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10th Annual Update of Take-Home Asbestos Duty Decisions

2019 Rulings Highlight Litigation Landscape

A Commentary by Carter E. Strang, Karen E. Ross, and Riley J. Shaw of Tucker Ellis LLP
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This 10th Annual Update of Take-Home Asbestos Duty Decisions provides a state-by-state review of important rulings regarding the duty owed, if any, by premises owners, employers, product manufacturers and suppliers, and contractors to protect against take-home asbestos exposure.

2019 saw take-home duty rulings interpreting Alaska, Colorado, and Washington law. The rulings offer a mixed bag. The Alaska decision was from a Washington appellate court, which was tasked with deciding whether the take-home exposure in the mid-1960s constituted "gross negligence" on the part of the defendant under Alaskan law, with the court holding it did not. The Colorado decision was from a federal district court that held a take-home plaintiff's claims against multiple defendant product manufacturers could proceed based on foreseeability principles where the alleged exposure period was from 1953-1974. The Washington decision was also from a federal district court which recognized an employer owed a take-home duty generally, but held it did not owe that duty in the late 1940s - mid-1950s because the hazard was not sufficiently known.

Last year also saw a continuing decline – now stretching back several years — in the percentage of take-home exposure claims that were filed.

The 2019 take-home rulings along with those from prior years are summarized in this 10th Annual Update, along with a general commentary regarding take-home claims and filing trends.

Take-Home Claims – Generally

Take-home claims are generally those asserted on behalf of claimants who have never set foot on the premises, or used the product at issue, but who allege exposure to asbestos through others. This alleged exposure typically occurs through contaminated workplace clothing brought into the home by a spouse or other family member. These claims are also commonly referred to as "household," "bystander," "secondary," "second-hand," "non-occupational," or "para-occupational" exposure claims.[1] Such claims are brought against premises owners, employers, product manufacturers and suppliers, and contractors.

When a take-home claim is asserted under a negligence theory of liability, a central question is whether a duty is owed to the take-home plaintiff. Courts typically apply one of two tests in making that determination: the "relationship" test or the "foreseeability" test.

The relationship test focuses on the relationship between the defendant and the take-home plaintiff. Absent the existence of a "special relationship" between those parties — such as "invitee" or "licensee" in premises liability cases — courts using this test hold that no duty is owed to take-home plaintiffs, such as spouses and other family members.

The foreseeability test focuses on the foreseeability of harm to the take-home plaintiff. Some courts hold that take-home exposure cannot be foreseeable under any circumstances, while others hold that it may be foreseeable, depending on the time period of exposure, knowledge of asbestos hazards, relationship between the take-home plaintiff and the person who tracked it home (spouse, uncle, etc.), and the ability to warn about, and protect, against the hazard, among other factors.

In the context of take-home claims based on negligence against premises owners, employers, and contractors, what was an emerging no-duty trend — in states addressing the issue — appears to have stalled.

When take-home claims are asserted as products liability claims against manufacturers or suppliers, the products law of that jurisdiction governs. Trends as to such claims are hard to discern, with decisions closely tied to the product, time period at issue, and other case-specific factors. In this article, the take-home products liability decisions discussed are primarily those in which the court focused on the time period of the take-home exposure and its impact on the viability of such claims.[2]

2019 Take-Home Case Filings

While the focus of this article is on take-home duty decisions, it is worth noting that KCIC Consulting reports that take-home filings in 2019 were once again lower – as a percentage of all asbestos case filings – than recent years, coming in at 2.6 percent, compared with 3.5 percent in 2018, 4.1 percent in 2017, and 4.9 percent in 2016.[3]

"Last year also saw a continuing decline – now stretching back several years – in the percentage of take-home exposure claims that were filed."

State-by-State Review of Take-Home Duty Decisions

❖ *Alabama* ❖

The United States District Court, Northern District of Alabama, extended a duty of care to take-home plaintiffs in *Bobo v. Tennessee Valley Authority*,[4] where plaintiffs were the personal representatives of Barbara Bobo. Ms. Bobo alleged that she was exposed to asbestos from laundering her husband's workplace clothing from 1975 to 1997 when he worked as a laborer for the Tennessee Valley Authority (TVA).

