

Riding out the Tidal Wave of Litigation: Industry Responds to Plaintiffs' Strategy

by Dan Sheridan

First it was asbestos. Will welding fumes be next? Inquired the lead to a recent article in *The Wall Street Journal* about the current Welding Fumes Litigation. CryoGas International sat down with attorney Stephen Harburg, liaison counsel for all the defendants in the Welding Fumes Litigation, to understand the issues behind the headlines.

Harburg, a partner with O'Melveny & Myers LLP, traces the recent tidal wave of cases in the Welding Fumes Litigation to an article published in 2001 by Dr. Brad Racette of Washington University. "Based on a study Dr. Racette conducted of 15 welders who had Parkinson's Disease, he came to the hypothesis, and it was only a hypothesis, that perhaps their Parkinson's Disease had started at an earlier age as a result of their exposure to manganese in welding fumes. We think this is what really triggered the plaintiff's bar to pursue Welding Fumes Litigation as 'the next asbestos'," said Harburg.

"The plaintiffs' bar is an informal group of plaintiffs counsel who typically pursue high profile, mass tort litigation such as asbestos and tobacco. Various law firms band together focusing on one or more industries at a time trying to create this mass litigation in the hopes of it becoming a money maker," explained Harburg who noted that over the course of the last decade the industry has gone through 10 trials in which the plaintiff had Parkinson's disease, and it has won nine with one on appeal. Instead of just one or two cases per year, the industry is currently facing an onslaught of approximately 4500 separate welding cases consolidated in a Multi-District Litigation (MDL) in Cleveland Federal Court with an additional 5000 cases filed in State Courts.

Q: What is the plaintiffs key argument in this litigation?

"The plaintiffs' main contention is that the manganese in welding rods causes a neurological disorder. Plaintiffs have defined that disorder in various ways. Originally, they called it manganism, a recognized neurological disorder and a form of Parkinsonism which is caused by exposure to very high levels of manganese," explained Harburg. "Manganism is an extremely rare disease. There are only a handful of reports of it in the medical literature dating back to the late 1800s."

Harburg noted, "Unlike asbestos, manganese is not a carcinogen. Although plaintiffs refer to manganese as a neurotoxin, manganese is in fact an essential element. The body needs manganese in order to function. If you look at your bottle of vitamins, you are likely to find manganese."

Manganese is also an essential element in welding manganese steel. In order for there to be a good weld, the welding consumable must have a similar property to the steel it is being welded to.

"The problem the plaintiffs have encountered is that there is no history of sick welders. There has not been an epidemic of welders with this disease," Harburg commented. "What is particularly noteworthy is that during WWII when there was an epic scale of welding in Navy shipyards to support the war effort, there is no evidence that welders coming out of that experience suffered an increase in neurological disorders. In fact, there was a public health report issued around that time that examined the health of welders which made no mention of any increase in the amount of neurological injury."

Harburg commented, "It seems that the problem with welding fumes is the result of litigation by the plaintiff's counsel. Over the last decade, there were perhaps one or two cases a year. Certainly it was not this huge tidal wave of litigation brought on by the plaintiffs'."

"The industry has been quite successful in those cases. Typically, we would find that if a welder did in fact have a neurological disorder, it was Parkinson's Disease which is distinct from the umbrella disease of Parkinsonism," said Harburg. "There is no scientific evidence that Parkinson's Disease is caused by exposure to manganese."

Q: What has been the plaintiffs' strategy in these cases?

"About three years ago the organized plaintiffs' bar became aware of welding fume litigation and decided that they could transform these one to two cases per year into the type of tidal wave litigation that they are quite fond of these days. It is pattern that we have seen repeated with asbestos, tobacco and silica litigation," said Harburg.

Overwhelming Numbers

The plaintiffs first course of action is to screen a target population, in this case the welders, to see if any of these people have a neurological injury. "They are not looking for classic manganism, which is a very severe disease and quite rare. They are broadening their search to include a much wider array of neurological disorders such as slight movement disorders, headaches, problems sleeping, fatigue, and various other ailments that the plaintiffs then label a neurologic injury," Harburg noted.



