

LITIGATION

SILICA LITIGATION:

CONTROLS ARE NEEDED TO CURB THE POTENTIAL FOR UNWARRANTED CLAIMS

BY VICTOR E. SCHWARTZ, LEAH LORBER, AND EMILY LAIRD*

The number of personal injury lawsuits alleging injuries from occupational exposure to respirable silica, or industrial sand, has risen markedly. The recent increase in silica lawsuits after years of relatively stable dockets may reflect efforts by plaintiffs' lawyers to "beat the clock" and file their cases before new tort reform legislation takes effect in a number of states.¹ It may also reflect efforts by members of the asbestos personal injury plaintiffs' bar to diversify their portfolio of cases in light of potential asbestos litigation reforms at the federal and state levels. In fact, many of the lawsuit-generating tactics and mechanisms used in asbestos cases, such as mass medical screenings, are now being redirected toward silica defendants.²

There are, however, important differences between asbestos and silica litigation. Silica litigation should never become "the next asbestos" or produce the same problems as asbestos litigation – lost jobs, bankrupt companies, and a dwindling pool of money to pay the claims of legitimately injured people – if courts apply traditional law and procedures. This article describes silica litigation as it is today and offers suggestions for courts to avoid repeating practices that created the current "asbestos-litigation crisis."³

What Is Silica?

Silica, more commonly known as quartz, covers beaches and fills children's sandboxes.⁴ It is the major portion of all rocks, sands, and clays.⁵ Silica is a naturally occurring substance, not an engineered or designed product. It commonly forms in nature because it is made up of oxygen and silicon atoms, the first and second most abundant elements in the earth's crust, respectively.⁶

As such a ubiquitous mineral, silica appears in a wide variety of industries. These industries include mining, foundries, ceramics, metal products, shipbuilding and repair, rubber and plastics, roofing, masonry, concrete and stonework and plastering, services to dwellings, agricultural chemicals, utility services, and automotive repair.⁷

What Are The Potential Health Risks of Overexposure to Silica?

The potential health risks from overexposure to silica sand arise in certain industries, such as abrasive blasting or concrete demolition, where silica produces respirable dust particles that can be hazardous when inhaled.⁸ Such exposures can result in the disease silicosis,⁹ as well as shortness of breath, coughing, wheezing, and various chest illnesses.¹⁰ Scholars disagree about whether overexposure to silica dust may cause lung cancer.¹¹

Plaintiffs in silica cases generally assert that they developed silicosis because they were exposed to silica dust at their workplaces.¹² They often claim that defendant industrial sand sellers failed to adequately warn them about the potential health risks of silica exposure. Plaintiffs allege that such risks were known to the medical and silica industry before the industry issued warnings or employer alerts.¹³

Silica Risks Were Well-Known and Heavily Regulated For Decades

The potential health risks of silica have been known for over a century in the United States and have been well publicized.¹⁴ 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.¹⁵ By the 1930s the problem of silicosis was so well-known that it was recognized as an industrial disease,¹⁶ the Department of Labor held its first National Silicosis Conference,¹⁷ and medical reports recognized the "harmfulness of silica dust" and the "firmly established" link between silica and silicosis.¹⁸ National public awareness of the potential health risks increased dramatically after 1936, when between 700¹⁹ and 1,500²⁰ miners died near the town of Gauley Bridge, West Virginia, after breathing silica dust. In the 1940s, the United States Supreme Court stated, "It 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."²¹ Today, public awareness of the potential health risks from silica overexposure is so universal that courts note that it is common knowledge.²²

In response to the known potential health risks of silica inhalation, federal and state governments began early on to regulate silica workplace safety. By the 1930s, the federal government launched a silica awareness campaign after investigating, testing, and certifying respiratory protection equipment for abrasive blasting.²³ Similarly, during the early twentieth century, state governments passed legislation regarding workplace ventilation and recognizing respiratory diseases as compensable under Workers' Compensation statutes.²⁴ Federal regulations and state statutes regarding appropriate exposure levels and safety measures have been in place for decades.²⁵ Currently, OSHA provides detailed regulations requiring employers to protect employees from silica exposure.²⁶

