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THE LEADER IN PROPERTY & CASUALTY NEWS

BEST PRACTICES



How Agents Can Score High On The 'Trust Equation'

By Bobby Reagan
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TOP STORIES OF THE WEEK

Broker Fee Suits Loom

Despite giving buyers advance disclosure of contingency fee deals with insurers, brokers could still face legal attacks under state business laws and RICO statutes, an E&O attorney warns. ▶ Page 6

Sarbox Threat Expanding

There is bad news on the horizon for insurance executives already feeling overburdened by the costly efforts involved in complying with the Sarbanes-Oxley Act. ▶ Page 7

NUCO Parent Buys Thomson Data Assets

An affiliate of Highline Media, parent of The National Underwriter Company, has acquired insurance and banking data and information services from Thomson Media. ▶ Page 8

Time To Sunset TRIA?

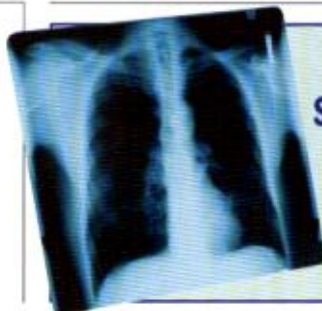
NU Washington Editor Steven Brostoff says terrorism should be an excludable risk and the Terrorism Risk Insurance Act should be allowed to expire. ▶ Page 34

MGAS IN JEOPARDY As Program Market Falters



With failed program carriers littering the roadside, some fear that all MGA business is fraught with financial peril and should be cut out of the market. A leading insurer, MGA and reinsurance intermediary offer survival tips on how to restore the MGA model's viability. See pages 16-22

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Insurers Hold The Line On Rate Hikes

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Trial Lawyers Bring Novel Strategies To Silica Cases

Some suits target parent companies to avoid workers' comp system hurdles

BY SUSANNE SCLAFANE

IT'S NOT OFTEN THAT plaintiffs' lawyers agree with defendants. But when it comes to banning silica for abrasive blasting, two successful lawyers representing workers in silica cases agree with a risk manager whose company is a frequent litigation target.

In the first article of our series last week, Roger Andrews, risk manager of Cynthiana, Ky.-based E.D. Bullard Company, a maker of respiratory protection devices, revealed that he and other risk managers facing silica litigation are working to gather



► **"IT'S POSSIBLE TO HAVE SILICOSIS SCARRING** on a lung and not have it show up on an X-ray," a plaintiff's attorney said, adding that some workers who had negative X-rays early on turned positive five or 10 years down the line. As a result, plaintiff's attorneys keep workers who have long-term exposure but negative X-rays in their screenings programs, he said.

PART TWO OF A SERIES

PLAINTIFFS' PERSPECTIVES

support for such a ban. In suits against his company, workers allege that respiratory masks failed to protect them from inhaling small particles of industrial sand.

"I am in favor of banning it," agreed Lance P. Bradley, an attorney for McPherson Monk Hughes Bradley Wimberley & Steele in Port Arthur, Texas. "I think the

problem with silica is that employers from all walks do not appreciate how dangerous the dust is. That's why they continue to have exposures to this day," he said, noting that silicosis is the oldest occupational lung disease.

"It is completely preventable. So it's really a shame that you continue to have cases," he said.

In Europe, silica was banned in the

1940s and 1950s, Mr. Bradley reported, adding that although the National Institute for Occupational Safety and Health—the research arm of the Occupational Safety and Health Administration—proposed that silica not be used for abrasive blasting in 1974, OSHA did not adopt that recommendation.

"It's not an open and obvious hazard. The dust that gets into your lungs—that hurts you—is invisible," he said, noting that the failure to appreciate the hazards

was a key point in NIOSH's proposal. "It's so small that you can't see it. So people can actually be exposed and not know it."

He added that "if you look at the number of cases you've had over the years since NIOSH proposed that—I think clearly a ban on silica abrasives is a great idea."

"They should have done that a long time ago," agreed Jason Gibson, an attorney for Smith-Gibson in Houston, Texas, who blames suppliers of silica sand for the failure to adopt a ban. "If sand is banned for this type of operation, then they're going to be out of business," he said, noting that one of the cases he brought was against a supplier that was active in forming an association that Mr. Gibson contends was created with the intent of combating the proposed NIOSH ban.

LEGAL STRATEGIES

The two plaintiffs' lawyers said that neither of their firms has been involved in a surge

of silica lawsuits filed in the last two years, and neither work on asbestos cases.

