"Take Home" Premises Liability Asbestos Exposure Claims ©

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Introduction

Increasingly, plaintiff attorneys are asserting asbestos claims against premises owners on behalf of claimants that never set foot on the premises but allegedly were exposed to asbestos through their spouses or others who brought it home on their clothing. Such claims are referenced as "take-home" premises liability asbestos exposure claims, though they are also commonly referenced as "household," "bystander," or "second-hand" exposure claims.

Fortunately, there is emerging case law helpful in the defense of take-home premises liability asbestos exposure claims, including decisions by the Michigan and Georgia Supreme Courts and by New York's highest court. However, there are a number of problematic decisions, including a New Jersey Supreme Court decision permitting such claims. An overview of the case law applicable to take-home premises liability exposure claims is the focus of this article.

Cases Denying Take-Home Premises Liability Exposure Claims

In *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas* (*Miller et al. v. Ford Motor Company)*, 2007 WL 2126516, July 2007, *reh'g denied*, a certified question from a Texas state appellate court, the Michigan Supreme Court denied the take-home exposure claim of the stepdaughter of an employee of an independent contractor who relined furnaces at a Ford plant from 1954-1965. The stepdaughter developed mesothelioma, allegedly as a result of washing her stepfather's work clothing during the years he worked at Ford.

In denying the claim, the court held that Ford owed the stepdaughter no duty to protect her from exposure to asbestos. It reached that conclusion after an analysis of the benefits of imposing such a duty against the social costs of doing so. That analysis required consideration of the relationship between the parties, the forseeability of the harm, the burden on the defendants, and the nature of the risk prevented.

Most important of these considerations is the relationship of the parties. Where none exists, no duty will be imposed. Here, the court characterized the stepdaughter's relationship to Ford as "highly tenuous," at best. She had never been on or near the plant. Her alleged exposure consisted solely of off-site laundering of her stepfather's clothing.

The "burden on defendant" prong is also held in Ford's favor. Ford could not be reasonably expected to protect everyone who may come in contact with employees of an independent contractor.

As to the "forseeability of the harm" prong, no duty should be imposed, the court held, because there were no OSHA rules in effect during the relevant period regarding potential exposure of that type. Such rules were not in effect until the 1972, when OSHA regulations first mandated that asbestos-contaminated clothing not leave the workplace. Further, the court noted, the first suggestion of a link between asbestos disease and exposure from washing clothing was not published until 1965. Thus, the take-home exposure was not foreseeable to Ford during the relevant time period (1954-1965).

The final prong was a consideration of the risks prevented. The court held that assuming Ford directed the independent contractor to work with asbestos-containing material, the "nature of the risk" was serious, which suggests a duty should be imposed.

However, all the prongs must be met, not just one, and even if all are met, the court must still ultimately balance social benefits of imposing a duty against the social costs of imposing one. That requires consideration of competing policy considerations, not just of logic and science. After noting the existence of a litigation crisis created by the existing asbestos docket, the court held that expanding a duty to "anybody" who may come in contact with someone who has simply been on the premises owner's property would expand traditional tort principals beyond manageable bounds. It would create an almost "infinite universe" of potential plaintiffs, which the court refused to do.

In *In re New York City Asbestos Litigation (Holdampf, et al. v. A.C. & S. Inc., et al. and the Port Authority of New York and New Jersey*), 5 N.Y. 2d 486, 806 N.Y.S. 2d 146 (October, 2005), the Court of Appeals for New York (New York's highest court) denied the take-home asbestos exposure claim of a wife asserted against the owner of the premises where the husband worked. The court held that the initial analysis required a determination of whether any duty was owed by the premises owner to the wife, not whether the exposure/injury was foreseeable. Forseeability, the court noted, is only considered once a duty is determined to exist. Duties arise from a special relationship, such as master-servant, where the relationship limits the scope of the liability. No such duty, the court held, should extend to the wife or others not actually present at the workplace and over whom no control can be exercised by the premises owner.