Silica Litigation: Where It Stands Now

For years, silica litigation was stable, with only a slow and steady low number of litigants pursuing silica

claims in any given year.²⁷ But, recently, the number of silica lawsuit filings has jumped. The same lawyers and law firms who for years have specialized in bringing asbestos personal injury lawsuits have brought many of the cases.²⁸

During the first six months of 2003, for example, nearly 15,300 new claims were filed against U.S. Silica Co., one of America's largest suppliers of industrial sand, up from about 5,200 claims for all of 2002 and roughly 1,400 claims in 2001.²⁹ One large insurance company currently is handling more than 25,000 silica claims in twenty-eight states – a tenfold increase from August 2002.³⁰ These claims are against both major and minor silica players alike. As the *Financial Times* has reported, "Silicosis 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."³¹

Despite the recent increase in lawsuit filings, there has been no evidence of a burgeoning silica medical crisis. The National Institute for Occupational Safety and Health (NIOSH) has studied silica-related injuries since the 1930s. Since that time, silica-related deaths have declined dramatically. Findings of silicosis cases today are so rare that one specialist has said, "[s]ilicosis is becoming more of a radiology curiosity."³² In fact, NIOSH reports that over the past thirty years, the annual number of silica related deaths has dropped nearly eighty-four percent, from 1,157 in 1968, to 308 in 1990, to 187 in 1999.³³ To put these figures into context, the U.S. Centers for Disease Control and Prevention report that on average, 400 people in the United States die each year from extreme heat.³⁴ The Bureau of Labor Statistics reports that 155 workers die annually in falls from rooftops.³⁵

One might expect that a medical crisis would also reveal a national pattern of lawsuit filings in large and populous states, such as California, Michigan, New York, and Illinois, or in states with the highest silica-related mortality rates (*i.e.*, West Virginia, Vermont, Colorado, and Pennsylvania).³⁶ But, just as with asbestos cases,³⁷ most silica cases are clustered in Texas and Mississippi³⁸ and other so-called "magic jurisdictions" where plaintiffs are likely to make a big recovery.³⁹

As stated, the same lawsuit-generating tactics and mechanisms that were used by the asbestos personal injury bar to generate claims are now being exploited in the industrial sand context, such as plaintiff recruitment through mobile internet websites, mobile x-ray vans, and mass screenings.⁴⁰ The examples of such abuses are extensive.

For example, one mass marketing brochure sent by a medical screening company to a plaintiffs' law firm suggested it could increase the firm's business if it hired the screeners, showcasing its number of positive screenings

in other states and asking for the opportunity to produce the same "remarkable results for your law firm."⁴¹ A former director of the NIOSH laboratory for lung disease research believes that when law firms pay for plaintiff screenings, screeners are pressured to find disease.⁴² Some plaintiffs' lawyers have forced patients at mass screenings to sign attorney fee contracts or documents giving power of attorney to the law firms sponsoring the screening.⁴³

It appears that the plaintiffs' bar is trying to turn silica into the next family of moneymaking toxic tort litigation after asbestos.⁴⁴ It is, therefore, important for courts to provide just and appropriate safeguards against unwarranted silica lawsuits. We will briefly summarize the problems created by uncontrolled asbestos litigation to show why courts should establish clear rules for silica litigation now.

The Lessons of Asbestos Litigation

The problems created by asbestos litigation are well documented.⁴⁵ Over 600,000 people nationwide filed asbestos personal-injury claims against 8,400 defendants by 2003, up sharply from the estimated 21,000 claims against 300 defendants in 1982.⁴⁶ The number of asbestos cases pending in the United States doubled from 100,000 to more than 200,000 during the 1990s. More than 90,000 new cases were filed in 2001 alone.

Experts agree that the litigation will worsen and predict that the number of claims yet to be filed could range from one million to three million.⁴⁷ Increasingly, most of these claimants are not sick and may never develop an asbestos-related disease.⁴⁸ Some estimates put the number of claims filed by unimpaired or only mildly impaired claimants as high as ninety percent.⁴⁹ Trial consolidations and other procedures can force defendants to settle these meritless or unripe claims.

