

Asbestos

Silica: An Overview Of Exposure And Litigation In The United States

by
Mark A. Behrens, Esq.
Leah Lorber, Esq.
and
Cary Silverman, Esq.

Shook, Hardy & Bacon L.L.P.
Washington, D.C.

**A commentary article
reprinted from the
February 21, 2005 issue of
Mealey's Litigation Report:
Asbestos**

Commentary

Silica: An Overview Of Exposure And Litigation In The United States

By

Mark A. Behrens, Leah Lorber and Cary Silverman

[Editor's Note: Mark A. Behrens is a partner in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He received his B.A. in Economics from the University of Wisconsin-Madison in 1987 and his J.D. from Vanderbilt University in 1990, where he served as Associate Articles Editor of the Vanderbilt Law Review. Leah Lorber is of counsel at the firm. She obtained her B.A. in Journalism and English and her J.D. magna cum laude from Indiana University, where she was a member of the Order of the Coif and served as Articles Editor of the Indiana Law Journal. Cary Silverman is an associate at the firm. He received his B.S. in Management Science from the State University of New York College at Geneseo in 1997, an M.P.A. and a J.D. with honors from George Washington University Law School in 2000, where he served as Managing Editor of The Environmental Lawyer. The views expressed herein are the authors' own. Responses to this column are welcome. Copyright 2005 by the authors.]

Background

What Is Silica?

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

Silica is commonly used as industrial sand. As a natural substance, it is not notably harmful. When fragmented into tiny particles, however, it can be dangerous if inhaled.

Because silica is ubiquitous, workers in a wide range of industries may be exposed to it. According to the National Institute for Occupational Safety and Health, mining industries had the largest numbers of potentially exposed workers. Non-mining industries with high potential for exposure included masonry, stonework, tile setting, and plastering; services to dwellings; concrete, gypsum, and plaster products; and general industrial machinery and equipment, among others.

What Health Conditions Can Result From Exposure To Silica?

Plaintiffs in silica cases assert that they suffer from a disease — primarily silicosis, or scarring of the lungs — as a result of exposure to silica dust through their occupations in various industries. 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.

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. Chronic simple silicosis 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. 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. Those with simple silicosis typically experience no symptoms as a result of the silicosis

and lung function is relatively preserved. 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.

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. 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.

Accelerated silicosis can develop five to ten years after initial exposure to silica. Individuals with accelerated silicosis can experience breathlessness, weakness, chest pain, cough, and sputum production. The radiographic appearance and symptoms of accelerated silicosis and acute silicosis are similar, but the clinical and radiographic progression of accelerated silicosis is *rapid*. Unlike chronic silicosis, with accelerated silicosis, fibrosis may be irregular. Accelerated silicosis can be serious. When death occurs from accelerated silicosis, it is usually caused by hypoxic respiratory failure.

Acute silicosis, 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. Symptoms can include breathing difficulty, weight loss, fever, and coughing. Pulmonary fibrosis is not always present in cases of acute silicosis. Acute silicosis progresses rapidly and can lead to severe disability within five years of diagnosis. When it is fatal, death normally occurs from hypoxic respiratory failure.

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. Since the 1980s, the scientific community has debated whether occupational exposure to crystalline silica is associated with an increased risk of lung cancer.

How Can Asbestosis Be Diagnosed As Silicosis?

Because histopathologic material (typically lung tissue) often is not available in suspected cases of either

silicosis or asbestosis, the diagnosis of both of these diseases usually is based on clinical parameters alone. In both cases, the diagnosis rests on: (1) an occupational exposure history sufficient to cause disease; (2) the presence of chest x-ray, or radiographic, abnormalities consistent with the disease; and (3) the exclusion of other pulmonary diseases that can mimic the diseases radiographically. Although several important differences exist which can distinguish radiographically between silicosis and asbestosis, there may be a tendency (and litigation incentive) to ignore these differences.

Silica Exposure, Regulation & Safeguards The Health Effects Of Working With Silica Have Been Long Understood

As early as 460 B.C., Hippocrates linked a metal digger's breathing problems to his work with dust. 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."