TVA argued in its motion for summary judgment that it owed no duty to the spouse, who had never set foot on its premises. After noting the lack of any Alabama appellate court take-home premises liability decisions, the court denied the defendant's motion.[5]

The case proceeded to a bench trial. After hearing the evidence from both sides, the court certified the take-home duty issue to the Alabama Supreme Court, which declined to address the dispute.

Without the requested response to the certified question, the trial court held that TVA was negligent in (1) violating applicable workplace standards relating to permissible workplace levels of asbestos exposure, (2) failing to follow mandatory directives governing the monitoring of such exposure, and (3) failing to provide those exposed to asbestos with protective clothing, equipment, locker rooms, and showers. It further held that such negligence was the proximate cause of Barbara Bobo's injuries, awarding the plaintiffs more than $3 million in damages.

The trial court's take-home duty ruling was affirmed by the 11th Circuit U.S. Court of Appeals on April 26, 2017.[6] In its de novo review of the duty issue, the court held that, under Alabama law, foreseeability of injury is the key factor in the determination of whether a duty exists.

On that issue, the 11th Circuit noted, there was sufficient evidence that the take-home hazard was foreseeable, citing TVA's knowledge of applicable OSHA regulations and TVA policies that were designed to protect people like Mrs. Bobo from take-home asbestos exposure. Further weighing in favor of the imposition of a duty under Alabama law is, the court held, the fact that TVA engaged in "affirmative acts" creating the risk of injury to its employees' family members, such as TVA's use of asbestos-containing products at the worksite.

After an analysis of appellate decisions from other jurisdictions, the court noted that its holding may represent a minority view on the take-home duty issue; however, it stated that most of the courts in jurisdictions holding that no duty exists focus on factors other than foreseeability, such as the relationship between the parties. Alabama's strong focus on foreseeability, the court further noted, stands in contrast to those holdings and overcomes any presumption that Alabama would adopt the majority rule.

❖ *Alaska* ❖

In *Hoffman v. Ketchikan Pulp Co.*[7] – the first known Alaska take-home decision – a Washington appellate court, applying Alaska law, held the employer defendant could not be held liable for exposure that ended in 1966 because take-home asbestos dangers were not sufficiently known at that time to establish "gross negligence." Gross negligence was the focus because it is an exception to Alaska's Statue of Repose, which the trial court said barred plaintiff's claim.

In upholding the trial court, the appellate court discussed the expert testimony presented by both sides regarding the foreseeability of take-home dangers. *In dicta*, the court stated it was "likely" that take-home dangers were sufficiently known in the 1950s and 1960s to, at least, establish an issue of fact in an ordinary negligence case. However, it was not sufficient to establish gross negligence because OSHA did not issue take-home regulations before 1972, and there was no consensus of opinions as to the take-home danger before then.

Given its focus on foreseeability, the decision – which never addressed the issue of duty[8] – implicitly added Alaska to the list of "duty" states.

❖ *Arizona* ❖

The Arizona Supreme Court in May 2018 issued a no duty ruling in *Quiroz v. Alcoa* upholding a 2016 appellate court decision.[9] In *Quiroz*, plaintiff was the son of an Aloca plant employee who it was alleged brought asbestos into the family home on his workplace clothing, exposing plaintiff to asbestos from 1952-1962. The trial court granted summary judgement, and the appellate court affirmed.

The Supreme Court declined to recognize a take-home duty under a "special relationship" theory (owed by an employer to and employee's family members) or on the basis of public policy or the Restatement of Torts.[10]

❖ *California*[11] ❖

In *Kesner v. The Superior Court*,[12] a unanimous California Supreme Court held that the duty of employers and premises owners includes preventing secondary exposure to asbestos carried home on the bodies and clothes of on-site workers. California appellate courts had been split on the issue. The *Kesner* decision resolved that split and provided a clear path to viable take-home claims in California; however, the court restricted such claims to household members.

The court's December 2016 ruling was a consolidated appeal of two cases – *Kesner v. Abex* and *Haver v. BNSF*. The plaintiff in *Kesner* alleged asbestos exposure as a result of frequent visits to his uncle's home from 1973 to 1979. The plaintiff's uncle worked for Abex, a manufacturer of asbestos-containing brakes. The trial court held Abex owed no duty, but an intermediate appellate court reversed and ruled that Abex did, in fact, owe a duty to protect the take-home plaintiff from the hazard.