The litigation has left unprecedented devastation in its wake, including seventy-eight bankruptcies and counting.⁵⁰ Besides bankrupt companies, asbestos suits have resulted in approximately 60,000 jobs lost; eroded pension funds and stock prices; clogged court dockets; and lengthy delays for compensation of the truly injured because of claims by litigants who are not sick.⁵¹ Lawsuits are now piling up against companies that have only a peripheral connection to the litigation. Indeed, "the litigation has spread to touch almost every type of economic activity in the U.S."⁵²

Estimates of the total future cost of the litigation range from \$200 to \$275 billion.⁵³ To put these sums into perspective, former United States Attorney General Griffin Bell has explained that they exceed current estimates of the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks."⁵⁴

How did the asbestos litigation problem get so bad? Early in the litigation, courts began to treat asbestos cases

differently from other product liability cases, changing both substantive and procedural rules. By lowering the legal barriers and moving the cases along quickly, the hope was that asbestos claims would disappear. These attempts to promote efficiency in the handling of asbestos cases instead attracted more and more plaintiffs with weaker claims.⁵⁵ The lesson of asbestos is instructive, because silica litigation is at a tipping point.

What Can Be Done?

Apply Well-Considered Substantive Legal Tools

Substantively, courts should continue to apply hornbook law to silica personal injury claims – the sophisticated user and bulk supplier doctrines.

The Sophisticated User Doctrine

The bright-line “sophisticated user doctrine” provides that a manufacturer or supplier has no duty to warn users when it supplies its product to a user who knows or reasonably should know of the product’s dangers.⁵⁶ According to the Restatement (Second) of Torts, the supplier of a product does not have to warn product users unless: (1) the supplier knows or has reason to know the product is likely to be dangerous for the use for which it is supplied; (2) the supplier has no reason to believe that product users will realize the product’s dangerous condition; and (3) the supplier fails to exercise reasonable care to inform the product users of the product’s dangerous condition.⁵⁷ The sophisticated user doctrine applies when a warning would have little or no deterrent effect because sophisticated users are already aware of a product’s potential risks.

The sophisticated user doctrine derives from a comment in the Restatement (Second), which recognizes that often, products do not pass directly from the supplier to the end-user.⁵⁸ Instead, products frequently pass through one or more intermediary users (e.g., wholesalers, distributors, retailers, and employers) before winding up in the hands of the end-user. If the intermediary user is sufficiently aware of the risks of the product, the supplier or manufacturer has no duty to warn the intermediary.

Applying this doctrine puts the burden of warning those exposed to silica on those who have the best ability to prevent the harm – intermediary employers – rather than on more remote suppliers and manufacturers, who do not know as well as employers the form and manner in which employees may be exposed to silica. As such, the burden falls on those who are in the best position to know of the product’s potential uses, thereby enabling that party to communicate safety information to the ultimate user based upon the specific use to which the product will be put.⁵⁹

It is particularly appropriate for courts to apply the sophisticated user doctrine in silica litigation because the potential health risks of silica exposure have been widespread common knowledge for almost a century. As

a result, sand producers should have no duty to warn sophisticated employers of silica plaintiffs as a matter of law.⁶⁰ Absent such a bright-line test, courts will be forced to parse out—for potentially thousands of silica sand plaintiffs—questions of fact in case after case concerning the parties’ individual, subjective awareness of the hazards of working with and around silica sand.

The Bulk Supplier Doctrine

The bulk supplier doctrine, set forth in the Restatement Third, Torts: Products Liability, allows a supplier of bulk products who delivers to an intermediary vendee to discharge its duty to warn the end users of a product.⁶¹ The reason is that bulk suppliers sell to a wide variety of users who put the product to a great number of different uses. The bulk supplier cannot readily identify the intended end-use of the product, and it cannot easily label the product to warn the end user of its potential hazards. As the reporters of the Restatement Third explained, “To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by [employers] over whom the supplier has no control.”⁶² The doctrine places liability on the person in the best position to warn the end users and to take steps to ensure they are not injured: the intermediary employer, who is in direct contact with the plaintiff end user.

