Trigger, allocation and pollution exclusion issues for silica toxic tort claims

By Thomas F. Quinn

I. Background

Silica claims, like the wave of asbestos claims that have clogged the courts and bankrupted major corporations, will have to be effectively managed and addressed by the personal injury defense bar as well as the insurance industry. From a liability insurer’s perspective, silica claims are significant in two respects: the defense costs of such claims can be significant and the increasing frequency of these claims can only be described as explosive.

Silica is one of the most common substances on earth and an essential part of construction, transportation, manufacturing and mining. The current estimates of silica claims nationally are in the 30-35,000 range, far less than the nearly 700,000 asbestos claims choking the United States court system. Nevertheless, there are ongoing events that could lead to silica claims becoming explosive. Not only does there seem to be a search by the mass toxic tort plaintiffs’ bar for something to replace their income if asbestos legislation is passed, but in 2003, OSHA distributed a new draft silica rule to help curtail the exposure of workers to silica. In addition, in February 2004, the ACGIH proposed to lower its silica standard to 25% of the current OSHA limits. Thus, even though silica-related mortality has declined substantially from 1969 (about 1800 deaths) to 2000 (180 deaths), there is a real concern that silica may become a litigation problem, even if it is not a health risk problem.

There are important differences between asbestos and silica. Silica has not been found to be per se unreasonably dangerous. See *Diamond v. Avandale Industries, Inc.*, 718 So. 2d 551, 552 (LA. App. 1998). It is a natural substance to which anyone has been exposed to who has ever gone to a beach. It only becomes a hazard when disturbed and made airborne into silica dust. Further, silicosis, unlike asbestosis, cannot arise from a single exposure, but instead occurs due to exposure over time.

The risks of silicosis are also well known. For example, the United States Supreme Court in 1949 found that it was a “matter of common knowledge that [silica] is injurious to the lungs and dangerous to the health.” *Urie v. Tompkins*, 337 U.S. 163, 180 (1949).

The following industries appear to pose the greatest potential risk for silica claims:

- Construction (sandblasting, rock drilling, masonry work, etc.)
- Mining (cutting or drilling through sandstone and granite)
- Foundry work (grinding, molding)
- Stone cutting (sawing, chipping, and grinding)
- Glass manufacturing
- Agriculture (dusty conditions from disturbing the soil such as plowing or harvesting)
- Ship building (abrasive blasting)
- Ceramics, clay and pottery

As one can see from the industries noted above, there is also an overlap between the types of workers who are exposed to asbestos and those exposed to silica. For example, ship builders have often been exposed to asbestos. Thus, these types of “mixed” claims can also present additional coverage issues that must be addressed.

As with many other toxic tort claims, silica claims present a number of unique coverage issues that must be promptly identified and communicated to the policyholder. The importance of properly identifying and communicating coverage defenses in these kinds of claims is borne out by their sheer expense, both in terms of defense costs and indemnity payments.
II. Trigger of Coverage and Allocation

As usual, one of the most important coverage issues presented in silica claims is determining when the bodily injury took place. This coverage issue is significant because silica claims almost always present serious date of loss issues.

The language requiring bodily injury to occur during the policy period is found in the insuring agreement itself. For example, a CGL policy typically provides that:

This insurance applies to “Bodily Injury” and “Property Damage” only if:
the “Bodily Injury” or “Property Damage” occurs during the policy period.

The language giving rise to the requirement that the bodily injury occur during the policy period may also be found in the definition of bodily injury itself:

“Bodily Injury” means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

In cases where the cause and manifestation of the injury are simultaneous (such as where a front porch step collapses causing immediate bodily injury), an analysis of the trigger issue is not difficult and is merely a question of whether the incident occurred within the policy period. However, in the case of latent diseases or injuries, such as asbestos or silica, courts have propounded several different theories to determine when a bodily injury took place and, hence, under what policy coverage is triggered.

Under the “exposure” theory, each insurance policy on the risk during the period the plaintiff is actually exposed to the injury-causing substance is triggered. E.g., Insurance Co. of North America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), cert. denied, 454 U.S. 1109 (1981) (asbestos). Thus, in the context of silica, the date of loss under this theory would be the period of time during which a worker is exposed to excessive levels of silica. The coverage period would terminate once the exposure ceased.