In the United States, silica's risks have been recognized for over a century. The American Foundrymen's Society has distributed literature addressing silica exposure and other foundry hazards to its members for over one hundred years.¹ 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.²

In the 1930s, medical reports discussed the "harmfulness of silica dust" and the "firmly established" link between silica and silicosis.³ National awareness of silica's health risks increased dramatically after a 1936 tragedy where nearly 1,000 miners died near Gauley Bridge, West Virginia, after tunneling through a mountain of almost pure silica without using safety precautions.⁴ 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.⁵ Silicosis was recognized as an industrial disease in the 1930s.⁶ The Department of Labor's first National Silicosis Conference featured the film "Stop Silicosis," which described how to protect workers from overexposure to silica.⁷ The Conference

culminated in a 1937 report that “directly addressed silicosis prevention in industrial settings, recommending measures for employers to take on behalf of their workers.”⁸

Close Regulation Of Silica Sand

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 after investigating, testing, and certifying respiratory protection equipment for abrasive blasting.⁹ In the 1940s, the United States Supreme Court noted in *Urie v. Thompson*, 337 U.S. 163, 180 (1949), that “[i]t is a matter of common knowledge that it is injurious to the lungs and dangerous to the health to work in silica dust, a fact which [a] defendant [is] bound to know.” Today, public awareness of silica’s potential health risks is so universal that courts observe that these risks are common knowledge.

In 1971, federal regulations set permissible exposure limits (PELs) for occupational exposure to airborne silica.¹⁰ In 1974, the Occupational Safety & Health Administration (OSHA) applied extensive abrasive blasting safety regulations enacted for government contractors in the 1960s under the Walsh-Healy Act to all employers,¹¹ and adopted standards for working with silica in the construction and maritime industries.¹² 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.¹³ The National Institute for Occupational Safety and Health (NIOSH) has provided even more stringent “recommended exposure limits” (RELs),¹⁴ proposed that blast media containing more than 1 percent silica not be used, and issued safety standards for the use of respirators.¹⁵

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.¹⁶ Laws in many states set threshold levels for silica dust in the workplace,¹⁷ prohibit minors from working

with silica refractory products,¹⁸ and offer many other worker protections.¹⁹ 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.

Available Safeguards Minimize Silica Exposure

Silica exposure can be minimized when employers and workers take the proper precautions. NIOSH provides numerous suggestions, 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.²⁰ 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 to reduce silica exposure.²¹

The Litigation: A Recent Surge In Silica Claims

Silica litigation is primarily composed of personal injury lawsuits brought by workers who allegedly developed silicosis after being exposed to silica on the job.

Plaintiffs in almost all silica personal injury cases allege product liability failure-to-warn claims against sand suppliers and makers of equipment or machinery regarding the potential health risks of exposure to industrial sand. They claim that such risks were known to the defendants before warnings or employer alerts were issued. 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.

Lawsuits name dozens of defendants and include little or no information about any given plaintiff’s claim against any given defendant, such as the actions allegedly taken by any defendant, the specific alleged harm to any particular plaintiff, or the location of where the harm took place.

Federal MDL defendants have alleged that each law firm typically brings suit against the same group of defendants regardless of the merits of the claims, a practice that may suggest collusion.²²

The Number Of Silica Claims Is Quickly Rising

Silica litigation is at a tipping point. Recent filings indicate that the plaintiffs’ bar intends to make a seri-

ous push to turn industrial sand litigation into “the next asbestos.” Some plaintiffs’ lawyers appear to have modified their “asbestos litigation kits” to address silica litigation.²³

For years, silica litigation was stable, with only a low number of people pursuing silica claims in any given year. Recently, however, 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.

One large insurance company is handling more than 25,000 silica claims in twenty-eight states — a tenfold rise from August of 2002.²⁴