In *Haver*, the plaintiff alleged that she was exposed to asbestos when washing her husband's clothing contaminated from his work as a railroad fireman and hostler at the premises of BNSF Railway Company's predecessor from 1972 through 1974. The trial court dismissed the plaintiff's claim, and the appellate court upheld that decision, finding that a premises owner did not owe a duty of care to household members for take-home exposure under a premises liability theory.

In addressing the intermediate appellate court split, the California Supreme Court noted that its task was to determine whether household exposure is "categorically unforeseeable" and whether the law should recognize such claims. In so doing, it refused to carve out an entire category of cases from the general duty rule of California Civil Code Section 1714, which establishes a duty to exercise reasonable care for the safety of others, holding that employers or premises owners who use asbestos in the workplace owe a general duty of care to protect household members from secondary exposures.

Focusing on the general foreseeability of potential exposure, the court noted that a "reasonably thoughtful person making industrial use of asbestos during the time period at issue in this case (i.e., the mid-1970s) would take into account the possibility that asbestos fibers could become attached to an employee's clothing or person, travel to that employee's home, and thereby reach other persons who lived in the home."[13]

The timing of the alleged exposure was important given that broadly applicable regulations in the mid-1970s identified the potential health risks of asbestos traveling outside a worksite. The court found the 1972 OSHA regulations for employers using asbestos to be instructive, as it recognized the potential risk from asbestos-exposed clothing and required employers to take appropriate precautions – including providing showers and changing facilities for workers – to minimize exposure to employees and others.

Although the court noted that earlier regulatory standards and documentation in scholarly journals recognized the potential risk of take-home exposures to harmful substances, including asbestos, it did not decide the issue of whether a defendant responsible for a take-home exposure prior to the early 1970s would be subject to liability. This would present a factual question as to the potential breach of the general duty of care.[14]

Recognizing that its holding could open the floodgates of litigation, the court limited the duty to members of a worker's household, identified by the court as persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a "significant" period of time. Although it did not provide much guidance as to what period of time would be considered significant, the court stated that the limitation comported with its duty analysis in *Rowland v. Christian*,[15] where a finding of foreseeability was based on the fact that a worker can be expected to return home daily and have close contact with household members on a regular basis over many years.

The interplay between this duty analysis and the standard for evaluating whether the alleged exposures in a given case were a substantial factor in contributing to the risk of disease will likely be the subject of future litigation.

The court – in returning both cases to their respective trial courts – also noted that the take-home plaintiffs were still required to prove breach of duty, causation, and damages. It also stated that fact-specific affirmative defenses and exceptions (i.e., supervisory control vs. passive consumer; no liability for negligence of independent contractor) may be available to premises liability defendants.

In 2017, there were several cases applying *Kesner*. In *Petitpas v. Ford Motor Co.,*[16] a California appellate court applied *Kesner*

to an alleged take-home claim. Mrs. Petitpas filed several claims against Ford alleging secondary exposure that resulted from handling her husband's clothes. The court held that even post-*Kesner*, Mrs. Petitpas was not entitled to relief because, at the time of the exposure, she was merely Mr. Petitpas' non-live-in girlfriend. Therefore, the court "decline[d] to expand *Kesner's* duty to apply to a non-household member" because "[i]nviting a trial to determine whether a non-household member's contact with the employee was 'similar to the status of a household member' appears to be exactly what the Supreme Court was attempting to avoid with this bright-line rule."

Other California courts applying *Kesner* in 2017 to retroactively overturn summary judgment rulings include *Sandoval v. Am. Appliance Mfg. Corp.,*[17] (applying *Kesner* retroactively to reverse the award of summary judgment on a take-home negligence claim), and *Beckering v. Shell Oil Co.,*[18] (applying *Kesner* retroactively to reverse the award of summary judgment in favor of the premises owner and concluding that Shell, the premises owner, did owe a duty to plaintiff who was exposed to asbestos from the clothes of her late-husband.).

The court, in *Kesner*, held that products liability law was "inapposite" to its consideration of the take-home duty of employers and premises owners, in light of the different legal analysis employed, and the court did not address the take-home duty owed by one contractor to household members of another contractor. As a result, pre-*Kesner* decisions addressing both areas will conclude this section of the summary of California take-home duty decisions.

