Texas [and became effective in 2003]. The other one is that, looking ahead, the lawyers were concerned that federal asbestos legislation might pass. . . .”); Warren, *supra* note 6, at B5 (“Some from the defense side charge that the sudden rise in silicosis claims coincides with increasing constraints on asbestos litigation in state courts, as well as the threat of legislation that would create a national trust fund and eliminate asbestos litigation altogether.”). Texas legislation enacted in 2005 may now be driving silica lawsuits out of Texas and into California, which, some say, “barring major tort reforms, remains a destination of choice for plaintiff lawyers.” Justin Scheck, *Breathing Down on California: Texans Charge Into State With Sometimes Shady Silicosis Suits*, THE RECORDER, June 3, 2005, at 1. The legislation, effective September 1, 2005, specifically seeks to address abuses in silica and asbestos litigation. It requires silica and asbestos plaintiffs to show clear breathing impairment to proceed with their claims, not simply a diagnosis based on an x-ray. 2005 Vernon’s Tex. Sess. Law Serv. 2005 Tex. Sess. Law Serv. Ch. 97 (S.B. 15) (West) (to be codified at TEX. CIV. PRAC. & REM. §§ 90.001 *et seq.*).

<sup>82</sup> *In re Silica Prods.*, 2005 WL 1593936, at \*45; see Susanne Sclafane, *Consolidation Ahead, Market Confusion Persists: Industry Execs; NAPSLO Convention Report: Potential Future Opportunity for Surplus Lines Brokers Is Discussed*, 107:38 NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BEN. MGMT., Sept. 22, 2003, at 44, available at 2003 WLNR 12557579 (one insurer remarking, “[a]ll of a sudden, silica is like ‘Asbestos, Jr.’ for some attorneys that are running out of clients”).

<sup>83</sup> See Gilligan, *supra* note 2, at 19.

<sup>84</sup> See *In re Silica Prods.*, 2005 WL 1593936, at \*\*24-45 (describing the use of mass screenings to generate plaintiffs in the federal silica MDL); Sue Reisinger, *Mounting Silica Suits Pose New Threat to Industrial Companies*, 13:136 CORP. LEGAL TIMES, Mar. 2003, at col. 1 (stating that a Texas firm provides free medical screening for

screenings in asbestos litigation—the huge profit incentives for screening companies, doctors and law firms, the use of unlicensed doctors and other unqualified personnel to generate plaintiff diagnoses, and the preponderance of claims by unimpaired people<sup>85</sup>—are appearing in silica litigation as well.<sup>86</sup>

It can be expected that the medical screeners and plaintiffs' lawyers will transfer to silica litigation the practice developed in asbestos litigation of "over-interpreting" chest x-rays to consistently misdiagnose

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workers who may have been exposed to silica and noting that Internet advertising states potential plaintiffs could include families of workers and people who lived or worked not at but merely near a silica site); *Increase in Screening for Silica Exposure Victims Evident in Texas*, 1:2 MEALEY'S LITIG. REP.: SILICA 10 (Oct. 18, 2002).

<sup>85</sup> See, e.g., Gilbert S. Keteltas, *Learning the Lessons of Asbestos: Courts and Defendants Can Do Better in the Case of Silica*, 21:24 ANDREWS TOXIC CHEM. LITIG. REP. 12 (Jan. 8, 2004) ("These for-profit, for-litigation screenings identify thousands of individuals as having results 'consistent with' silica exposure. But the phrase 'consistent with' is not an accepted medical diagnosis and is not legal proof of causation. As in the case of asbestos, this screening process yields tens of thousands of plaintiffs who may never experience any silica-related disease."); 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); David M. Setter et al., *Why We Have to Defend Against Screened Cases: Now Is the Time for a Change*, 2:4 MEALEY'S LITIG. REP. SILICA 11 (Dec. 2003) (detailing deposition testimony regarding profits generated from medical screenings and stating, "[t]hese individuals make huge amounts of money at other's expense"); Order by the Hon. Sharon S. Armstrong, ACR XXIII (Super. Ct. of King County, Wash., Oct. 15, 2002) (stating in an asbestos case that it would "contravene public policy" to allow testimony from one doctor employed by a screening company, as the doctor was not licensed in the state and relied for his diagnoses on radiology reports from unregistered and uncertified technicians or radiologists using unregistered and uncertified equipment).

<sup>86</sup> See, e.g., *In re Silica Prods.*, 2005 WL 1593936, at \*54 ("[I]n the business of mass [silica litigation] screenings, a diagnosis, whether accurate or not, is money in the bank. ... without large numbers of positive diagnoses, the screening company would lose money or would lose the law firm account to a competitor."); *id.* at \*\*37, 85 (issue of whether doctors licensed out-of-state engaged in unauthorized practice of medicine may become relevant if plaintiffs continue to assert claims based on those doctors' B-reads and diagnoses); *id.* at \*62 ("Perhaps even more stunning was [one doctor's] reliance on largely untrained secretarial staff to 'translate [the ILO form he completed] into English,' [and] 'prepare [his] reports, stamp [his] name on them and send those reports out without [him] editing or reviewing them.'") (record citations omitted) (internal quote alterations in original).



disease in subjects where no disease exists.<sup>87</sup> The first occurrence of false readings of x-rays was an enterprising scheme of two attorneys and three physicians who formed the National Tire Workers Litigation Project (NTLWP) in 1986 to sign up tire workers and to file claims for lung injury from asbestos.<sup>88</sup> According to a handout distributed to tire workers, titled "Information Sheet—Tire Workers Litigation Project," 64% of the workers first examined by chest radiography for asbestosis were positive and in a second group 95% had the disease.<sup>89</sup> Scientists subsequently conducted a radiologic re-evaluation in 439 tire workers previously designated by the NTLWP as having x-ray changes consistent with an asbestos exposure.<sup>90</sup> The re-evaluation was conducted by a panel of three board-certified radiologists who were NIOSH certified B-Readers.<sup>91</sup> The readings were performed independently, according to the International Labour Office Guidelines for Pneumoconioses Classification.<sup>92</sup> Of the 439 films re-interpreted by the three independent radiologists the percentage of positive films was 3.7%, 3.0% and 2.7%.<sup>93</sup> A consensus evaluation indicated that approximately 3.6% of the subjects evaluated had a condition consistent with asbestos exposure—a figure that markedly differs from the 64% and 95% findings of the NTWLP physicians.<sup>94</sup>

Similar discrepancies were recently reported in the recent study by researchers at Johns Hopkins University who conducted a re-evaluation

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<sup>87</sup> Indeed, United States District Court Judge Janis Graham Jack noted in the federal silica MDL that "in just over two years, [one screening company] found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period." *In re Silica Prods.*, 2005 WL 1593936, at \*31.

<sup>88</sup> See *Raymark Indus. v. Stemple*, No. 88-1014-K, 1990 WL 72588 (D. Kan. May 30, 1990).

<sup>89</sup> See *id.* at \*10.

<sup>90</sup> R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32:11 J. OCCUPATIONAL MED. 1088-90 (1990); see also Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 39, 45 (1991) (recounting that, in sixty-five asbestos cases before District Judge Carl C. Rubin, court-appointed medical experts found no radiographic evidence of any asbestos-related condition in forty-two cases).

<sup>91</sup> *Reger et al.*, *supra* note 90, at 1088-90.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