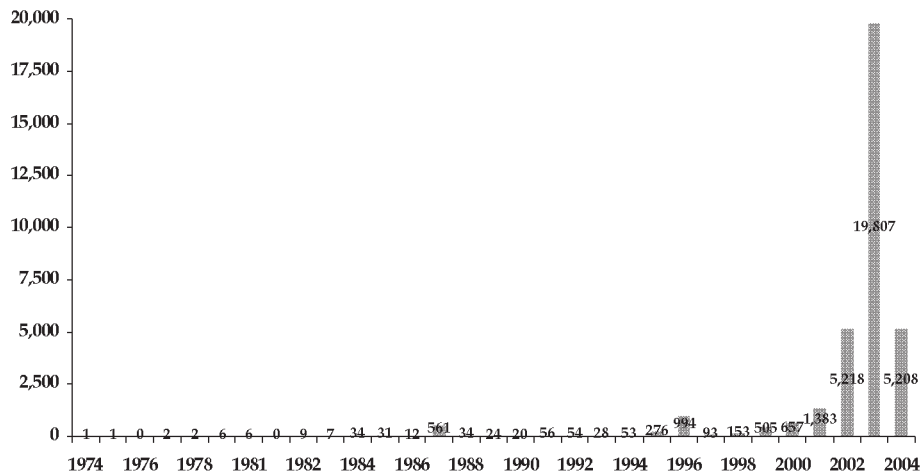
The increase in silica claims are against both major and minor players alike.²⁵

Before 2002, one respirator manufacturer had about 200 silicosis claims filed against it each year. Between 2002 and 2004, 29,000 silicosis claims were filed — a 5000% increase in claims filed.

(See chart below.)

According to the *Financial Times* April 28, 2003 article “Weighing the Risk From Food and Phones,” “Silicosis claims 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.” The plaintiffs allege that the air-supplied respirator products did not work or that the company did not give proper warning. According to the *National Underwriter* May 10, 2004 article “Silica Claimants Jump From Hundreds to Tens of Thousands,” the company (E.D. Bullard Co.- the inventor of the hard

Number of plaintiffs, by year, against a major silica defendant

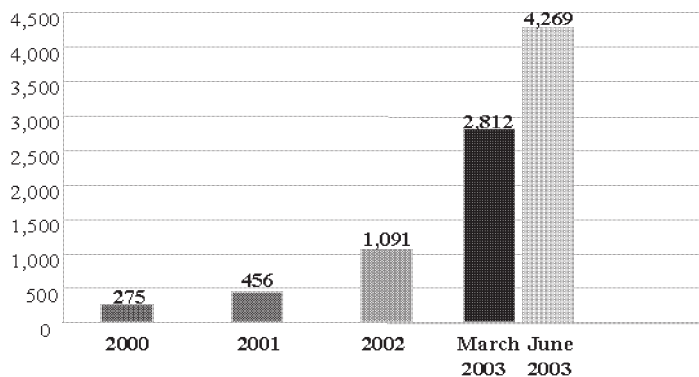


hat) faced one silica-related lawsuit in 1975. In the 1990s, multiplaintiff suits began to crop up. The following summarizes the increase in cases filed against Bullard:

62 cases with 200 plaintiffs in 1999.
156 cases with 4,305 plaintiffs in 2002.
643 cases with 17,288 plaintiffs in 2003.

lated deaths has dropped nearly eighty-four percent, from 1,157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999.²⁸ To put these figures into context, the U.S. Center for Disease Control and Prevention reports that on average, 400 people in the United States die each year from extreme heat,²⁹ and the Bureau of Labor Statistics reports that 671 workers die annually from falls "to [a] lower level."³⁰

Silica Claims Against Halliburton Subsidiaries



According to a bankruptcy disclosure statement filed by Halliburton subsidiaries on September 18, 2003, pending silica claims against the companies jumped 15 times between 2000 and 2003.

Silica Claims Against Halliburton Subsidiaries

According to a bankruptcy disclosure statement filed by Halliburton subsidiaries on September 18, 2003, pending silica claims against the companies jumped 15 times between 2000 and 2003.

The Number Of Silica-Related Deaths Has Decreased Dramatically As The Number Of Lawsuits Has Increased

One would expect that such an explosion in lawsuit filings would correspond to a dramatic rise in the incidence of silica-related diseases. Yet there is no evidence of a burgeoning silica medical crisis; to the contrary, silicosis fatalities are steadily falling.²⁶

For example, NIOSH and its predecessor public health organizations have studied silica-related injuries since 1910. NIOSH reports that over the past thirty years, silica-related deaths have declined dramatically.²⁷ *In fact, the annual number of silica-re-*

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, Michigan, New York, and Illinois. But most silica claims are filed in Mississippi and Texas,³¹ 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.³²

As of 2003, over 17,000 silica claims were filed in Mississippi alone, which is more than half of the silica cases pending nationwide.³³

Why Is There An Explosion Of Silica Lawsuits When Silica Deaths Are On The Decline?