Under the “manifestation” theory, still used in many southern states, the insurance policy on the risk on the date that bodily injury becomes reasonably capable of medical diagnosis is triggered. E.g., Eagle-Pitcher Indus. Inc. v. Liberty Mutual Insurance Company, 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1109 (1983) (asbestos). Language from Eagle-Pitcher sums up this theory and the easy application it would have to silica cases: “[A]n injured person] would say that a disease resulted when [he/]she had symptoms which impaired [his/]her sense of well-being, or when a doctor was able to detect sufficient scarring to make a prognosis that the onset of manifested disease was inevitable.” Id. at 19.


We believe that the continuous trigger theory best comports with what medical science teaches and what common sense dictates, that a disease begins with the onset of exposure and continues until the illness becomes manifest.
It follows that insurance policies, in place from exposure to manifestation are implicated and provide coverage.

[Owens-Illinois, supra, 264 N.J. Super. at 485.]

(i) New Jersey Law

There is no New Jersey case law that has specifically addressed the trigger and allocation questions as they apply to silica claims. Nevertheless, most commentators seem to assume that the trigger analysis in Owens-Illinois will apply so that policies on the risk from first exposure to manifestation would be triggered.

But should the Owens-Illinois trigger analysis really apply to silica claims? In Aetna Casualty & Surety v. Plygem Industries, Inc., 343 N.J. Super. 430 (App. Div. 2001), the court addressed the issue of whether the continuous trigger analysis applied to the installation of defective plywood. The court held that the trigger question was one of fact to be decided at a plenary hearing.

Silica, unlike asbestos, cannot cause silicosis based upon a single exposure. Further, most chronic silicosis cases are the result of massive and long-term exposure to silica dust. Thus, there is a factual question that must be resolved for trigger
purposes in determining whether policies on the risk when a worker is first exposed to silica dust truly should be triggered as opposed to policies at some later date.

As those versed in New Jersey insurance coverage well know, the key to the Owens-Illinois analysis is the allocation methodology. This allocation analysis was further elaborated upon in Carter-Wallace, Inc. v. Admiral Insurance Company, 154 N.J. 312 (1998). Moreover, the Owens-Illinois allocation methodology applies to defense costs, as well as indemnity. Universal Rundle Corp. v. Commercial Union Ins. Company, 319 N.J. Super. 223 (App. Div. 1999).

There is one further point. Beginning in 1986, it became difficult to purchase policies without an absolute pollution exclusion, except on a claims made basis. As will be discussed further in this paper, there is a substantial issue under New Jersey law on whether the Absolute Pollution Exclusion would apply to silica claims. Assuming New Jersey law favors the insurance industry on this issue, it leads to a substantial allocation question as to the impact of post-1986 coverage and whether such coverage was truly “available” to policyholders for purchasing. See Champion Dyeing & Finishing Co., Inc. v. Centennial Ins. Co., 355 N.J. Super. 262 (App. Div. 2002).

(ii) Out-of-State Cases Addressing Silica Trigger Issues

- Clemtex, Inc. v. Southeastern Fidelity Insurance Company, 807 F. 2d 1271 (5th Cir. 1987) (discussing trigger issues for silica claims and noting that the “exposure” theory was not necessarily applicable).
- Clemco Industries v. Commercial Union, 665 F. Supp. 816 (N.D. Cal. 1987) (finding that the “pathogenesis of silicosis is similar to that of asbestosis in all relevant respects for purposes of determining the proper ‘trigger’ of coverage,” the court applied the continuous trigger theory).

III. Pollution Exclusion

Typically, pollution exclusion clauses fall into one of two categories: the so-called “standard” pollution exclusion with an exception to the exclusion reviving coverage for sudden and accidental discharges, and the “absolute” or “total” pollution exclusion (“APE”). The real coverage battleground is the applicability of the APE to silica claims.

