It has been reported in the national press that plaintiffs’ lawyers are mapping out a litigation scenario for silica based on the assumption that it will follow the asbestos model, e.g., Warren, Susan, “Silicosis Suits Rise Like Dust: Lawyers in Asbestos Cases Target Many of the Same Companies,” Wall St. J., Sept. 4, 2003, at B5; Glater, Jonathan D., “Suits on Silica Being Compared to Asbestos Cases,” N.Y. Times, Sept. 6, 2003, at C1.

Plaintiffs’ lawyers are saying publicly that they are planning no such thing, and all this alarm is just defense lawyers playing “Chicken Little.” But the prospect of asbestos legislation, together with an increasing number of bankruptcies of asbestos defendants, may drive plaintiffs’ counsel to look at ways to diversify their portfolio of cases, and silica litigation presents an attractive area.

Thousands of cases have already been filed. Insurers are adding to their reserves and reconsidering the terms on which they will provide liability insurance to businesses that may face silica-related exposures, and across the country, in a variety of industries, companies are hunkering down for what may prove to be a protracted litigation battle.

What trajectory will the silica litigation take? Will it expand for decades, ensnaring an ever-widening array of targets, or will it fizzle out? It is still early in the game, but some important similarities and differences between the asbestos and silica litigation are already apparent.

**SILICA LITIGATION TODAY**

Current silica cases center on workers in activities such as sandblasting and foundry work. The work in these trades involves the creation of high concentrations of small-particle silica dust that may be available for breathing by the worker, creating opportunities for the type of exposure that could result in silica-related disease if appropriate precautions are not taken to mitigate the exposures. The asbestos litigation got off to a similar start by focusing on specific categories of workers, such as shipyard workers, who had a heightened potential to be exposed to asbestos in the course of their work.

There are three principal categories of defendants in the silica litigation: 1) makers of silica sand (or “abrasive blasting materials”); 2) makers of protective equipment, such as respirators; and 3) manufacturers of sandblasting equipment. Occasionally, an employer will be named as a “premises defendant,” provided that the plaintiff has a basis to avoid workers’ compensation exclusivity (e.g., as an independent contractor).

Primary legal theories include product defect and failure-to-warn claims. Sometimes, plaintiffs will also assert allegations of intentional tort against employers, or claims against the parent companies of employers, in an attempt to avoid workers’ compensation exclusivity. And in some recent cases, the plaintiffs have included allegations of an industrywide “conspiracy” to hide the dangers of silica-related products, in an apparent attempt to mimic allegations made in the asbestos context.

Important defenses include the “bulk supplier” and “sophisticated user” doctrines. These defenses generally provide that a product manufacturer has no duty to warn of product hazards if the plaintiff or his/her employer knows of the hazards, particularly where the product is supplied in bulk form such that warnings would not be feasible. Recent opinions by the highest courts in two states have focused on these defenses. In *Gray v. Badger Mining Co.*, 676 N.W.2d 268 (Minn. 2004), the Minnesota Supreme Court accepted that a bulk supplier of silica sand has no duty to warn end users of the product—the customer’s employees—but held that the supplier had a duty to warn the employer if it possessed “special knowledge” regarding product hazards not also known to the employer or the end users. *Id.* at 279-80. And, in *Humble Sand & Gravel, Inc. v. Gomez*, 47 Tex. Sup. J. 1214 (9/17/04), the Texas Supreme Court held that a supplier of bagged silica sand has no duty to warn its direct customers of the hazards of its product because such hazards are

---

**Mark S. Raffman** is a litigation partner at Goodwin Proctor LLP in Washington, D.C. He specializes in complex cases, class actions, and mass torts, including the management of silica claims, as national coordinating counsel. Before joining the firm, he served as judicial clerk to then-Judge Anthony M. Kennedy on the U.S. Court of Appeals for the Ninth Circuit.
generally known to such customers, but left open the possibility that the supplier may have a duty to warn the customers’ employees by placing a warning on the bagged product.

Like the asbestos litigation, silica claims have clustered in certain jurisdictions thought by plaintiffs’ lawyers to be the most hospitable to their claims. Litigation hot spots have included Mississippi, where there have been hundreds of filings by many thousands of plaintiffs (17,000 in 2003 alone); Ohio, where there are hundreds of silica plaintiffs just in Cuyahoga County; and Texas, where a jury awarded $7.6 million in damages in a wrongful death case in 2001. See U.S. Silica Co. v. Tompkins, 92 S.W.3d 605 (Tex. App. 2002). Newer venues include Alabama, California, West Virginia, and Madison County, IL, long a hotbed of asbestos litigation. (In an effort to level the playing field, some defendants removed silica cases to federal court and sought the creation of a multidistrict litigation for silica. This resulted in the creation of a multidistrict proceeding in the Southern District of Texas. See In re Silica Prods. Liab. Litig., 280 F. Supp. 2d 1381 (J.P.M.L. 2003.).)