Some suggest that the surge in silica lawsuits in Mississippi and Texas is an attempt by plaintiffs' lawyers to beat the clock on the passage of state civil justice reform legislation.

The Associated Press reported that the increase in Mississippi silica litigation “may be due to attorneys who had sought to file lawsuits before the January 1, 2003 deadline when Mississippi’s tort reform laws capped punitive damages.”³⁴

Another source attributed Mississippi’s surge of over 17,000 plaintiffs in silica cases in 2002 to plaintiffs’ attorneys rushing to beat the deadline before civil justice reform legislation took effect in early 2003.³⁵

The possibility of enactment of federal asbestos litigation reform legislation has spurred plaintiffs’ attorneys who honed their skills on asbestos cases to diversify their litigation portfolios.

As one lawyer familiar with the litigation observed, “There’s no medical explanation that explains the sudden spike in claims. When you look at when the number of silica claims began to rise, it was at about the same time there began to be serious discussions in Washington about asbestos litigation reform.”³⁶

A 2003 article published in the *National Law Journal* predicted, “With legislation pending before the U.S. Senate proposed to bar all future filing of asbestos injury claims, we may see a new wave of bodily injury cases that would have had alleged asbestosis in the past filed under the rubric of mixed dust.”³⁷

As the *Wall Street Journal* found, “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.”³⁸

After bankrupting more than seventy companies through asbestos lawsuits, plaintiffs’ lawyers are searching for new deep pockets. Businesses with connections to silica provide a new batch of solvent defendants.

The lead plaintiff’s lawyer in the largest group of silicosis claims in the U.S., the Silica Multi-District Litigation (“MDL”) involving 10,900 claims, wrote to each defendant in that litigation in April 2004, and set forth his estimate of just the pre-trial defense costs:

We estimate litigating the Silica MDL [Multi-District Litigation] will collectively cost the defendants over \$1,500,000,000 just for the following: depose plaintiffs, obtain records (medical employment, social security, disability), drafting reports, deposing corporate representatives, deposing doctors, deposing co-workers, deposing fact witnesses, deposing experts, independent medical exams, hotel and travel expenses, motion practice. This estimate does not include the expenses that will be incurred once the cases are sent back to Mississippi . . . The foregoing estimate does not include the cost to try each of these cases.

The plaintiffs’ lawyer then demanded \$100,000 per claim to settle with 10,900 claimants — *\$1.09 billion*.

Some plaintiffs’ lawyers are “double-dipping” or filing “re-tread” cases — they restyle the claims of asbestos plaintiffs, who may have already received a recovery, as silica lawsuits, and submit the same screening results as consistent with silicosis.

One example is the case of Noah Myers Bufkin, 62, an asymptomatic former railroad worker who filed a claim after being recruited by a medical screening company. He settled his claim for about \$10,000. Seven or eight years later, the same screening company found his testing consistent with silicosis and he recently filed suit again in Macon, Mississippi.³⁹

Others have filed “mixed dust” claims alleging that their clients either developed asbestosis or silicosis due to their exposure to various products in the workplace.⁴⁰

The same lawsuit-generating tactics and mechanisms that worked to generate claims for the asbestos plaintiffs’ bar are now being exploited in the silica context.⁴¹ Such tactics include plaintiff recruitment through direct mailings, the use of marketing firms to develop “inventories”, free mass screenings,⁴² mobile x-ray vans,⁴³ and Internet websites.⁴⁴ Screenings of potential silica plaintiffs by plaintiffs’ law firms and their agents have increased “immeasurably” during the past few years.⁴⁵

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 disease in subjects where no disease exists.

Medical experts from both sides agree that the number of actual silicosis cases is far less than the current number of claimants.

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. According to a handout distributed to tire workers, titled “Information Sheet — Tire Workers Litigation Project,” 64 percent of the workers first examined by chest radiography for asbestosis were positive and in a second group 95 percent had the disease. 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.⁴⁶ The re-evaluation was conducted by a panel of three board-certified radiologists who were NIOSH certified B-Readers. The readings were performed independently, according to the International Labour Office Guidelines for Pneumoconioses Classification. Of the 439 films re-interpreted by the three independent radiologists the percentage of positive films was 3.7, 3.0 and 2.7 percent. 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 percent and 95 percent findings of the NTWLP physicians.