To hold otherwise, the court further noted, would be unworkable in practice and unsound as a matter of public policy. The potential for open-ended liability would exist, because anyone (babysitter, renters, car pool members, taxi drivers, servants, delivery people, home repair people, etc.) who might come in contact with the worker may have a cause of action. A veritable "avalanche" of litigation could be triggered by such persons, none of whom worked with or around asbestos at the premises.

It should be noted that the court also found it significant that the husband did have the opportunity at work to have his laundry sent offsite for cleaning but did not avail himself of it, therefore leaving the premises owner entirely dependent on the husband's willingness to reduce the risk of take home exposure. See also *In re Eighth Judicial District Asbestos Litigation (Rinfleisch v. Allied-Signal, Inc.),* 12 Misc. 3d 936, 815 N.Y.S 2d 815 (N.Y. Sup. Ct. 2006), where a wife's take-home premises liability asbestos exposure claim based on exposure during the 1984-1990 period the was denied, despite the fact that the premises owner did not provide protective work clothing, laundry service, changing rooms or advice as to how to avoid exposure to asbestos.

The Georgia Supreme Court, in *CSX Transp., Inc. v. Williams*, 608 S.E. 2d 208 (Ga. January, 2005), similarly refused to create a duty extending to those who allege off-site contact with asbestos-contaminated work clothing. The take-home claimants were the wife and children of the worker. The court held the initial inquiry in such claims is whether a duty exists, which question is a matter of public policy, not mere forseeability. As a matter of public policy, the court held, no duty is owed to such claimants because they did not work at and were not exposed at the workplace.

In *Martin v. General Electric Co*., Case No. 02-210-DLB, 2007 WL 2682064 (E.D. Ky. N. Div. Sept. 2007), a federal district court, construing Kentucky law, denied a take-home premises liability asbestos exposure claim asserted by the son of a former utility company employee (1951-1963) who on occasion changed out of his work clothing

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at home in his basement, where his son often played. Interestingly, the utility company did provide locker and shower facilities for use its employees, and at times, the father used them. The utility alleged there was insufficient knowledge about take-home exposure, thus, no forseeability or duty owed to the son under Kentucky law. The court noted that forseeability is the primary consideration in establishing a duty under Kentucky law. After a review of the published literature during the relevant time period, the court found that while there was information available about the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers as of the 1930s, the extension of that harm to others was not widely known until at least 1972, when the OSHA regulations first addressed it. Thus, the utility was not placed on notice during 1951-1963 that family members of employees were subject to health effects from take-home asbestos exposure.

In *Rochon v. Saberhagen Holdings Inc.*, No. 58579-7-1, 2007 WL 2325214 (Wash. Ct. App., Div. 1 August, 2007, a Washington state appellate court upheld the trial court's dismissal of the take-home premises liability asbestos exposure claim of a wife against her husband's former employer that arose from alleged exposure during 1956-1966. However, the court reversed the trial court's holding that no duty of care was owed under ordinary negligence theory. The court held that there was a genuine issue of material fact regarding whether the company operated and maintained its plant in an unreasonably unsafe manner that caused foreseeable and proximate harm to the wife, and it remanded the case to determine those issues.

A Texas appellate court, in *Exxon Mobile Corp. v. Altimore*, No. 14-04-0113-CV (April, 2007), also held no duty was owed by the premises owner to the take-home exposure plaintiff, who claimed asbestos exposure from washing her husband's work clothing during the 1942-1972 period. In so ruling,

the court reversed the trial court's award of almost $2 million dollars to the wife. It did so because the wife's exposure was not foreseeable during the time it occurred. Mobil, the premises owner, had not been sufficiently put on notice prior to 1972 of the take- home exposure risk. That changed in 1972 with OSHA's contaminated clothing regulations (previously referenced). The court held that prior to the adoption of OSHA's regulations there had been no clear consensus in the scientific community as to the degree of the danger posed by take home exposure. While the court reversed the trial court for the reasons stated, it agreed with the trial court's holding that, generally, a duty may be owed by a premises owner to a take-home claimant. However, the exposure would have to be after 1972. See also *Alcoa, Inc. v. Behringer*, 2007 WL 2142988 (Tex. Ct. App. July, 2207), where the court held there was no duty owed during the 1950s when the take-home exposure occurred.