One insurer has estimated that silica suits have been filed on behalf of 70,000 plaintiffs against more than 400 defendants. GenRe, “Hazardous Times: Burgeoning Silica Litigation” (August 2004), at 1.

Why the rise in silica litigation? What is driving the increase in the numbers of silica suits? It is not an increasing number of silica-related injuries. To the contrary, the National Institute for Occupational Safety and Health (“NIOSH”) reports that there has been a decrease, not an increase, in the number of silica-related deaths over the past several decades. National Institute for Occupational Safety and Health, “Hazard Review: Health Effects of Occupational Exposure to Respirable Crystalline Silica,” Pub. No. 2002-129 (2002) (“NIOSH 2002 Report”), at 3.

Nor is this a situation in which new dangers are discovered in an old product. The dangers associated with breathing small particles of airborne silica have been known for generations, if not centuries. See, e.g., Humble Sand & Gravel Inc. v. Gomez, 47 Tex. Sup. J. 1214 (9/17/04), slip. op. at 4-6 (holding that “the health risks from inhaling silica dust have been well known for a very long time”).

Rather, it appears that the increase in the silica filings reflects a business decision by certain segments of the plaintiffs’ bar to diversify their litigation portfolio. And if that is so, then the staying power of the silica litigation will probably depend on whether the litigation business model succeeds, as it did with asbestos.

**The Asbestos Model**

In an asbestos-model litigation, plaintiffs’ lawyers emphasize volume. Claims are asserted on behalf of many plaintiffs at a time, and against many defendants. Consolidated cases (dozens of plaintiffs suing in one action) means that failure of product identification does not necessarily result in dismissal at an early stage. Some plaintiffs assert serious illnesses caused by asbestos exposure, but many more allege exposure coupled with only minor symptoms or even no symptoms at all. In a drive to identify more potential victims/plaintiffs, plaintiffs’ firms conduct mass screenings, often working with a labor union at a given facility. And cases are brought in jurisdictions that are thought to be particularly favorable, whether or not venue would ordinarily be appropriate. Defendants, deluged with suits, are tempted to proffer settlement at nuisance amounts to avoid litigation costs — but such settlements beget even more suits.

The success of the asbestos business model was fueled in large part by a “perfect storm” of liability-producing factors. First, the plaintiffs’ bar succeeded in establishing a particularly lurid set of liability facts, persuading juries — after some initial failures — that asbestos companies knew about the dangers of workplace exposure to asbestos, concealed the dangers from their employees, failed to provide adequate protection to the employees, and indeed actively lobbied against stricter regulation of asbestos in the workplace. See, e.g., Stephen J. Carroll et al., “Asbestos Litigation Costs and Compensation,” RAND Institute for Civil Justice (2002) at 14. Next, a unique causal association was shown to exist between asbestos exposure and a specific disease, mesothelioma, a type of cancer that causes terrible suffering and invariably results in death. This association had sufficient power that, as a practical matter, the jury would presume that a plaintiff’s mesothelioma was caused by exposure to asbestos — and would, in turn, often forego a close analysis of which of defendant’s product the plaintiff might actually have been exposed to. And, while mesothelioma is a rare condition, plaintiffs’ lawyers learned to package mesothelioma cases with other cases involving less severe or even subclinical injuries, to achieve “volume” settlements. And plaintiffs’ lawyers were able to find lots of plaintiffs, through screening and other techniques, to fuel the litigation explosion.

**Similarities Between Asbestos and Silica Litigation**

There is undeniably a superficial resemblance between asbestos litigation and silica litigation.

Both involve injuries to industrial workers arising from inhalation of dust containing small particles of the relevant substance. Some of the classes of plaintiffs, such as shipyard workers, are the same. The theories of liability, including product defect and failure to
warn, are the same. Important defenses, such as the sophisticated-user doctrine and bulk-supplier doctrine, are relevant in silica cases as well as asbestos cases.