Similar discrepancies were recently reported in the recent study by researchers at Johns Hopkins University who conducted a re-evaluation of 551 films interpreted by B Readers used as a basis for a legal claim.⁴⁷ In the initial readings, 91.7% of the 551 films were interpreted as positive for abnormalities. The films were reinterpreted by six B readers in an independent manner with a finding of *only* 4.5% having those same abnormalities. The data showed statistically significant differences between the interpretations of the initial B Readers — that were used as a basis for the lawsuit — and the independent B Reader panel.

Recent discovery in the silica MDL pending in the U.S. District Court in Corpus Christi, Texas has shown many of the diagnoses (in excess of 3,000

claims currently) to be fraudulently prepared with three of the small group of “diagnosing” doctors testifying that they never authorized the inclusion of silicosis diagnosis in reports submitted in litigation and that they are not qualified to render such diagnoses.

One “diagnosing” doctor was involved in diagnosing well over half of all of the silicosis claims pending in the Silica MDL. One of the doctors admitted that he made as many as 150 diagnoses of silicosis in a single eight-hour period.

One major manufacturer of disposable respiratory products has recently withdrawn from the industrial disposable respirator market, in part, because of the onslaught of claims.

Endnotes

1. 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).
2. Thomas A. Gilligan, Jr., *Silica Litigation from Both Sides of the Bar: Is Silica the Next Asbestos? The Defendant's Perspective*, 1:5 Mealey's Litig. Rep.: Silica 19, 20 (Jan. 2003) (citing U.S. Bureau of Labor, Bull. No. 79: The Mortality from Consumption in Dusty Trades 633-875 (1908)).
3. W.J. McConnell & J.W. Fehnel, *Health Hazards in the Foundry*, 16 J. Ind. Hyg. 227-51 (1934).
4. See *NIOSH Issues Nationwide Alert on Silicosis, Update* (Nat'l Inst. for Occupational Safety & Health, U.S. Dep't of Health & Human Servs., Washington, D.C.) Nov. 18, 1992, available at <<http://www.cdc.gov/niosh/93-123.html>>.
5. 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 percent, 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 percent silicosis among workers with 15 or more years of exposure. In the 1930s, a dust standard was established, engineering controls were initiated, and medical surveillance was begun. By 1956, of 1,133 workers employed since 1937, the year in which engineering controls were implemented, only one worker had evidence of suspected silicosis.
6. Gilligan, *supra*, at 20.
 7. *Haase*, 669 N.W.2d at 745 n.2.
 8. See *id.*
 9. 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.
 10. 41 C.F.R. § 50-204.50 (1971).
 11. 29 C.F.R. § 1910.94(a)(5)(ii) (1974).
 12. 29 C.F.R. § 1910.1000 tbl. Z-3.
 13. See, e.g., 29 C.F.R. §§ 1901.94, 1910.1000, 1910.134, 1915.34, 1915.1000, 1926.55, 1926.57, 1926.103 (2003). OSHA's standards for "personal protective equipment" (PPE) are also available at <<http://www.osha.gov/SLTC/silicacrystalline/index>>.
 14. 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, at 127 app. tbl. A-1 (2002) (providing comparison of PELs and RELs for crystalline silica).
 15. NIOSH Respirator Users' Notices, available at <<http://www.cdc.gov/niosh/usersntc.html>>.
 16. See Gilligan, *supra*, 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; Ark. Rev. Stat. § 11-9-602; Cal. Lab. Code § 5500.5; Colo. Rev. Stat. § 8-43-103; D.C. Code Ann. § 32-1510; Idaho Code § 72-438; 820 Ill. Comp. Stat. § 310/1; Ind. Code § 22-3-7-9; Kan. Stat. Ann. § 44-5a10; Me. Rev. Stat. Ann. § 1491; Mich. Comp. Laws § 418.501; Nev. Rev. Stat. § 617.460; N.J. Stat. Ann. § 34:15-34; N.Y. Workers' Comp. § 3; N.C. Gen. Stat. § 97-53; N.M. Stat. Ann. § 52-3-10; Ohio. Rev. Code Ann. § 4123.68; Okla. Stat. tit. 85, § 11; 77 Pa. Cons. Stat. § 1208; R.I. Gen. Laws § 28-34-2; S.D. Codified Laws § 62-8-14; Tex. Health & Safety Code Ann. § 84.003; Va. Code Ann. § 65.2-503 (Michie 2003); W. Va. Code Ann. § 23-4-1.
 17. See, e.g., Ala. Code § 25-9-111; 225 Ill. Comp. Stat. § 705/24.06; W. Va. Code § 22A-2-24 (setting silica dust exposure threshold levels).
 18. See, e.g., Ariz. Rev. Stat. § 23-231(A)(12); Colo. Rev. Stat. § 8-12-110; N.Y. Lab. Law § 133.
 19. See, e.g., Minn. Stat. § 144.34 (requiring physicians to report suspected silica exposure to the Michigan Department of Health); Mont. Code Ann. § 39-73-104 (establishing eligibility for those with silicosis who cannot continue employment to receive special silicosis benefits); Nev. Rev. Stat. § 617.168 (creating a state general fund for silicosis pensions); N.C. Gen. Stat. §§ 97-60 (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 (authorizing the Industrial Commission to make inspections of employers' workplaces where there is risk of silica exposure); 52 Pa. Cons. Stat. § 701-251 (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 (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 (making it more difficult for employees who suffer from preexisting silicosis to sign waiver of added compensation for aggravation of preexisting condition).
 20. 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 6-10 (1997), available at <<http://www.msha.gov/S&HINFO/SILICO/SILICAX.pdf>> [hereinafter "Guide to Working with Silica"].
 21. See *id.* at 6-8, 10-11.

