

Chemicals

Welding Rod Litigation: Unlikely to become the 'next asbestos'

Analyst Comment

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Americas

We recently attended a welding rod litigation conference, featuring plaintiff and defense attorneys as well as medical experts. At issue is the concern that manganese in welding rods can lead to neurological disorders, such as Parkinson's disease. Welding rod litigation has garnered more attention in the past year as the plaintiff bar won its first verdict in October 2003 in the Elam case, signaling the possibility of mass tort litigation (similar to that of asbestos and tobacco) could increase. Our takeaway: While the flurry of additional claims filed and unpredictable nature of varying juries and jurisdictional locations around the country could prove a headache for defendants, we believe mass tort litigation (i.e., asbestos) is unlikely to occur in the near-term as plaintiff attorneys continue to be challenged to provide medical proof of a causal link between welding fumes and Parkinson's disease. Nonetheless, the Elam case demonstrates the plaintiffs can win verdicts, despite limited medical evidence currently available, making welding rod litigation a risk to monitor. Industrial gas companies such as BOC and a predecessor company of Praxair have historically manufactured such products and Airgas and Air Products have distributed them.

Full details

THE BOTTOM LINE In our view, the important takeaway for chemical investors from this conference is that welding rod litigation for companies such as BOC, Praxair, Air Products and Airgas is unlikely to become the next asbestos scenario as the medical link is not as clear (asbestos is a carcinogen). Furthermore, at the conference we happened to be seated next to a plaintiff attorney with 15 years of experience in asbestos litigation who claimed she does not believe welding rod litigation will gain the mass tort momentum similar to asbestos due to the greater challenges in providing undisputable medical proof. This is purely anecdotal and the opinion of just one individual, but appears to validate the claims of the defense.

Although we left the conference feeling more confident about the defense's stance, we would caution that the headline risk will likely remain a concern from an investment perspective. In addition, we would highlight that history can provide other types of mass litigation that ended up being a significant problem, despite the lack of substantial medical evidence. For example, PCB litigation became a considerable issue for Solutia a few years ago, when plaintiffs filed class action suits against the company, alleging medical problems such as acne, emotional distress, and fear of future health issues arising from exposure to PCBs. Despite Center for Disease Control (CDC) studies that showed no health-related link due to PCBs leaching into the ground and water, Solutia and Monsanto ultimately settled the cases for approximately \$600M. Thus, while we expect the welding rod litigation to be manageable, history shows nothing is certain in front of a jury.

WHAT IS THE CLAIM? Welding rods contain manganese and fumes given off during welding can cause Parkinson's disease or other similar neurological disorders, such as

Robert Koort, CFA
robert.koort@gs.com
New York: 1-212-357-4333

Jonathan Tyler
jonathan.tyler@gs.com
London: 44-20-7774-1115

Marybeth Connolly
marybeth.connolly@gs.com
New York: 1-212-357-7548

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manganism. In addition to the contention that welding fumes lead to manganese-induced Parkinson's disease, the plaintiffs allege that the welding rod industry (manufacturers, distributors, welding associations) was aware of the dangers and failed to properly warn welders and therefore, is negligent.

To support its position, the plaintiff bar has outlined a chronological timeline, demonstrating that the impact of manganese overexposure has a long history as Parkinson's disease was identified in 1817 and the first case of manganese poisoning was reported in 1837. The first two cases of manganese poisoning in welders were reported in 1932. To support its claim of industry negligence, the plaintiff attorneys highlight that the first industry-approved caution label was not placed on welding rod products until 1967.

THE DEFENSE The central tenet of the defense's case is that there is no established medical link between welding fumes and Parkinson's disease (PD), based on the fact that medical experts have agreed that the causes of PD are unknown and welding activity came about in the 1920s, more than 100 years after PD was first identified by James Parkinson. Furthermore, four of the plaintiffs' medical experts in the Elam case were unable to conclude in their depositions that exposure to welding fumes causes PD or manganism. Unlike asbestos and tobacco that are carcinogens, manganese is a naturally occurring element and necessary for good health (manganese can be found in meat, grains, water, etc.), and studies have not determined what specific level of manganese is considered overexposure, although the Occupational Safety and Health Administration (OSHA) has established a manganese limit of 5 mg/m³.

The industry does acknowledge that high levels of manganese can be toxic, but asserts there is no scientific evidence to prove that the manganese from welding fumes results in overexposure. Indeed, an estimated 90% of welding activity in the US is what is known as "mild" welding, meaning that manganese is approximately 6%–10% in the fumes versus hard steel welding (e.g., railroad work) that has an estimated 40%–60% manganese exposure (estimates presented by Elam defense attorney). The manganese exposure from welding is unlikely to be toxic, particularly if the area is properly ventilated. Moreover, there have been no reported cases of neurological injury in the US or Canada from mild steel welding (established in the October 2003 Elam case).