This doctrine should be applied in silica litigation because in many cases, industrial sand is provided to employers in bulk. Moreover, industrial sand suppliers and other similarly situated businesses that ship raw materials to diverse industries cannot easily identify how their products will be used in a given workplace, who will use it, and what warnings would be appropriate under the circumstances.⁶³

Apply Innovative Procedural Tools

Courts considering silica lawsuits can and should look to steps taken by innovative courts in the asbestos litigation to ensure that people who are truly sick are compensated and that frivolous claims are rejected. The choices that courts make will have a critical effect on the direction of the litigation.⁶⁴ It is imperative that courts carry lessons learned in the asbestos context into the silica litigation front. Steps courts can take include enacting inactive docket programs and rejecting the shoddy practice of mass “medical” screenings to recruit new plaintiffs.⁶⁵

Inactive Docket Programs: A Proven Track Record of Long-Term Success

Inactive docket programs, also known as deferral registries or pleural registries, are judicially managed docketing systems that allow claims of impaired claimants to be heard more promptly by deferring the claims of unimpaired claimants to an “inactive docket” until the individual develops an actual impairment.⁶⁶ No plaintiff loses

a cause of action; once someone becomes sick, his or her claim can proceed.⁶⁷

Docket management plans give trial priority to the truly sick. Inactive dockets also benefit currently unimpaired individuals by protecting their claims from being time-barred should a silica-related disease later develop. Plaintiffs and defendants are relieved of legal costs under inactive docket plans because all discovery is stayed until the claimant manifests impairment.

Inactive dockets can also reduce the specter of more employers being driven into bankruptcy, thereby helping to ensure adequate resources remain for impaired claimants in the future. Courts, relieved of having to address claims by the non-sick, can dedicate greater resources to those most in need of judicial assistance – the truly sick.

Inactive dockets have existed with success for over a decade in asbestos cases in several large cities – Boston, Chicago, and Baltimore. According to a recent article in HarrisMartin's *Columns: Asbestos*, judges in all three jurisdictions believe that the inactive docket plans are working well for all parties involved.⁶⁸ Recently, courts in New York City, Syracuse, and Seattle adopted inactive asbestos dockets.⁶⁹ The Michigan Supreme Court is currently considering whether to implement a statewide inactive asbestos docket.⁷⁰

Reject Shoddy Plaintiff-Recruitment Practices

Courts should reject claims by silica plaintiffs recruited through mass "medical" screenings, and should require evidence of silica exposure to allow silica claims to proceed. This is a lesson from the asbestos litigation, in which mass screenings are so badly abused that even prominent asbestos plaintiffs' trial lawyers acknowledge that the practice threatens payments to the truly sick.⁷¹ Some plaintiffs' experts agree. As one plaintiffs' expert medical witness remarked regarding the way mass screenings are interpreted by the plaintiff-hired screeners, "I was amazed to discover that, in some of the screenings, the worker's x-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one."⁷²

The asbestos litigation taught the lesson that such mass screenings produce droves of non-impaired and uninjured plaintiffs, a practice lawyers who file suits for truly injured plaintiffs have strongly questioned. Dallas asbestos lawyer Peter Kraus, who files suits on behalf of asbestos cancer victims, condemns rivals who represent claimants who are not sick. He has said, "[t]hey're sucking the money away from the truly impaired."⁷³

Mississippi tort king Richard Scruggs has said, "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."⁷⁴

Mass screenings in silica litigation have already increased "immeasurably" during the past few years.⁷⁵ One way courts can stop this abuse is by following the example of Senior U.S. District Judge Charles Weiner of the Eastern District of Pennsylvania, the manager of the federal asbestos docket. In January 2002, Judge Weiner found that "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."⁷⁶ Accordingly, Judge Weiner acted to administratively dismiss without prejudice (and toll the applicable statutes of limitations of) all asbestos cases initiated through mass screenings.

The federal court recently appointed to manage the federal silica multidistrict litigation should adopt Judge Weiner's approach.⁷⁷ Though only one silica company has become bankrupt as a result of silica litigation to date,⁷⁸ the lessons of asbestos cases are instructive. Courts facing silica suits should implement policies whereby they reject claims filed as a result of mass screenings, and only allow cases to proceed with evidence of impairment using objective medical criteria.

Conclusion

The recent increase in silica lawsuit filings suggests that good judicial controls are needed to curb potential adverse consequences from unwarranted, excessive litigation in the future. We strongly believe that careful judicial controls along the lines of those we have suggested will help keep the silica litigation dockets fair and just, and in line with the hornbook law. Learning from the errors that resulted in the current asbestos litigation crisis, courts can both stem the tide of lawyer-generated silica litigation and provide justice to those injured parties who deserve it.