The absolute pollution exclusion typically provides as follows:

[This policy does not apply:]

(1) to bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises owned, rented or occupied by the named insured;

(b) at or from any site or location used by or for the named insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) which are at any time transported, handled, stored, treated, disposed of or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible; or

(d) at or from any site or location on which the named insured or any contractors or subcontractors working directly or indirectly on behalf of the named insured are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) to any loss, cost or expense arising out of any governmental direction or request that the named insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

“Pollutant” is typically defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.”
(i) New Jersey Law

There is no New Jersey case applying the APE to silica claims. New Jersey courts, however, have uniformly upheld application of varying forms of absolute pollution exclusions to traditional environmental cases. For example, the Court in *Kimber Petroleum v. Travelers*, 298 N.J. Super. 286 (App. Div. 1997) rejected an argument that the policyholder, a gasoline distributor, would not expect that its pollution exclusion would apply to gasoline, its primary product. The Court instead reasoned that once gasoline leaked out of a tank into the surrounding soil and groundwater, it was a “pollutant” within the meaning of the absolute pollution exclusion and coverage should be barred by the plain terms of the policy.1

The New Jersey cases interpreting absolute pollution exclusions, however, do not uniformly apply to indoor pollution scenarios. The two reported cases that have addressed such issues have arrived at different results and those cases turn on both the specific language of the exclusion at issue and the specific facts giving rise to the claim.

*Byrd v. Blumenreich*, 317 N.J. Super 496 (App. Div. 1999) involved injury to a child from ingestion of flaking and peeling lead paint chips in his parents’ apartment. The Court was faced with determining if the manner in which the injury was caused arose out of the “discharge, dispersal, seepage, migration, release or escape of pollutants.” Upon reviewing numerous indoor pollution cases, the Court held that the “weight of authority” was to construe the language of “discharge, dispersal, release or escape” as either: (i) “limited to environmental damage or injury caused by improper disposal…of hazardous substances or [(ii)] as simply ambiguous in the absence of specific language excluding from coverage injury or damage caused by the indoor residential exposure to lead paint.” *Id* at 504. The Court concluded that the second reason applied and found the exclusion to be ambiguous as it applied to the chipping or flaking of lead paint, which is “an involuntary effect occurring over a considerable period of years.” *Id.*

In contrast, *Leo Haus, Inc. v. Selective Insurance*, 353 N.J. Super. 67 (App. Div. 2002) involved bodily injury caused by discharge of carbon monoxide from a home’s heating units over a one-year period. Distinguishing *Byrd*, the Court found that Selective’s form of absolute pollution exclusion applied. The Court noted that carbon monoxide fell within the definition of a pollutant as it was a “gaseous contaminant.” Moreover, it was “actively discharged dispersed released or escaped” from the heating units. *Id.* at 72. Thus, this was the kind of occurrence that fell “squarely” within the terms of the exclusion. *Id.* at 73.

The Court also noted that Selective’s form of pollution exclusion was not “absolute;” the policy covered short-term indoor pollution exclusion claims that were reported to Selective within 30 days. “The presence of this provision bolsters our conclusion that the exclusion does generally contemplate exposure within a building which does not meet these…criteria.” *Id.* at 73.

Lastly, the Court noted that it was sensitive to the argument that general notions of “pollution” relate to industrial discharges and environmental contamination. Nevertheless, the language of the policy provision did not limit its application to such events, and the Court reiterated that the exception in the exclusion that would provide coverage for short-term “indoor” pollution exposures suggested that those exposures that did not fall within the exception were otherwise not covered. *Id.* at 73-74.

(ii) Out of State Cases Applying The APE To Silica Claims

- *Clarendon America Insurance Company v. Bay, Inc.*, 10 F. Supp. 2d 736 (S.D. Tex. 1998) (Applying the APE to silica claims as unambiguous but holding that other allegations in underlying complaint may trigger duty to defend).

IV. Silica Exclusion

In 2004, ISO developed a silica exclusion and insurers are reportedly extensively using it during recent renewals of coverage.
V. Conclusion

Silica coverage cases will continue to be litigated over the next several years. Trigger, allocation and the applicability of the absolute pollution exclusion will remain battlegrounds.

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1 The undersigned was counsel of record to one of the insurers in Kimber.

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