In *Grigg v. Allied Packing and Supply, Inc.*[19] an appellate court denied the motion for summary judgment of Owens-Illinois (O-I) in a strict products liability take-home asbestos case arising from a wife's alleged exposure to contaminated workplace clothing from 1950 to 1965. Rejecting O-I's no-duty argument, the court held that the relevant focus in assessing whether a product is defective is consumer expectation, not the knowledge of the scientific community. Strict liability, the court further noted, was developed to protect consumers by imposing a duty to manufacture defect-free products. It was not unreasonable, the court held, for the wife to expect that her husband could work with, or around, the defendant's products without contracting cancer. The case proceeded to trial and resulted in a jury verdict of more than $27 million.

In *Bennett v. A.W. Chesterton, Inc.,*[20] a trial court denied defendant Goodyear's motion for summary judgment in a take-home asbestos exposure case alleging exposure from 1961 to 1965 during the course of a former spouse's brake work; the plaintiffs asserted products liability claims for negligence and strict liability. Addressing the defendant's allegation that the asbestos hazard was not foreseeable prior to 1965, the court – in denying the summary judgment motion – noted the contrary testimony of Dr. Barry Castleman that the hazards of asbestos were known as early as the 1930s.

In *Sendle v. Pacific Gas and Elec. Co.,*[21] a trial court – in a case of first impression – denied a contractor's motion for summary judgment, holding that California Civil Code 1714 created a duty extending to contractors to protect family members from take-home asbestos exposure caused by the work of other contractors, such as the defendant, at a job site. The plaintiff's parents worked at a shipyard where the defendant's employees generated asbestos dust while working with asbestos-containing products used in ship construction from 1942 to 1945. *See also Valenzuela v. Allied Packing & Supply*,[22] where a contractor defendant's no-duty argument was similarly denied arising from take-home exposure from 1968 to 1978.

"The court held that, even though the Colorado Supreme Court has not yet recognized such a claim, the plaintiff's alleged take-home exposure was sufficient to survive a motion to dismiss."

❖ *Colorado* ❖

In *Mestas v. Air Liquid Systems Corp.*,[23] the United States District Court of Colorado, applying Colorado law, held that a take-home plaintiff's claims against multiple defendant product manufacturers could proceed over a 12(b)(6) challenge based on foreseeability principles. The complaint alleged that the plaintiff's father was exposed to asbestos at work and brought it home on his clothes, exposing the plaintiff from 1953 to 1974. The court held that, even though the Colorado Supreme Court has not yet recognized such a claim, the plaintiff's alleged take-home exposure was sufficient to survive a motion to dismiss.[24]

In *Gergely v. ACE Hardware*,[25] a 2016 case of first impression, the plaintiff's take-home premises liability claim against BNSF Railway was dismissed by the trial court, which applied a relationship test analysis pursuant to Colorado law. The plaintiff was the son of a BNSF employee who alleged exposure to asbestos brought home on his father's contaminated workplace clothing from 1948 to 1968. The court held that, under Colorado law, claims against premises owners can be asserted only by plaintiffs who are members of the class of persons – such as an invitee or licensee – to whom the Colorado Premises Liability Act was intended to protect. Here, the plaintiff was not a member of that class, so his claims against the premises owner were dismissed.

❖ *Connecticut* ❖

In *Reed v. 3M Co.,*[26] the trial court denied a motion for summary judgment in which the defendant contended that the plaintiff's alleged take-home asbestos exposure was not foreseeable. The plaintiff's father was an auto mechanic at defendant Stamford Motors, Inc. until 1966, during which time the plaintiff lived in the family home and was allegedly exposed to asbestos from his father's contaminated workplace clothing. In denying the defendant's motion, the court cited the plaintiff's submission of a number of studies published before 1966 that discussed the take-home asbestos risk, some going back as far as 1913, which sufficiently established foreseeability to overcome summary judgment.