Steve Harburg

To garner as many potential litigants as possible, the plaintiffs' have adopted the strategy of advertising in major metropolitan news papers such as the ad below from the *New York Daily News*. In addition to advertising, the plaintiffs also do much recruiting through the union halls. Many of the shipyard welders were well known to the plaintiffs' attorneys who represented them in asbestos litigation since much of the asbestos litigation came out of the shipbuilding industry. "When we look at the background data on many of the plaintiffs, a significant percentage of them were former asbestos claimants," commented Harburg. (*The Wall Street Journal* also reported that nearly a third have also made claims in asbestos litigation. 70 percent became involved as result of the screening process in which lawyers invite welders to come in for medical tests.)

Harburg pointed out that a significant percentage of the claimants were only diagnosed in the screening process and did not previously seek medical treatment. "Except for the fact that they saw an advertisement, many of these individuals did not even believe they had a disorder. This indicates to us that we are not dealing with the epidemic that plaintiffs would like to portray," explained Harburg. "The question we have repeatedly asked, 'Where is the epidemic? Why hasn't this been an issue before?'" Plaintiffs' response is 'Look at all the claimants.' That is a self-fulfilling prophecy. The plaintiffs counsel are the ones that created the epidemic." Harburg added, "When you dig down, you find that there is a significant number who have no obvious illness other than a diagnosis of a neurological disorder by a screening doctor."

'Make this Go Away'

"One of the key aspects of the plaintiffs' strategy in creating this tidal wave, is not so much to frighten the lawyers, as it is to frighten the boards of directors," Harburg explained. "A big part of the strategy is to force settlement by pressuring the boards of directors and stockholders in these companies. Their goal is to make the board turn to their lawyers and say, 'make this go away.'"

"The plaintiffs can also create news coverage by simply filing lawsuits as they have this huge warehouse of potential plaintiffs that they have acquired through their screening efforts. For example, plaintiffs in California created a news event after filing one hundred new lawsuits," commented Harburg.

Magic Jurisdictions

After creating a large pool of plaintiffs, the strategy is to begin filing cases in very plaintiff friendly jurisdictions often referred to as 'magic jurisdictions' such as south Texas, and Mississippi.

"The Elam Case, the only case the defendants have lost to date, was tried in Madi-

son County, IL. That is another favorite jurisdiction for the plaintiffs. The Elam verdict came down just over a year ago and is currently on appeal. Plaintiffs touted that as a break in the dam," said Harburg who noted that the defendants won the very next case, Presler. "Interestingly, the Presler Case, the most recent trial, occurred in Brazoria County, Texas which is not a very favorable jurisdiction for defendants. It is a jurisdiction that plaintiffs routinely like to go to. That case went to trial last year and it resulted in a hung jury. It was re-tried in April of this year and the defendants won after only a couple of hours of jury deliberations," Harburg added.

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— Steve Harburg

"The plaintiffs' strategy is to bring these cases quickly to trial before there is any serious analysis of the science. They hope to win a few big verdicts with one or two sympathetic plaintiffs," explained Harburg. "Then with overwhelming numbers of plaintiffs, they will threaten the industry with total destruction essentially, unless they agree to settle with them for enormous dollars. That is the pattern."

'The Next Asbestos'

"The plaintiff's rhetoric often refers to welding fumes litigation as the 'next asbestos'. That has been a catch phrase that plaintiffs have used from the beginning," commented Harburg. "However, manganese is quite different than asbestos. Manganese is not a carcinogen and is an essential element. But in certain circumstances and at extremely high doses, it does cause a very rare neurological disorder, manganism. But there is no evidence that the people coming forward in these cases have that disorder. Typically, it turns out they have Parkinson's Disease, just as anyone in the general population has a risk for this disease," he added.

Q: What are the key defense arguments in this litigation?

"The two fundamentals in our defense are that science is on our side and that the companies have acted responsibly," said Harburg. "There is no science behind what plaintiffs are trying to put forth. They have a syllogism that links up exposure to manganese and welding fumes to a neurological disorder that they sometimes call manganism and sometimes they call manganese induced Parkinsonism, sometimes they just call it brain damage."