"I am probably one of the pickier lawyers out there when it comes to whether to take a case or not," said Mr. Bradley, who also revealed that he usually files single-plaintiff cases rather than class actions, and that he usually represents sandblasters rather than foundry workers. "We try to make sure that the exposure's there and the medical is there, and then we

try to name people that belong in the case rather than naming a laundry list of folks."

As for why there have been so many cases filed by other firms, Mr. Bradley could only speculate. "Who really knows? A lot of asbestos defendants are going bankrupt. I suspect there are folks looking for other areas to pursue claims, and this is one of them," he said.

Among his most successful cases, Mr. Bradley lists one against a respirator company in the mid-1990s. "That was just a case where the jury found that the respirator was unreasonably dangerous because it didn't carry the proper-use limitations."

A more recent victory—a \$1.9 million verdict for a sandblaster in *Humble Sand & Gravel v. Raymond Gomez*—is on appeal in the Supreme Court of Texas over the issue of "sophisticated user, which is a hot area right now in this litigation," Mr. Bradley said.

The sophisticated user doctrine is a defense that says that if users (employers) knew or should have known about the dangers, then sand suppliers had no duty to warn them.

"The facts of our case just didn't fit the argument made by the defendant. In our case, we had a guy who actually saw the bag and read the

warning on the bag. And the jury found that that warning was inadequate," Mr. Bradley said. (Court documents indicate that users believed the warning referred to eye protection rather than respiratory protection.)

Mr. Bradley agreed with the general notion that the sophisticated user defense is more effective in cases involving foundry workers than those employed in sandblasting. "The primary reason is that the vast majority of sandblasting operations are smaller, Mom-and-Pop-type operations, where it's hard to argue sophistication, as opposed to foundries, which are generally larger," he said, noting that foundrymen's societies have distributed literature about dust hazards since early 1900s.

A DIFFERENT APPROACH

Giving his take on the sophisticated user defense, Mr. Gibson said that "regardless of what an employer knows, product manufacturers have a non-delegable duty to provide adequate warnings."

But Mr. Gibson also noted that one of his legal strategies, which essentially involves making a case against the employer, can have the unintended effect of helping product defendants such as sand suppliers and protective equipment makers as they assert sophisticated user defenses (since both he and the product defendants are pointing to the employer as the negligent party).

Mr. Gibson highlighted his firm's strategy—one of bringing cases against the parent companies of employers to sidestep the workers' compensation system—as one of several emerging trends he believes insurers should watch.

For Smith Gibson, he said, silica litigation started in the mid-1980s with a facility called AMF Tuboscope, which set up a subsidiary in Houston to clean rust from oil pipes corroded by Gulf Coast waters. At the time, defendants were solely product defendants—respirator and sandblasting equipment makers. But during the course of the trial, an attorney in Mr. Gibson's firm realized there might be a case against AME, the parent company, "because they basically had assumed the responsibility for the workers at that plant."

In Texas and other states, workers' comp laws—providing a no-fault system of benefits—bar employees from suing their employers (except in death cases for gross negligence), he noted. "So every worker who gets hurt...on the job is without the ability to sue their employer," he said.

"What we've done consistently over the years—and very successfully—is to see if there's a parent-subsidiary relationship," he said. "When you sue the parent company, they are technically not the ones who are

providing the comp insurance. So you're basically able to sue the employer without suing the employer."

The last big settlement against AMF was in early 2000, he said. "The place is now shut down," he added, noting that settlements came in batches over two decades. Some workers, who had negative X-rays early on, turned positive five or 10 years down the line, he explained.

"It's possible to have silicotic scarring on a lung and not have it show up on an X-ray," he said. "Guys who have long-term exposure with us—and that are negative—we keep...in our screening program."

Noting that cases against parent companies will continue, he said his firm used the strategy more recently in cases involving the Tyler Pipe Foundry in Tyler, Texas, filing the first silicosis case against the parent company in 1997. "That led to almost 1,500 claims against the company handled by various law firms. It also led to a pre-packaged bankruptcy," he said.

(Further investigation by *National Underwriter* revealed that Swan Transportation Company, which owned or operated the Tyler Pipe Foundry from 1968 to 1995, is the parent company now in bankruptcy. Swan, in turn, is characterized as a "non-operating subsidiary" of Dallas-based Tyler Technologies, a provider of management services to local governments, in SEC filings and press statements of Tyler Technologies.)

Those documents indicate that Tyler Technologies transferred the stock of Swan into an asbestos and silica trust in December 2003, and that the firm has also made three cash payments of \$1.5 million to the fund. The trust, however, is principally funded by a who's who of more than a dozen commercial insurance carriers.