From the negligence perspective, the defense points out that the industry did not conceal information about the potentially harmful effect to welders of breathing concentrations of fumes and gases, noting that the American Welding Society (AWS) began to require caution labels on welding rod products in 1967. Furthermore, the Occupational Safety and Health Administration (OSHA) adopted an almost identical warning to that of the AWS in 1972. Notably, although there were 2 cases of manganism reported by welders in 1932, no additional cases were reported until the 1980s and the defense has disputed the conclusions of these reports. If welding leads to manganese toxicity, the defense contends that it is surprising there were no incidents reported in a 50-year span, particularly given the significantly high level of welding activity following World War II.

WHO IS INVOLVED? The primary focus for the plaintiffs' suits is the welding rod industry, including the National Electrical Manufacturers Association (NEMA) and the American Welding Society (AWS) as well as welding rod manufacturers, welding equipment manufacturers, and sellers and distributors of welding products. The three defendant companies involved in the Elam case were Lincoln Electric, Hobart (Illinois Tool Works) and Aircro (The BOC Group), however, similar to asbestos litigation, the plaintiff target list is far-reaching. For example, there have been some class action filings that name multiple parties believed to be involved somewhere along the supply chain, such as the White case in the Northern District of Illinois that names 24 defendants such as Lincoln Electric, Hobart, and Aircro as well as other companies like General Electric, Caterpillar, Viacom and Westinghouse.

BACKGROUND Only 9 welding rod litigation cases have gone to trial since 1992, with the juries finding for the defense in all of the cases except the Elam case in October 2003. Not surprisingly, the Elam verdict has become a rallying cry for the plaintiff bar that seeks opportunities in mass tort litigation and has resulted in a flurry of filings over the past six months or so, with the total number of filed suits estimated somewhere between 8,000–15,000. This number could continue to grow, given that there are approximately 800,000 welders in the US. PX has been named in

190 cases, BOC in 172 and ARG in about 100.

Although this is a sizable number of pending cases, class action status has been withdrawn by the plaintiffs due to lack of commonality (e.g., different welding environments, different levels of exposure, different rods used, etc.), likely reducing the scale benefits for the plaintiff attorneys trying the cases. Furthermore, approximately 4,000 of the cases are at the federal court level, which is typically less desirable to plaintiff attorneys than district or state jurisdictions. Therefore, we would not expect to see mass tort litigation in the near-term, but believe the risks could increase longer-term, particularly if the claimants are successful in winning additional cases in more traditionally "plaintiff-friendly" jurisdictions, such as Madison County, IL (location of Elam trial).