* The authors are attorneys in the Washington, D.C., office of Shook Hardy & Bacon L.L.P. They serve as counsel to the Coalition for Litigation Justice, Inc., a non-profit association formed by insurers to address and improve the silica, asbestos, and other toxic tort litigation environments.

Footnotes

¹ See *Silica Lawsuits Jump in Mississippi*, AP NEWSWIRE, Oct. 19, 2003.

² See 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).

³ *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

⁴ 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, available at 2003 WL-WSJ 3978694.

⁵ See U.S. DEP'T OF THE INTERIOR & U.S. BUREAU OF MINES, CRYSTALLINE SILICA PRIMER, SPECIAL PUBLICATION 5 (1992).

⁶ *Id.* at 2.

⁷ See Thomas A. Gilligan, Jr., *Silica Litigation From Both Sides of the Bar: Is Silica the Next Asbestos? The Defendant's Prospective*, 1:5 MEALEY'S LITIG. REP.: SILICA 19, 23 (Jan. 2003).

⁸ See *id.*

⁹ See U.S. Dep't of Health & Human Servs., *Health Effects of Occupational Exposure to Respirable Crystalline Silica*, Exec. Summ. V (Apr. 2002).

¹⁰ See U.S. Dep't of Health, Education & Welfare, *Occupational Exposure to Crystalline Silica* 21 (1974).

¹¹ See Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. TIMES, Sept. 6, 2003, at C1.

¹² See Warren, *supra* note 4, at B5.

¹³ See *id.*

¹⁴ Dresser Indus., Inc. v. Lee, 880 S.W.2d 750, 751 (Tex. 1993).

¹⁵ See Gilligan, *supra* note 7, at 20 (citing U.S. BUREAU OF LABOR, bull. no. 79: THE MORTALITY FROM CONSUMPTION IN DUSTY TRADES 633-875 (1908)).

¹⁶ See *id.*

¹⁷ Haase v. Badger Mining Corp., 669 N.W.2d 737, 745 n.2 (Wis. Ct. App. 2003) (noting that the National Silicosis Conference was held in 1937, which featured the film "Stop Silicosis," and the report of which addressed silicosis prevention in industrial settings, recommending measures for employers to take on behalf of their workers).

¹⁸ W.J. McConnell & J.W. Fehnel, *Health Hazards in the Foundry*, 16 J. IND. HYG. 227-51 (Jul. 1934).

¹⁹ 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 (2002).

²⁰ See NIOSH *Issues Nationwide Alert on Silicosis*, (Nat'l Inst. for Occupational Safety & Health, U.S. Dep't of Health and Human Servs., Washington, D.C.), Nov. 18, 1992, available at <http://www.cdc.gov/niosh/93-123.html> (last visited Oct. 1, 2003).

²¹ Urie v. Thompson, 337 U.S. 163, 180 (1949).

²² See *Dresser Ind.*, 880 S.W.2d at 751. This theme runs through many silica cases. See, e.g., *Smith v. Walter C. Best*, 927 F.2d 736, 741 (3rd Cir. 1990) ("it was reasonable for the sand suppliers to assume [the intermediary] knew of the dangers of silica given the state of common medical knowledge at all relevant times [and] the various statutes and regulations governing silica . . .") (emphasis added); *Bergfeld v. Unimin Corp.*, 319 F.3d 350, 354 (8th Cir. 2003) (describing one intermediary's knowledge of the dangers of silica going back to the 1930s, as well as the "generalized industry knowledge"); *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 561-62 (W.D. Va. 1984) (finding "a plethora of material" showing the "extensive knowledge of the hazards of inhaling silica dust, the disease of silicosis, and proper dust control methods" dating back to the early 1930s), *aff'd sub nom.* *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985); *Gray v. Badger Mining Corp.*, 664 N.W.2d 881, 884 (Minn. Ct. App. 2003) (observing that for over 100 years, the foundry industry has been aware of some health risks from the inhalation of silica), *review granted* (Minn. Sept. 24, 2003); *Humble Sand & Gravel, Inc. v. Gomez*, 48 S.W.3d 487, 493 (Tex. Ct. App. 2001) ("The connection between silica sand and silicosis has been well documented and known in the abrasives industry since the 1920's. Safety codes were enacted as early as 1938 . . ."), *review granted* (Tex. May 30, 2002).

²³ See Warren, *supra* note 4, at B5.

²⁴ Gilligan, *supra* note 7, at 20.

