

September 6, 2003

## Suits on Silica Being Compared to Asbestos Cases

By JONATHAN D. GLATER

**F**irst asbestos, now silica. Lawyers who are veterans of the wave of asbestos litigation have begun to file more and more lawsuits contending that their clients are suffering from exposure to silica. But while the lawyers say they are zeroing in on another potentially lethal substance, their opponents counter that there is no medical crisis.

A coalition of insurance companies is trying to draw attention to the potential costs of the silicosis lawsuits, which are dwarfed in number by the roughly 600,000 asbestos-related claims that have been filed. The insurers, along with manufacturers that have used silica — mindful of the 60 or more companies that have filed for bankruptcy protection as a result of asbestos litigation — would like to see the courts deal summarily with the lawsuits before they become a problem as broad as asbestos.

Silica — for the most part, highly purified quartz — is used to make glass, fiberglass, paints and ceramics, as well as in foundry casting. Because of silica's wide use, the potential for lawsuits is great, said Bob Glenn, president of the National Industrial Sand Association, whose members mine and process industrial sand, which is derived from quartz.

The insurers assert that lawyers bringing the silicosis lawsuits are cynically manipulating the justice system for financial gain by claiming silicosis in people who have already filed asbestosis claims and who may not have both diseases, for example, or by obtaining two diagnoses for the same patient — one describing possible asbestosis, the other a potential case of silicosis.

"This is about the plaintiffs' bar trying to turn silica into the next asbestos," said Mark A. Behrens, a lawyer in the Washington office of Shook, Hardy & Bacon, which is representing the insurers. "It is not there yet."

Trial lawyers respond that if silicosis claims are rising, it is because of more widespread screening and a greater awareness of legal rights. Arguments otherwise, they say, are just an effort to obtain legislative protection.

"It's part of the overall tort reform movement that the insurance companies have put together," said Lance H. Lubel, a partner at the Houston law firm of Heard, Robins, Cloud, Lubel & Greenwood, which represents clients with both asbestosis and silicosis claims. "If anybody tells you that silicosis is on the verge of becoming the next asbestos, there's no support for that."

No one seems to have comprehensive data on the number of silicosis lawsuits filed. (More than 600,000 people had filed asbestos claims as of last fall, the RAND Corporation said.) One large insurer now faces 30,000 silica cases, up from about 2,500 a year ago, said a spokesman for the coalition of insurance companies. And the U.S. Silica Company had nearly 15,300 new claims filed against it through June, up from about 5,200 for all of 2002 and roughly 1,400 in 2001.

"We're basically being swamped with paper," said John Ulizio, chief executive at U.S. Silica. And at least one complaint has named several other companies, including Bechtel, Ingersoll Rand and Lockheed Martin.

There has been no increase in deaths from silica exposure, people in the industry say, arguing that plaintiffs' lawyers

are manufacturing a litigation crisis, not responding to a medical one.

"I just don't think that we're seeing an epidemic of silicosis," Mr. Glenn said, noting that according to the National Institute for Occupational Safety and Health — the government agency where Mr. Glenn used to work — fatalities are declining.

Injuries "were low to begin with and are on the way down," said Mr. Behrens, the lawyer for the insurers. "But if you look at the number of claims, they were low to begin with and are on the way up. What explains that?"

Most of the cases have been filed in Texas and Mississippi, states viewed by defense lawyers as overly friendly to plaintiffs, Mr. Behrens said.

There is disagreement over whether there is a clear way to diagnose either disease based solely on objective criteria like an X-ray. Asbestos and silicosis can have very similar effects, said Gregory R. Wagner, the director of the institute's division of respiratory disease studies.

"Silicosis is a chronic lung disease caused by the inhalation of fine crystalline silica or quartz dust," Dr. Wagner said. When the dust is retained in the lungs, he said, it starts a cycle of inflammation that scars the lungs. Something as mundane as shortness of breath may be a result of silicosis, which is not usually fatal, he said.

To complicate matters, it is possible to suffer from both asbestosis and silicosis — meaning some people may legitimately file lawsuits involving both diseases.

Relatively recent — and somewhat controversial — scientific findings have given plaintiffs new ammunition, said Nathan A. Schachtman, a defense lawyer at McCarter & English in Philadelphia. Some scientists, he said, have linked silica exposure to cancer, for example. While there are not a lot of cases claiming cancer caused by silica, he said, "To borrow a phrase from the BBC, it does sex up the litigation."

The arguments on the two fronts differ, lawyers said. In asbestos cases, plaintiffs' lawyers have argued that manufacturers concealed how harmful the material was, but with silica they must argue that manufacturers failed to warn of the dangers, Mr. Behrens said.

The distinction matters. If an employer knows how risky silica is, he said — and its dangers have been known for at least 70 years — then the employer may be liable, but not the supplier.

"Traditional tort law has said, at least for suppliers, there is no duty to warn where the employers have knowledge about the risks," Mr. Behrens said.

But it is a law that many do not know, said Mr. Schachtman, who defended companies against silicosis lawsuits nearly two decades ago. He will be speaking about silica litigation at a conference in Las Vegas later this month and is co-chairman of another conference in Atlanta in October.

After his cases in the 1980's, Mr. Schachtman said, he never expected his particular expertise to be popular again.

"I actually thought that we had made the world safe for sand," he said.