In *Adams v. Owens-Illinois, Inc.*, 705 A. 2d 58 (Md. Ct. App. 1998), a Maryland appellate court held no duty should extend to a wife who was exposed to asbestos when her husband tracked it home on his clothing. It so held because the wife, who never set foot on the premises and had no relationship to or with the premises owner, was a mere stranger. Holding otherwise would impose a broad duty that would necessarily extend to other strangers with similarly had no relationship with the premises owner, such as those sharing a ride to work or other relatives of the employee.

In re Asbestos Litigation, 2007 WL 45711196 (Del. Super. 2007) the Delaware Superior Court of New Castle County, in a case of first impression, held that plaintiff Lillian Riedel's "take-home" exposure claim must be denied because no duty was owed. Mr. Riedel's husband was employed at ICI Americas, Inc. from 1962-1990, and it was alleged he brought asbestos home on his clothing which his wife Lillian washed. There was no dispute that Mrs. Riedel never set foot on ICI's property and was not alleging any direct exposure.

The court, in what is a very complete survey and analysis of the law, rejected plaintiff's forseeability analysis, stating that to the relationship between ICI and Mrs. Riedel was simply "too tenuous to support a legal duty of care." To rule otherwise, the court further noted would place an unacceptable "burden upon the defendant to undertake to war or otherwise protect every potentially foreseeable victim of off-premises exposure" (babysitters, cleaners, etc.) rendering potential liability "practically limitless."

In *Van Fossen v. MidAmerican Energy Co.*, Case No. 7-747/06-1691 (Iowa Ct. App. 2008), the Iowa District Court for Woodbury County upheld the trial court's grant of summary judgment in favor of two companies that hired an independent contractor, an employee of which claimed that his wife was exposed to asbestos from his clothing, which she washed from 1973-1997. The court held that the trial court correctly balanced and weighed the three factors required by Iowa law: "the relationship between the parties, reasonable forseeability of harm to the injured person, and public policy considerations." Here, no duty was owed by the defendants as landowners to the spouse of an employee on an independent contractor who was in control of the premises when the exposure occurred and, further, no evidence was presented showing that the defendants "knew or should have known that such exposure to the microscopic fibers created a risk of harm to persons in the position of Mrs. Van Fossen."

Case Permitting Take-Home Exposure Premises Liability Claims

The most-oft cited case for the existence of a duty owing to one asserting a take-home premises liability claimant is *Olivo v. Owens-Illinois, Inc.*, 895 A. 2d 1143 (N.J. April, 2006). In *Olivo*, the New Jersey Supreme Court upheld the appellate court's reversal of the summary judgment granted in favor of a premises owner, holding that it was foreseeable that asbestos might be brought home on the clothing of one working in the vicinity of it.

Plaintiff was the wife of a steamfitter/ welder who from 1947-1984 worked at a number of job sites, including at defendant Exxon Mobile's facility in Paulsboro, New Jersey. The court held that the proper standard to apply to determine whether any duty extends from the premises owner to the wife "devolves to a question of forseeability of the risk of harm to that individual [the wife] or identifiable class of individuals," as the "risk reasonably to be perceived defines the duty to be obeyed." Once it is determined that the risk is foreseeable, the court considers whether imposition of a duty is fair by weighing and balancing factors, including the relationship of the parties, nature of the risk, opportunity and ability to exercise care, and the public interest. The plaintiff's status as someone who was never actually at the work site is one consideration in a fairness analysis, but not the primary one in determining whether liability can attach. It simply becomes a factor in that analysis. Evidence demonstrating Mobile's knowledge of the hazards of asbestos caused the court to hold that the risk that asbestos may be carried home on a worker's clothing was forseeable. The *Olivo* court distinguished *Holdampf* and

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Williams, by noting that those jurisdictions do not consider forseeability when determining whether a duty exists.