²⁵ 41 C.F.R. § 50-204.50 (1971) (establishing appropriate threshold limit value for silica); 29 C.F.R. § 1910.94(a)(5)(ii) (1974) (extending safety regulations for government contractors to all employers).

²⁶ See 29 C.F.R. §§ 1901.94, 1910.1000, 1910.134, 1915.34, 1915.1000, 1926.55, 1926.57 (2003).

²⁷ Black, *supra* note 19, at 824.

²⁸ See *Ingredients Might Be In Place To Make Silica The Next Asbestos*, BEST'S INS. WIRE, Sept. 10, 2003, available at 2003 WL 59121078.

²⁹ See Glater, *supra* note 11, at C1.

³⁰ See Warren, *supra* note 4, at B5.

³¹ Bob Sherwood, *Weighing The Risk From Food and Phones*, FIN. TIMES, Apr. 28, 2003, at 12, available at 2003 WL 15525812.

³² Jerry Mitchell, *Silica Suits Latest to Hit Miss. Courts: More than 17,000 Plaintiffs Claim to have Incurable Lung Disease*, CLARION-LEDGER, Oct. 19, 2003, at 1A, available at 2003 WL 60127248.

³³ See Nat'l Inst. for Occupational Safety & Health, U.S. Dep't of Health & Human Servs., *Work-Related Lung Disease Surveillance Report 2002* xxiv, 53, 54 (2002); Warren, *supra* note 4, at B5.

³⁴ See Centers for Disease Control & Prevention, *Extreme Heat*, <http://www.cdc.gov/nceh/hsb/extremeheat/> (last visited Nov. 6, 2003).

³⁵ See Bureau of Labor Statistics, U.S. Dep't of Labor, *National Census of Fatal Occupational Injuries in 2002*, Sept. 17, 2002, at 7.

³⁶ See NIOSH, *Work-Related Lung Disease Surveillance Report 2002*, xxiv, 58 (age-adjusted mortality rates).

³⁷ See Stephen Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report vi* (RAND Inst. for Civil Justice, Sept. 2002) (66 percent of asbestos filings between 1998 and 2000 were in just five states – Mississippi, New York, West Virginia, Ohio and Texas – which accounted for just nine percent of cases before 1988) [hereinafter "RAND Report"].

³⁸ See Glater, *supra* note 11, 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.

³⁹ *Medical Monitoring and Asbestos Litigation – A Discussion With Richard Scruggs and Victor Schwartz*, 17 MEALEY'S LITIG. REP.: ASBESTOS, Mar. 1, 2002, at 1, 6 (remarks by Mr. Scruggs) [hereinafter *Scruggs & Schwartz*].

⁴⁰ See *Increase in Screening for Silica Exposure Victims Evident in Texas*, Vol. 1, No. 2 MEALEY'S LITIG. REP.: SILICA 31 (Oct. 18, 2002).

⁴¹ Letter from Lloyd Criss, Gulf Coast Marketing, to Mr. M. Davis Ready (May 9, 2003) (on file with authors).

⁴² See Mitchell, *supra* note 32, at 1A.

⁴³ See *Increase in Screening for Silica Exposure Victims Evident in Texas*, *supra* note 40, at 10.

⁴⁴ See Norman L. Haase, *Current Silica Landscape—The Jurisdictions, The Defendants and Beyond*, Vol. 1, No. 6 MEALEY'S LITIG. REP.: SILICA 19, 20 (Feb. 2003).

⁴⁵ See, e.g., Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, 6:6 BRIEFLY (June 2002) (Nat'l Legal Center for the Pub. Interest monograph), <<http://www.nlcp.org>> (visited Nov. 24, 2003); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002).

⁴⁶ See Stephen Carroll & Deborah Hensler, *Facts and Figures About Asbestos Litigation: Highlights from the New Rand Study 2* (RAND Inst. for Civil Justice, Jan. 2003).

⁴⁷ See RAND Report, *supra* note 37, at 77.

⁴⁸ See *id.*; Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1.

⁴⁹ See Jennifer Biggs et al., *Overview of Asbestos Issues and Trends 3* (Dec. 2001), available at <<http://www.actuary.org/mono.htm>> (last visited Nov. 24, 2003).