The existence of potentially large groups of exposed workers is another similarity between asbestos and silica. Over time, the asbestos litigation has come to encompass workers in a wide variety of industrial fields, extending from shipyard workers to construction, manufacturing, transportation, demolition, and a host of other areas. Regarding silica, it has been posited that exposures routinely occur for iron and steel mill workers; refractory workers (bricks and cement); construction workers, including those working with concrete, gypsum and plaster products and providing services to dwellings; brick, tile, and stone workers; railroad maintenance workers; and even workers in medical and dental laboratories. See NIOSH 2002 Report at 4-5.

Many of the leaders of the silica plaintiffs' bar are firms that have also been active in asbestos litigation. They appear to be employing many of the same tactics in the silica cases that were employed so successfully in the asbestos litigation, including mass screenings, mass consolidations, and forum choices that focus on specific jurisdictions considered to be favorable to these sorts of claims. See, e.g., Sclafane, Susanne, “Silica Suits: Tipping Point or Just Tip of the Iceberg?,” National Underwriter (May 31, 2004), at 12 [Texas plaintiffs’ lawyer: “We drum up the cases by doing the screenings.”] This trend is not a surprise — given the similarities in the potential pool of plaintiffs, the types of industrial exposures and ways to identify them, and the types of legal claims to be asserted, retooling from asbestos to silica would not appear to be a stretch.

**Differences Between Asbestos and Silica Litigation**

Despite the superficial similarities between asbestos and silica litigation, there are important differences lurking below the surface — differences that suggest that the silica litigation may turn out to be a temporary squall rather than another “perfect storm.”

First, the industrial history relating to silica is different. As noted above, the asbestos litigation skyrocketed when plaintiffs’ lawyers uncovered evidence that asbestos manufacturers actively concealed the hazards of their product. This evidence gave rise to a particularly bad set of “liability facts” that came to permeate the asbestos litigation. By contrast, the workplace hazards of silica have been widely known and reported for “a very long time.” *Humble Sand v. Gomez*, supra. It will be difficult or impossible for plaintiffs to show concealment of these hazards.

Second, notwithstanding the variety of industries in which some silica exposure may occur, the range of affected industries in the silica litigation is narrower than for asbestos. The silica litigation, at least at present, is mostly limited to workers in specific occupations involving heavy exposure to silica (like sandblasting and foundry work). The expansion of the silica litigation to other industries has been predicted for some time, but has not come to pass — at least, not yet. Notably, however, improvements over time in dust suppression techniques and other industrial hygiene measures may limit the scope of possible claims; and in many trades (e.g., construction) the highest exposure levels are not sustained over time, both because employees perform multiple functions and because there is high turnover among employees.

Third, the legal environment may be changing, in part as a reaction to the asbestos litigation. In some jurisdictions, tort reform legislation passed in the wake of the asbestos debacle makes it unlikely that the silica litigation could reach the volume achieved in asbestos. Ohio, which just passed legislation imposing strict medical criteria in silica cases, is an important example. See Ohio House Bill 342 (signed into law June 2, 2004, and effective Sept. 1, 2004). Also, the litigation environment is changing in courts that have traditionally been havens for mass tort litigation. For instance, the Mississippi Supreme Court has recently issued opinions severely restricting the mass consolidation of cases involving divergent fact patterns (*Janssen Pharmaceuticals Inc. v. Armond*, 866 So.2d 1092 (Miss. 2004)), and requiring plaintiffs to plead specific facts regarding the time period and circumstances of their exposure to defendants’ products. See *Harold’s Auto Parts Inc. v. Mangialardi*, No. 2004-IA-01308-SCT (Miss. Aug. 26, 2004) (unpublished opinion). And in Madison County, IL, the court has begun to dismiss asbestos cases brought by out-of-state plaintiffs pursuant to forum non conveniens motions filed by the defendants, signaling that that jurisdiction may no longer be a judicial haven for plaintiffs from across the country. See, eg, *Quackenbos v. A.W. Chesterton Inc.*, No. 04-L-168 (Madison Cty., Ill. Circuit Ct., Oct. 6, 2004).

