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Silica Exposure Lawsuits: The Next Toxic Tort?
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With the Occupational Safety and Health Administration (OSHA) signaling its increased attention to workers' exposure to crystalline silica, and the plaintiffs' bar evidently in search of new subjects for "toxic tort" claims, there is growing concern among builders about a potential rising tide of "silica exposure" lawsuits against them. Will that type of suit soon take its place alongside such historical legal headaches as asbestos and Chinese drywall claims?
The possible good news for builders is that the science underlying silica exposure claims has generally been deemed questionable enough that plaintiffs have encountered significant difficulties in proving their claims. The bad news is that OSHA nevertheless appears to believe that pertinent studies clearly establish the dangers of crystalline silica. OSHA also believes that avoiding silica inhalation should therefore be a high priority both for workers and those for whom they work. OSHA's sustained focus on this subject makes it imperative for builders to educate themselves, and their personnel most likely to come into extensive contact with silica particles, about the key issues -- including the preventive measures that OSHA touts.

Crystalline silica is a basic component of soil, sand, granite, and many other minerals. Quartz is the most common form of crystalline silica. Tiny particles no more than one-hundredth the size of grains of sand can be created and sent airborne during work with stone, concrete, brick or mortar. According to OSHA, which proposed new rules in August 2013 regarding silica exposure, such "exposure remains a serious threat to nearly two million U.S. workers, including more than 100,000 workers in high-risk jobs such as abrasive blasting, foundry work, stonecutting, rock drilling, quarry work and tunneling. Crystalline silica has been classified as a human lung carcinogen. Additionally, breathing crystalline silica dust can cause silicosis, which in severe cases can be disabling, or even fatal."

Allegedly inadequate industrial hygiene practices years ago exposed workers to thresholds of sand and similar dusts that workers have claimed did significant damage to their lungs. Many (including OSHA) contend that practices aimed at reducing silica exposure are still in dire need of improvement today. When filing silica exposure lawsuits, plaintiffs typically seek compensation for respiratory illnesses, risks of serious bacterial disease, and fear of cancer (if cancer has not yet been diagnosed). The steel industry, and other industries that use vast quantities of sand, were defending mass numbers of silicosis claims even before the huge wave of asbestos claims in the early 1980s. The relative success of those industries in dealing with those suits may be one reason that asbestos claims became much more prevalent than crystalline silica claims in the years that followed. However, advancements in medical research related to the role of silica in causing diseases helped to propel a second wave of such lawsuits from 2000-2004.

A federal multi-district litigation panel (MDL) was established for silica claims in 2003. Two years later, Judge Janis Graham Jack of Texas largely brought those proceedings (and mass silicosis claims throughout the country) to a halt. Judge Jack issued an opinion in the silica MDL that was highly critical of the plaintiffs' counsel and their medical experts. She made clear that she believed that plaintiffs' counsel and their experts were generating "mass tort" litigation through fraudulent diagnoses of silicosis. What followed were mass dismissals of silica suits in the MDL, and in state courts across the country.

In the next several years after Judge Jack issued her opinion, the number of silicosis lawsuit filings diminished to a few hundred cases nationwide. Her scathing opinion was likely not the only factor causing potential plaintiffs' counsel to steer clear of silica exposure claims. Among other problems, the difficulties of establishing causation, the logistical problems and expenses of mass medical screenings, and the continued difficulty of diagnosing silicosis, all pose major threats to prospective lawsuits. Those factors are also likely to give rise to extensive discovery, the filing of lots of pre-trial motions, and potent challenges to plaintiffs' experts.

Of course, homebuilder defendants also face the potentially staggering costs (and many distractions) of a silica exposure suit whenever one is filed. Moreover, OSHA, by proposing in August new rules designed to limit crystalline silica -- and by asserting that those new rules would prevent nearly 700 deaths a year -- may well have begun to spark a resurgence of silica lawsuits. At the very least, OSHA's proposals, and certain immediate action steps that it outlines in a recent "Fact Sheet," require the attention of builders. Here are some of the steps that this federal agency strongly recommends, and may soon require:

- Replace crystalline silica materials with safer substitutes, whenever possible.
- Provide engineering or administrative controls, where feasible, such as local exhaust ventilation, and blasting cabinets. Where necessary to reduce exposures below the Permissible Exposure Limit (PEL), use protective equipment or other protective measures.
- Use all available work practices to control dust exposures, such as water sprays.
- Participate in training, exposure monitoring, and health screening and surveillance programs to monitor any adverse health effects caused by crystalline silica exposures.
- Wear only a "N95 NIOSH" certified respirator, if respirator protection is required. Do not alter the respirator.

There may be substantial negative legal and business consequences in the event of non-compliance with OSHA's expectations. Those consequences could reasonably be expected to include reputational risk as well as possible exposure to costly lawsuits seeking huge amounts of alleged damages. Builders would therefore be well advised to work with legal counsel to stay apprised of OSHA's directives, implement a program for training and for compliance with those directives, and track the effectiveness of their training and compliance programs over time.