22. See *In re Silica Prods. Liab. Litig.*, MDL Docket No. 1553, Defendants' Opposition to Plaintiffs' Motions to Remand, at 3-5 (filed Jan. 12, 2004).
23. Gilligan, *supra*, at 19.
24. Warren, *supra*, at B5.
25. Bob Sherwood, *Weighing the Risk from Food and Phones*, Fin. Times, Apr. 28, 2003, at 12 ("[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").
26. Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. Times, Sept. 6, 2003, at C1.
27. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *The Work-Related Lung Disease Surveillance Report*, 2002 54 tbl. 3-1 (Pub. No. 2003-111, 2003); Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Worker Health Chartbook, 2000: Fatal Illness 3* (Pub. No. 2003-111, 2002), available at <<http://www.cdc.gov/niosh/00-127pd.html>>.
28. See *id.*
29. *Extreme Heat* (Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., Washington, D.C.), available at <<http://www.cdc.gov/nceh/hsb/extremeheat/>>.
30. Bureau of Labor Statistics, U.S. Dep't of Labor, *Census of Fatal Occupational Injuries Data*, available at <<http://www.bls.gov/iif/>>.
31. Glater, *supra*, at C1; James Doran & Helen Leonard, *Claims Surge as U.S. Lawyers See Silica as the New Asbestos*, The Times, Sept. 10, 2003 at 4M.
32. *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos 1, 6 (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>>.
33. Meg Green, *Dust Storm: A Sudden Rise in Silicosis Claims is Reminiscent of Asbestos Litigation, but this Time Insurers are Blocking the Turbulence*, Best's Review, Nov. 1, 2003. On September 4, 2003, the Judicial Panel on Multidistrict Litigation ("JPML") transferred twenty-two cases originally filed in a Mississippi state court and removed by defendants to federal court to the United States District Court for the Southern District of Texas. See *In re Silica Prods. Liab. Litig.*, MDL Docket No. 1553, 2003 U.S. Dist. LEXIS 15515, at *1-*6 (J.P.M.D.L. Sept. 4, 2003). The JPML has since transferred another forty-one cases, see Conditional Transfer Order (CTO-4), *In re Silica Prods. Liab. Litig.*, MDL Docket. No. 1553 (J.P.M.D.L. Jan. 26, 2004), available at <http://www.mdl1553.com/docs/0089.pdf>, and three more have been identified as potentially subject to transfer.
34. *Silica Lawsuits Jump in Mississippi*, Assoc. Press Newswire (Oct. 19, 2003).
35. See *Ingredients Might Be in Place to Make Silica the Next Asbestos*, Best's Ins. Wire, Sept. 10, 2003.
36. *Dust Storm: A Sudden Rise In Silicosis Claims Is Reminiscent Of Asbestos Litigation, But This Time Insurers Are Blocking The Turbulence*, Best's Review, November 1, 2003 (quoting Mark A. Behrens); see also Gary S. Mogel, *Silica Isn't the 'Next Asbestos,' Nat'l Underwriter: Prop. & Casualty/Risk & Benefits Mgmt. Edition*, Sept. 15, 2003, at 8 ("The plaintiffs' bar is diversifying its portfolio. They thought that the federal asbestos bill and state reforms might take away their asbestos cases, so they turned to silica. They became worried about having all their eggs in one basket.") (quoting Mark A. Behrens).
37. Mark Love & Scott Goldberg, *Mixed-Dust Claims Could be the Next Wave; Asbestos Exclusions May not Work in New Context*, 25:106 Nat'l L.J. 17 (2003).
38. Warren, *supra*, at B5.
39. Gilbert S. Keteltas, *Learning the Lessons of Asbestos: Court and Defendants Can do Better in the Case of Silica*, Andrews Asbestos, Jan. 15, 2004, at 10; Jerry Mitchell, *Silica Suits Latest to Hit Miss. Courts*, Clarion Ledger, Oct. 19, 2003.
40. See *In re R.O.C.*, No. 04-01-00404-CV (Tex. 4th Ct. App., Jan. 14, 2004) (granting summary judgment).