⁵⁰ See Editorial, *Asbestos Dreams*, WALL ST. J., Oct. 17, 2003, at A10, available at 2003 WL-WSJ 3982978.

⁵¹ See Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities*

on Workers in Bankrupt Firms, 12 J. Bankr. L. & Prac. 51 (2003); Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003).

⁵² RAND Report, *supra* note 37, at vii.

⁵³ *See id.* at vii; Biggs, *supra* note 49, at 4.

⁵⁴ Bell, *supra* note 45, at 4.

⁵⁵ *See* 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. OF TRIAL ADVOC. 248, 249-50, 253-60 (2000).

⁵⁶ *See* Gilligan, *supra* note 7, at 25 (citing Hoffman v. Houghton Chem. v. Corp., 751 N.E.2d 848, 854 (Mass. 2001)).

⁵⁷ Restatement (Second) of Torts § 388 (1965).

⁵⁸ *See id.* at cmt. n.

⁵⁹ *See* Haase, 2003 WL 21800493, at *21; Singleton v. Manitowoc Co., 727 F. Supp. 217, 226 (D. Md. 1989) (holding that employer was in better position to convey warnings to the ultimate users of the product – its employees – and to enforce attendance at safety meetings and adherence to safety policies); Phillips v. A.P. Green Refractories Co., 630 A.2d 874, 881 (Pa. Super. Ct. 1993) (holding, in a silica sand case, that it would be prohibitively expensive and unduly burdensome to require suppliers to warn each worker and continually monitor them to make sure they were wearing their respirators; therefore, the silica sand suppliers could not feasibly reduce the risk to end-users).

⁶⁰ *See* Dresser Indus., 880 S.W.2d at 751.

⁶¹ Gilligan, *supra* note 7, at 25 (citations omitted).

⁶² Restatement (Third) of Torts: Products Liability § 5 cmt. c (1997).

⁶³ *See, e.g.,* Smith v. Walter C. Best, Inc., 927 F.2d 736, 740 (3d Cir. 1990) (explaining that because sand was delivered in bulk and the plaintiffs did not participate in the delivery process, the employer was in a better position to convey warnings to its employees).

⁶⁴ *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001).

⁶⁵ *See* David M. Setter et al., *Why We have To Defend Against Screened Cases: Now Is The Time For A Change*, Vol. 18, No. 20, MEALEY'S LITIG. REP.: ASBESTOS (Nov. 12, 2003).

⁶⁶ *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

⁶⁷ *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001).

⁶⁸ *See* *Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, HARRISMARTIN'S COLUMNS: ASBESTOS, Feb. 2002, at 2. *See also* *In re* USG Corp., No. 01-2094, Memo. Op. and Order, at 8 n.3 (Bankr. Del. Feb. 19, 2003) ("The practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in many jurisdictions.").

⁶⁹ *See* Steve Brostoff, *Asbestos Fixes at State Level; Groups Look to Michigan for Inactive Docket Test*, NAT'L UNDERWRITER: PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, Sept. 15, 2003, at 19.

⁷⁰ *See In re* Pet. for an Admin. Order, No. 124213 (Mich. 2003).

⁷¹ *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, available at 2001 WL 30366341.

⁷² *See* Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, PLAIN DEALER (CLEVELAND, OHIO), Nov. 5, 2002, at A1, available at 2002 WL 6382801.

⁷³ Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1, available at 2002 WL-WSJ 3025073; *see also* Quenna Sook Kim,

Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims, WALL ST. J., Dec. 14, 2001, at B6, available at 2001 WL-WSJ 29680683.

⁷⁴ *See* Scruggs & Schwartz, *supra* note 39, at 39.

⁷⁵ *See* *Increase in Screening for Silica Exposure Victims Evident in Texas*, *supra* note 40, at 10.

⁷⁶ *In re* Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Admin. Order No. 8, at 1-2 (E.D. Pa. Jan. 14, 2002).

⁷⁷ *In re* Silica Prods. Liab. Litig., 280 F. Supp. 2d 1381 (J.P.M.D.L. 2003) (As of September 4, 2003, Judge Janis Graham Jack of the United States District Court for the Southern District of Texas will centralize pre-trial oversight of many federal silica cases.).

⁷⁸ *See* *Courtroom News*, HARRISMARTIN'S COLUMNS: SILICA, Aug. 2003, at 11 (internal citation omitted).