Possibly most significantly, silica litigation involves a very different set of medical circumstances. As noted earlier, asbestos is uniquely associated with mesothelioma, a terrible and invariably fatal form of cancer. This association is so powerful that, as a practical matter, any given case of mesothelioma is generally presumed (by a jury, at least) to have been caused by asbestos exposure — particularly since the common understanding is that disease may be caused by exposures that do not rise to the level of high concentra-
tions over many years. By contrast, there is no similar “signature disease” for silica. Rather, the conditions most commonly related to silica exposure are associated with very high exposures, either acute (short-term) or chronic (long-term). It’s true that silica has been classified as a carcinogen by the International Agency for Research on Cancer (IARC). See International Agency for Research on Cancer, “Silica, some silicates, coal dust and para-aramid fibrils,” in Monographs on the Evaluation of Carcinogenic Risks to Humans (1997) (“sufficient evidence in humans for the carcinogenicity of inhaled crystalline silica in the form of cristobalite from occupational sources”); see also NIOSH Report at 50-51 (finding that “meta-analyses” of epidemiologic data “strongly support an association between silicosis and lung cancer”); but see Graham, W.G.B. et al., “Vermont Granite Mortality Study: An Update With an Emphasis on Lung Cancer,” J. Occup. Environ. Med. (May 2004), at 459-465 (“Our data do not support the hypothesis that quartz is a carcinogenic agent in humans”). Still, there is no way to distinguish a silica-related cancer from one caused by other sources, and jurors will not automatically presume that a particular cancer was caused by silica as opposed to other sources.

These differences suggest that the silica litigation may not follow the asbestos model. Absent a compelling liability story and a uniquely associated disease that can occur at low levels of exposure, and in a litigation environment that is becoming less hospitable each passing year, it may be hard for plaintiffs’ lawyers to generate the sort of leverage that fueled the mass claims and mass settlements characteristic of the asbestos litigation.

**WHAT ARE THE WILD CARDS?**

There are, of course, variables that could change the equation. For instance, if the diagnostic criteria used to identify lung disease were to change in a way that blurs the distinction between asbestos and silica injury, as has occasionally been rumored, then that would raise the possibility of “mixed dust” claims involving both silica and asbestos. (At present, X-ray-based diagnostic criteria distinguish between silica-related conditions and asbestos-related conditions). This would make it easier to sue silica and asbestos defendants in the same action and would muddy the waters.

Another possibility is that permissible exposure limits may be reduced by OSHA or MSHA, or by recommendation of the American Conference of Governmental Industrial Hygienists (“ACGIH”). See, e.g., 68 Fed. Reg. 72352 (Dec. 22, 2003) (OSHA regulatory agenda for silica). Such a reduction might call into question whether

[T]here are reasons to believe

*that, in the long run, the silica lit-

igation will not yield large num-

bers of meritorious claims or

large jury verdicts *

as compliance with previous standards was adequate. Though unlikely to give rise to dramatic liability consequences in the short run, such a change could fuel the litigation by providing plaintiffs with added arguments on issues such as duty and breach.

Finally, if medical research were to establish a definitive link between silica exposure and certain types of disorders (eg, rheumatoid arthritis, autoimmune disorders), it could fuel the silica litigation. Although the medical evidence to date has not established such a link, the question is being studied closely. It is impossible to rule out further developments in this field. See, e.g., Stolt, Patrik et al., “Silica exposure is associated with increased risk of rheumatoid arthritis: results from the Swedish EIRA-study,” *Annals of Rheumatic Disease*, Aug. 19, 2004 (concluding that silica exposure is associated with increased risk of developing rheumatoid arthritis); Castranova, Vincent, “Signaling Pathways Controlling the Production of Inflammatory Mediators in Response to Crystalline Silica Exposure: Role of Reactive Oxygen/ Nitrogen Species,” *Free Radical Biology & Medicine*, Oct. 1, 2004 (finding that exposure to crystalline silica produces factors that are active in gene promotion for inflammatory mediators).

**CONCLUSION**

Based on the litigation trends to date, we would expect to see some expansion of the universe of silica defendants as certain plaintiffs’ firms test the waters with new types of cases beyond sandblasting and foundry workers. Should federal asbestos legislation be passed, or the pace of asbestos bankruptcies quicken, then this trend could be expected to accelerate over the next couple of years.

Yet, the fundamental conditions underlying the silica litigation do not mirror those in the asbestos arena, and there are reasons to believe that, in the long run, the silica litigation will not yield large numbers of meritorious claims or large jury verdicts, nor come to involve an ever-widening array of plaintiffs and defendants. Of course, early claims did not meet with success, and it took years for that litigation to gain traction. And, as noted, there are contingencies that may come into play over time. The book on silica has yet to be written — and, so long as it is viewed as a possible sequel to asbestos, it will garner close attention for some time to come.

---

This article is reprinted with permission from the July 2005 edition of the LAW JOURNAL NEWSLETTERS - SILICA LEGAL NEWS REPORT. © 2005 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. #055/081-07-05-0001