"What the industry has been trying to establish is that the science does not support their claims. There is no evidence that the exposures you get from the mild steel welding which is the vast majority of welding, causes this problem, or any neurological problem," Harburg added.

"This is not a case simply where the in-

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To maximize the number of plaintiffs, their counsel has and is advertising in major metropolitan newspapers. The above is an example of an ad from the *New York Daily News* for new plaintiffs.

dustry has tried to hide its head in the sand,” Harburg continued. “In fact, there have been warnings on welding rods since at least 1967. And as science has progressed, the warnings have progressed. The industry’s position is that between the warnings they put out and the training that they have implemented, between the overall efforts that they make on safety, that they have acted quite responsibly.”

Q: What is the latest science?

“Part of the plaintiffs’ playbook in any of these mass tort litigations is to say that the industry buried its head in the sand,” said Harburg. “On the contrary, the industry continues to sponsor science in this area. Recently, the industry funded a study of 9800 welders in Denmark using an elaborate database which keeps very good medical records and work records. (The industry had no control over the content of this study.) It showed that there was no increase among this group for developing Parkinson’s Disease or other forms of Parkinsonism. We view this as a confirmation of what we have been saying all along,” commented Harburg about the peer reviewed study which found that welders have a slightly lower level of hospitalization from Parkinson’s Disease than the average population.

Q: While the plaintiffs have been using a strategy of sheer numbers to pressure the industry to settle, what has been the defense strategy for fighting these cases?

“One of the key elements in any plaintiff’s strategy in a mass tort litigation is to quickly get to the state courts where they think they have the best chance of hitting it big,” said Harburg. “The way we fight that is to remove as many cases from State Court to Federal Court.”

“We prefer the Federal Court system for two reasons. One, we have a belief that the Federal Court system provides a much more fair battleground in which to have these issues litigated. Second, within the Federal system you are able to create what is referred to as a Multi-District Litigation,” explained Harburg.

A Multi-District Litigation (MDL) is a consolidated Federal proceeding where all of the federal cases are handled by one judge. In the Welding Rod Litigation, the MDL proceeding has been consolidated in the state of Ohio before Judge Kathleen McDonald O’Malley. “With an MDL, you don’t have to be putting out fires in lots of different courts. You have one judge who devotes themselves to the issues involved in the case and controls the discovery process,” Harburg explained.

“While our goal is to get as much of the litigation as we can centralized in the Federal proceeding, we are not able to remove every case from state court. There are plenty of state court cases that we are still fighting,” said Harburg.

As we go to press, the defense team is currently preparing for the Ruth Trial, the first trial in the MDL Federal Proceeding, and the Boren Case, a state case in the plaintiff friendly jurisdiction of Madison County, IL. “My hope is that with the strategy we have implemented, that if we knock out a few of the plaintiffs’ next attempts, that the organized Plaintiffs Bar will start to lose interest in this case as their next asbestos. The plaintiffs view this case as

an investment,” said Harburg noting the considerable expense involved in hiring experts, conducting screenings, and performing discovery with numerous depositions. “We think that this is a poor investment on their part, we would like to show them that,” he added.

“We have reason to believe that even plaintiffs own strategy isn’t working for them. We are hopeful that the wave of litigation will begin to recede and go back to what it has always been – a couple of cases going to trial periodically. If history is any guide, we will win the vast majority of those cases. Periodically there will be a loss, but it won’t be the tidal wave of mass tort that becomes name litigation such as asbestos, tobacco. We don’t believe welding rod will join that elite company,” Harburg surmised.

In concluding our interview, Harburg noted, “The industry is committed to fighting these cases. Given the lack of science, given the long history of welding without there being an issue, given the industry’s commitment to safety, the industry will not buckle. They have the science and the facts to back them up. They did not buckle after they lost the Elam case, they kept fighting and won the Presler case. We have won nine out of ten cases. These companies are quite committed to staying with this fight because they don’t think that there should be any pot of gold for the plaintiffs’ bar at the end of this.” ■

— Steve Harburg