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and
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Smoke and Mirrors: How Soot May Be The Next Asbestos

Ok, ok ... every plaintiff's attorney on earth has been looking for the next asbestos in every product known to man. So far, nothing has come close to the pervasiveness or ubiquitous nature of asbestos. Based on new research, however, could claims arising from soot ever hold a candle to asbestos claims?

Yesterday's massive fire at a Chevron refinery in Richmond, California forced thousands to evacuate and the City issued shelter in place orders. The fire apparently erupted when a diesel tank leaked fuel that was ignited. Thick, black smoke filled the air in Richmond and other parts of Contra Costa County. Incidents like this churn out enormous amounts of smoke and soot over vast areas.

According to the County's Health Services Department, more than 1,700 people went to local emergency rooms with nose, throat or eye irritation or respiratory issues. The source of the irritation is "[s]moke particulates, which are what makes smoke black... [s]moke particulates can irritate the throat, lungs and eyes particularly in those with pre-existing lung disease, such as asthma." The particulate matter (PM) found in soot is comprised of very fine particulates that once inhaled can become deeply embedded in lung tissue, resulting in respiratory issues.

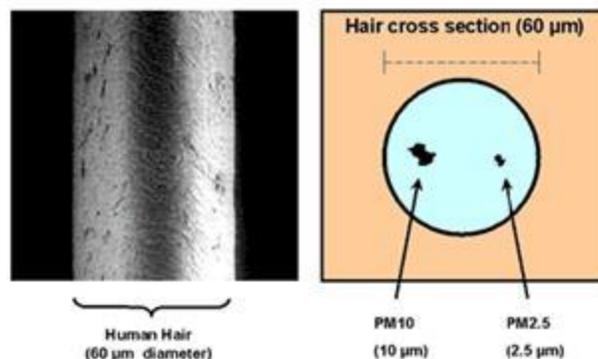
The health effects of soot have been known for centuries. In the 18th century, the British Parliament passed the Chimney-Sweepers Act of 1788 due to the insidious effects of soot on chimney sweepers.^[1] Since 1971, the U.S. EPA has regulated PM. See 36 FR 8186 (1971). Just this past June, the World Health Organization (WHO) classified diesel soot as a lung carcinogen.

Size Matters

For regulatory purposes, PM is segregated into two groups; PM 2.5 and PM10. The size of the PM is measured in microns, (a micron is one-millionth of a meter). Exposure to elevated concentrations of PM is associated with increased hospital and doctor visits and increased numbers of premature deaths. See Ambient Air Quality Standards (AAQS) for Particulate Matter, available at: <http://www.arb.ca.gov/research/aags/pm/pm.htm#1>. PM of 1.5 to .4 μm is referred to as ultra fine particles. The smaller the PM, the deeper it can penetrate into lung tissue.

^[1] Overview of Occupational Safety and Occupational Health/Industrial Hygiene, available at: <http://www.laborcommission.utah.gov/UOSH/Outreach/ConstructionCD/www.osha.gov/SLTC/smallbusiness/sec5.html>.

HOW SMALL IS PM?



See Id.

Sources of Soot

In addition, to transportation equipment, power plants and other industrial sources of soot, fires, including wild fires, are substantial sources of soot. The majority of PM produced in wildfires, of the type that have been raging in parts of the country, are of the ultra fine variety. *See* Kristen Shaw, AFTER THE WILDFIRE SMOKE HAS CLEARED; available at: http://www.csceng.com/services/indoor_air_quality/after_the_wildfire_smoke_has_cleared/index.php. (hereinafter Shaw).

Moreover, PM is just one of the potentially hazardous constituents of soot. Included in the mix are polynuclear aromatic hydrocarbons (PAHs), organic acids, semi-volatile and volatile organic compounds (VOCs). *See* Shaw, *supra*. Most of these constituents, including PM, are not visible to the naked eye, and thus go undetected. *Id.* PM can infiltrate buildings, even with doors and windows shuttered. Moreover, HVAC systems that draw in outside air, may not have filtration systems to adequately capture PM. *Id.*

Soot, or black carbon also can originate from indoor sources, such as candles, fireplaces, or from combustion of oil or gas in HVAC systems. Even printer cartridges produced a manufactured black carbon nearly identical to soot. Because PM can originate from numerous sources, there may not be one discrete event attributable to a plaintiff's claim.

Regulatory Response

In February of this year, eleven states, including New York and California, sued the federal Environmental Protection Agency in Federal District Court in New York due to the EPA's delays in tightening air quality standards involving PM emanating from diesel trucks, buses, power plants and other sources. Despite this most recent hiccup, federal regulations have been ratcheting down the permissible levels of PM in ambient air since 1971.

In addition, New Jersey is the only state that has its own indoor air quality standards with applicability limited to public buildings. *See* New Jersey Public Employees' Occupational Safety and Health (PEOSH) Act, N.J.S.A. 34:6A-25 *et seq.*

What does it all mean?

For insurers in general, a hostile fire exception to a pollution exclusion could crack the door open for more expansive types of claims. Some courts have already viewed the hostile fire exception broadly. *See e.g. Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892 (9th Cir. 1993) (exception applied to smoke emanating from a chemical drum that later exploded).

A concern exists that recent studies and tighter regulations can be used to increase the types and amounts of damage sought by plaintiffs, e.g., claims for medical monitoring and injunctive relief. The WHO classification can only add fuel to the fire. Workers continually exposed to diesel fumes, such as truckers or construction workers, may be potential plaintiffs. Landlords, tenants, or building owners that do not follow indoor air quality standards or industry standards applicable to HVAC systems may become target defendants.

In addition, testing equipment has become much more efficient in detecting minute quantities of contaminants, including PM. Once discovered, the miniscule size of PM makes it virtually impossible to remove PM from certain types of porous materials. If the components contaminated are part of an HVAC system, can the system ever be returned to its pre-loss condition? Since PM is ubiquitous, can an insured prove that PM contamination is not due to background conditions or is not preexisting? These issues, and the lack of regulatory standards for determining “how clean is clean” for PM in indoor environments will undoubtedly cause PM claims to become very hazy indeed. Plaintiffs’ counsel may soon be singing “Smoke Gets in Your Eyes” for good reason.



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