In *Satterfield v. Breeding Insulation Co.*, No. E2006-00903-COA-R3-CV, 2007 WL 1159416 (Tenn. Ct. App. April, 19, 2007), a take-home asbestos exposure premises liability claim was asserted on behalf of the daughter of a man who worked during the 1970-'80s at a plant where it was alleged he was exposed to asbestos and tracked it home on his clothing. The trial court held that there simply was no duty owed to the daughter under Tennessee law, either under statute or under common law. However, the court of appeals overturned that decision, citing *Olivo* with approval. It noted that defendant Alcoa should have understood that the risk of injury to someone like the plaintiff was a "reasonably foreseeable probability," given the evidence presented regarding Alcoa's knowledge about the dangers of asbestos during the time plaintiff's father worked at the plant and was exposing his daughter through his clothing. In so ruling, it specifically rejected the "unlimited liability" argument presented in those cases declining to permit take-home claims. It held that where such exposure was sporadic, periodic or remote (such as would be more likely with non-family members), it would be outside the scope of reasonable forseeability and, thus, not actionable. *Satterfield* is pending before the Tennessee Supreme Court (Case No. E2006-00903-SC-R11-CV).

In a lengthy opinion addressing many of the cases cited in this article, a Louisiana appellate court, in *Chaisson v. Avondale Industries, Inc.*, 947 So.2d 171 (La. App. 4 Cir. December, 2006), held that a duty does extend offsite to the wife of a man who wore asbestos-contaminated clothing home, which wife shook it out then washed it during the 1976-1978 period. The wife contracted mesothelioma. A multi-million dollar trial verdict in favor of plaintiff was appealed. In rejecting the appeal, the court noted that the employer did not provide any work clothing, laundry facilities or changing facilities, nor did it warn of the dangers of take-home exposure in light of the increased recognition of such danger by the scientific community and despite adoption of the (earlier referenced) 1972 OSHA regulation addressing that danger.

Citing *Olivo* with approval, the court noted that Louisiana, like New Jersey and unlike Georgia, relies heavily on forseeability in its duty/risk analysis. It distinguished *Holdampf* based on the fact that the premises owner in that case provided uniforms and laundry services which were not utilized by the worker. It also stated that *Holdampf's* concern about "limitless liability" was misplaced, noting that not only is the duty limited by time of exposure (after 1972) but also by the nature of the association between the worker and the person exposed off-site. The court noted that there should be no hard and fast rule as to whom the duty will extend. Such claims should be considered on a case-by-case basis. The court did cite an "ease of association" component to consideration of the extent to which such duty will extend, finding the wife at issue, who daily washed her husband's work clothing, to be within that group of people to which the duty extends. See also *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005), which also found a duty exited, though it relied on a New York decision since reversed.

And, in *Condon v. Union Oil Company*, Case No. A 102069, 2004 Ca. App. Unpub.LEXIS 7975 (Cal App., August, 2004), the court upheld a jury verdict in favor of the wife (ex-wife as of the time of trial) of an employee who allegedly brought asbestos home on his work clothing, which the wife washed during the 1948-1963 time period. Change rooms were provided at the plant, but no showers or laundry facilities. The court found that there was substantial evidence, including expert testimony, to support a finding that during the relevant time period, it was known that worker clothing could be the source of contamination to others; thus,

it was foreseeable that the husband's contaminated clothing could lead to contamination of his wife. In the face of such knowledge, the premises owner did not provide adequate protection against it. See also *Honer v. Ford Motor Co.*, Case No. B18916, 2007 WL 298271 (Cal. App., October, 2007), where the court overruled the grant of summary judgment based on take-home exposure during the 1940s.

Conclusion

There is emerging authority for the position that no duty is owed by a premises owner to a take-home claimant, regardless of when the exposure occurred, and hopefully more courts will so hold. There are also a number of cases holding that a duty may or does exist, but not prior to the adoption of OSHA's workplace clothing regulations in 1972. Unfortunately, there are a few cases extending the duty to the pre-1972 period, but they are in the minority at this time.

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2008 Seminar Schedule

Medical Malpractice/ Nursing Home Litigation
May 9, 2008
Maumee Bay Resort & Conference Center, Oregon, OH

Insurance Coverage
June 20, 2008
Westfield Insurance
Cleveland, OH

Annual Meeting
November 12-14, 2008
Ritz-Carlton Hotel
Cleveland, OH