ment against plaintiffs due to the lack of evidence of exposure to either asbestos or silica), available at <<http://www.4thcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=16806>>.

41. Gilligan, *supra*, at 19.
42. Sue Reisinger, *Mounting Silica Suits Pose New Threat to Industrial Companies*, 13:136 Corp. Legal Times, Mar. 2003, at Col. 1 (Texas firm provides free medical screening for workers who may have been exposed to silica).
43. See *Increase in Screening for Silica Exposure Victims Evident in Texas*, 1:2 Mealey's Litig. Rep.: Silica 10 (Oct. 18, 2002). As illustrated in the asbestos context, the manner in which plaintiffs' lawyers usually use such mobile x-ray vans is that first

“[t]he active and retired [union] members of [asbestos-affected industries] crafts are notified through their newsletters and through meetings of retired employees that mobile vans or temporary offices equipped with X-ray machines are available to screen those with a history of asbestos exposure. The X-rays in turn are then viewed by radiologists for any abnormalities. At the initial screening, representatives associated with the national counsel of the various unions are present and distribute brochures advising both retired and still working employees of their legal remedies. Retainer agreements are often obtained on the spot. After initial screenings, those with anything other than normal X-rays are called in for a second examination which may include more chest X-rays, CT scans, pulmonary function tests and a

clinical examination. A more detailed history of asbestos exposure is also obtained. If abnormal findings consistent with asbestos exposure are again demonstrated, a lawsuit is usually filed.”

John C. Corrigan & Craig J. Whitney, *Asbestos Litigation Under the F.E.L.A.*, 20 The Forum 580 (Summer 1985); see also 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).
44. See Reisinger, *supra*, at Col. 1 (noting potential plaintiffs could include families of workers and people who lived or worked, not at, but merely near silica sites).
45. See *Increase in Screening for Silica Exposure Victims Evident in Texas*, *supra*, at 10. Medical screening is big business. See, e.g., 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 (2003) (detailing deposition testimony regarding profits generated from medical screenings and stating, “[t]hese individuals make huge amounts of money at other's expense.”).
46. See R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: a Radiologic Re-Evaluation*, 32:11 J. Occupational Med., 1088-1090 (1990).
47. Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843-56 (2004).

■

MEALEY'S LITIGATION REPORT: ASBESTOS

edited by Bryan Redding

The Report is produced twice monthly by



P.O. Box 62090, King of Prussia Pa 19406-0230, USA
Telephone: (610) 768-7800 1-800-MEALEYS (1-800-632-5397)
Fax: (610) 962-4991
Email: mealeyinfo@lexisnexis.com Web site: <http://www.mealeys.com>
ISSN 0742-4647