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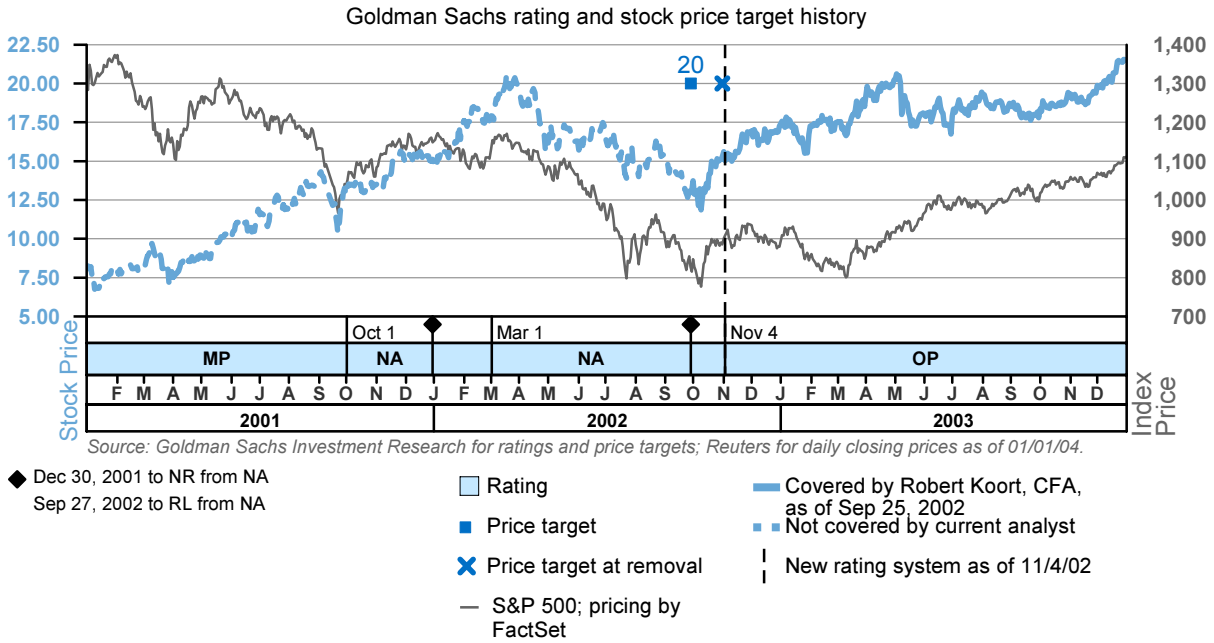
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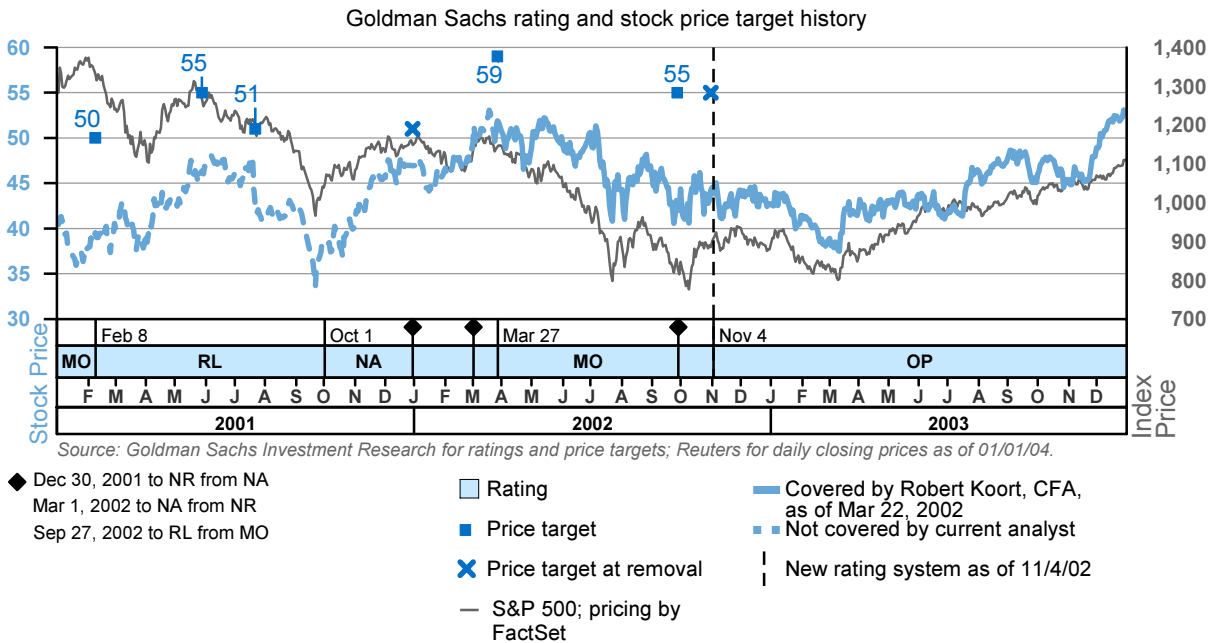
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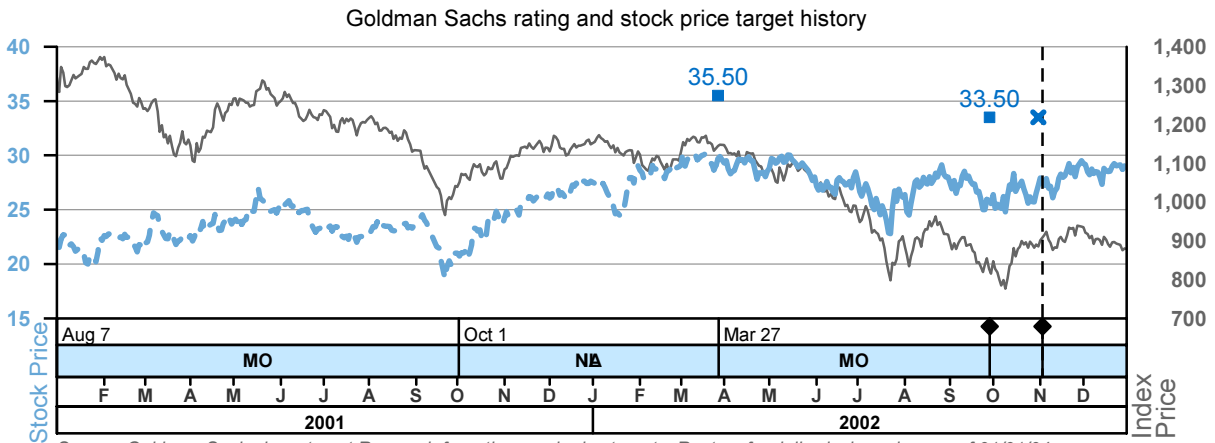
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