More recently, McWane Inc., a family of companies that makes pipes and which acquired Tyler Pipe in 1995, was the target of an expose in *The New York Times* and on various television programs like *Frontline*, detailing repeated safety and environmental violations that put workers in various operations in danger, including high levels of silica exposure.)

In total, Mr. Gibson reported that his firm has about 500 active cases right now,

"It is completely preventable. So it's really a shame that you continue to have cases," said Lance Bradley, a plaintiffs' attorney.

down from roughly 1,000. "Over the years, we've handled thousands of cases. We like to be aggressive on each one and really investigate the case," he said.

"We tend to stay away from bystander cases—workers who have indirect exposure—unless it's at a foundry," where workers are exposed to dust in any job they're doing, he said, contrasting sandblasting operations, where his firm will represent only the sandblaster and his helper.

What about other workers? "We pride ourselves in looking beyond those two," he said, noting that there are tons of occupa-

tions that involve silica, listing brick manufacturing, glassmaking and construction work among them.

In one situation, he reported, a man walked in "off the street with a diagnosis of complicated silicosis from a hospital," reporting that this was a drywall worker. "We had never really seen a silicotic drywall worker before," he said.

"These guys were mixing joint compounds and then they're applying them" between pieces of sheetrock to eliminate seams. After letting the compound dry, drywall workers sand the seam "right in

front of their face[s], which causes respirable silica to be emitted," he said, noting that big defendants in asbestos cases—such as National Gypsum, US Gypsum and Georgia Pacific—are now being sued for the drywall products. ■

PART THREE

Research on the incidence of silicosis. Also, a plaintiff lawyer involved in both silica and asbestos cases describes legal strategies and makes some predictions.

CHALLENGE FOR INSURERS

BRING ON THE TRIALS

JASON GIBSON, A PLAINTIFFS' attorney for Smith-Gibson in Houston, Texas, has a prediction about silicosis cases that he believes insurers should pay attention to. There will be more trials, he contends.

Mr. Gibson personally never lost a silicosis case at trial, he said. His most celebrated victory, in the *Horton vs. Lone Star Industries Inc.* case, ended in a \$650,000 settlement for a sandblaster in 2003 (although several published reports indicate that the jury was en route to awarding over \$12 million).

First of all, "there's this red herring spreading through the insurance industry that 1/0s are basically negative—that they're people that are not sick." (A 1/0 profusion is the rating for the minimum scarring you can have to be considered positive for silicosis, Mr. Gibson said, referring to a rating on a report from a "B" reader of X-rays trained to look for occupational lung disease.)

A majority of cases are 1/0s, he said, reporting that insurers are saying those are not compensable, or that if they agree to pay on them, it will be for only "very small amounts of money."

"I'm really tired of hearing that

1/0s aren't worth anything or that they're negative," he added.

"We are going to start trying a lot more of those cases, because there are people that have a 1/0 profusion that are really sick," he said. "It may depend on the case. You may have some that aren't very sick, meaning they have the scarring of their lungs, they have silicosis, but they're pulmonary function has not been impaired. Then there may be one that will be really sick and can't breathe."

Mr. Gibson also reported that his firm does handle "quite a few" cases involving workers who have cancer or other diseases from silica exposure, noting that he has one case of a 20-year sandblaster with rheumatoid arthritis. He pointed out that some scientific literature supports links between silicosis and autoimmune diseases like rheumatoid arthritis, lupus and scleroderma.

As to the question of whether more non-silicosis cases will be filed, Mr. Gibson said, "I think they're pretty consistent. You see something

like that in maybe one out of every 100 cases."

More generally, he couldn't predict how many silica suits might be filed in the future, expressing some disbelief about the recent crop of Mississippi cases that his firm has stayed away from. "I don't see how there could be that many cases out of one state," he said.

While his firm's caseload increased some over the years, it's now leveled off. "We've never advertised and we've never actively pursued [cases]. All our cases have either been direct or through referral lawyers," he said.

To Mr. Gibson's mind, increased filings aren't the trend to watch. Instead, it's the number of trials. "If they [insurers] want to start trying cases, we're going to give them trials. And nine times out of 10, we're going to win, because the facts are on our side," he predicted.

Insurers "need to start looking at these cases seriously—even the 1/0s—and they need to start figuring out a solution, which is not trying every single case. We're willing to do that. But I think they're taking the wrong position," he said.

—Susanne Scalfane

**PLAINTIFFS' ATTORNEY
JASON GIBSON BELIEVES**
that important trends
for insurers to watch
in silica litigation are
cases brought against
employers, on behalf of
drywall workers, and the
potential for more trials.