❖ *Delaware* ❖

In June 2018 the Supreme Court of Delaware — in *Ramsey v. Georgia S. Univ. Advanced Dev. Ctr.*[27] — held a duty is owed by an employer of take-home plaintiffs, reversing itself in the process. In *Ramsey*, the now-deceased wife of an industrial facility employee sued the companies who provided asbestos containing products to her husband's employer. She alleged that the companies who supplied asbestos to her husband's workplace failed to warn her of a foreseeable harm that she would encounter while laundering asbestos tainted clothes that her husband brought home.

The Court held "[i]t is neither fair nor efficient to immunize employers who control employee exposure, are best positioned to inform employees of the risks of laundering asbestos-covered clothes, and are positioned to prevent dangerous at-home laundering altogether by requiring that employees' clothes stay on-site and be cleaned under conditions controlled for safety by the employer."[28] Although the Court noted "we take into fair account the legitimate concerns about exposing asbestos product manufacturers to uncabined liability to myriad plaintiffs in take-home asbestos exposure cases," it ultimately determined that injuries to some class of take-home plaintiffs was foreseeable enough to necessitate a "basis for recovery."[29]

❖ *Georgia* ❖

In a November 2016 decision, a unanimous Georgia Supreme Court, with one concurring opinion, ruled in *CertainTeed v. Fletcher*[30] that failure-to-warn take-home claims are not permitted against a product manufacturer; however, the court made clear that product defect take-home claims are permitted.

In *CertainTeed*, the plaintiff claimed she was exposed to asbestos from laundering her father's workplace clothes that were contaminated with asbestos from CertainTeed pipe from 1960 to 1977. The trial court dismissed the plaintiff's failure-to-warn and product defect claims. The appellate court reversed in part.

The Georgia Supreme Court reversed the appellate court's ruling on the plaintiff's failure-to-warn claim, holding that it is unreasonable to require that manufacturers provide warnings to take-home plaintiffs who do not see or use the products in question. Holding otherwise, the court said, would cause both the mechanism and scope of such warnings to be endless.

However, as noted, the court upheld the appellate court's ruling on the plaintiff's product defect claim, holding that CertainTeed failed to meet its burden of showing there was no evidence that its product was defective as designed.

In *CSX Transp., Inc. v. Williams*,[31] the Georgia Supreme Court barred take-home claims against employers brought by family members of employees that allegedly tracked asbestos home on their clothing. The court noted that the initial inquiry, with such claims, is whether a duty exists, which is a matter of public policy. The court held that, as a matter of public policy, no duty is owed to such claimants because they did not work at and were not exposed at the workplace.

❖ *Illinois* ❖

In another 2016 case, *Neumann v. Borg-Warner Morse TEC LLC,*[32] a federal district court – applying Illinois law – dismissed the plaintiff's case, where she alleged that her mesothelioma was caused by take-home exposure to asbestos from washing her son's clothing.

The asbestos-containing products at issue were friction paper and other materials supplied or manufactured by the defendants and used by the plaintiff's son as a gas station attendant and mechanic from 1970 to 1974. The plaintiff alleged that the defendants were negligent, breaching their duty to exercise ordinary care to avoid injury to the end users of their products.

The court looked to Illinois state court decisions to properly apply Illinois law on take-home claims. In doing so, it noted a split in Illinois state appellate courts on whether a duty is owed to such plaintiffs and that the Illinois Supreme Court had declined to address the issue.

In light of the split of authority, the district court applied federal common law, which provides that when faced with two opposing and equally plausible interpretations of state law, the interpretation that restricts rather than expands liability is to be followed. The plaintiff's claims would expand liability; thus, they were dismissed.

In *Simpkins v. CSX Transp., Inc.,*[33] the plaintiff alleged take-home asbestos exposure from her husband's workplace clothing during the years 1958 to 1964. She contended that the defendant – her husband's employer – owed her a duty to protect against the hazard. The trial court granted the defendant's motion to dismiss; however, the appellate court reversed and remanded, holding that the complaint sufficiently states a cause of action to establish a duty of care. The Illinois Supreme Court noted that the existence of a relationship is the touchstone of a duty analysis and that the existence of a relationship depends on the foreseeability of the injury, likelihood of the injury, magnitude of the burden of preventing the injury, and consequences of putting the burden on the defendant.

The court held that the plaintiff's conclusory allegation that the defendant knew or should have known of the take-home asbestos hazard failed to allege any specific facts supportive of that claim, rendering the complaint insufficient; however, because the defendant had not raised the issue with the trial court, the Illinois Supreme Court, in its remand, gave the plaintiff leave to amend the complaint.[34]

In *Nelson v. Aurora Equipment Company*,[35] an Illinois appellate court held that premises owners owe no duty to take-home plaintiffs. The court held that the threshold question in a premises liability case is duty, which requires an analysis of the nature of the relationship between the parties. In the case at bar, the court noted, there was no relationship between the take-home plaintiff and the defendant, where the plaintiff was the spouse of one man and the mother of another, both of whom she alleged exposed her at home through their workplace clothing.

In *Estate of Holmes v. Pneumo Abex, L.L.C.,*[36] a state appellate court dismissed the take-home plaintiff's failure-to-warn claims against two manufacturers of asbestos-containing products. The court held that the plaintiff failed to establish that the danger of take-home asbestos was foreseeable in 1962 or 1963 when the workplace clothing was worn home and laundered there. Key to that determination was the testimony of the plaintiff's expert Dr. Barry Castleman, who stated that the first epidemiological study establishing the danger of take-home exposure was published in 1964. *See also Rodarmel v. Pneumo Abex*,[37] where the same appellate court overturned a $2.5 million judgment, holding that no duty was owed during an earlier exposure period for the same reasons cited in Holmes.

❖ *Indiana* ❖

In *Stegemoller v. A.C. & S., Inc.,*[38] the Indiana Supreme Court held that the wife of a union insulator was a "consumer" under Indiana's Product Liability Act (the Act) and could sue the manufacturers of asbestos products for her injuries from take-home asbestos exposure. The court explained that the definition of "consumer" under the Act included any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

The court noted that the normal, expected use of asbestos products entails contact with its "migrating and potentially harmful residue." It further reasoned that clean-up was encompassed in product use, including cleaning asbestos off clothing after work. Thus, the plaintiff had standing to sue the defendant manufacturer under the Act. *See also Martin v. A.C. & S., Inc.,*[39] where the court – in a ruling issued the same day as *Stegemoller* – also held that the plaintiff's decedent, a spouse allegedly exposed to asbestos through her husband's workplace clothing, had standing to bring claims under the Act.

❖ *Iowa* ❖

In *Van Fossen v. MidAmerican Energy Co.,*[40] the Iowa Supreme Court affirmed an award of summary judgment in favor of two companies sued for take-home exposure by the wife of an employee of an independent contractor. The court held that no duty of reasonable care is owed to a member of the household of an employee of an independent contractor. To hold otherwise, it further noted, would result in a drastic expansion of liability that would be incompatible with public policy.

❖ *Kansas* ❖

Under K.S.A. 60-4905, Kansas plaintiffs cannot maintain an asbestos claim against a premises owner based on exposure to asbestos if the exposure did not occur while the "individual was at or near the premises owner's property."

❖ *Kentucky* ❖

In *Martin v. Cincinnati Gas and Electric Co.,*[41] the 6th Circuit U.S. Court of Appeals, applying Kentucky law, affirmed the trial court holding that a premises owner and a manufacturer owed no duty under Kentucky law to a take-home plaintiff.

The plaintiff alleged that his father brought asbestos particles home on his workplace clothing during the father's employment – which concluded in 1963 – with the utility where GE products were used. Focusing on the foreseeability of harm at the time of injury, the court held that the plaintiff must show that the employer knew or should have known of the danger of take-home asbestos exposure during the time his father was employed there; however, it found no such evidence, noting that the evidence

"Given its focus on foreseeability, the decision – which never addressed the issue of duty – implicitly added Alaska to the list of 'duty' states."

introduced at the trial court showed that the first studies regarding the dangers of take-home exposure were not published until 1965, two years after the father's employment had ended. The court applied the same reasoning to grant summary judgment in favor of the manufacturer defendant.

❖ *Louisiana* ❖

In a 2016 take-home duty decision, *Sutherland v. Alma Plantation, L.L.C.,*[42] a Louisiana appellate court overturned the trial court's grant of summary judgment for the defendant premises owner. The take-home plaintiff alleged exposure to asbestos from contaminated workplace clothing between 1964 and 1972, when her husband was employed as an independent contractor at the defendant's plant. In rejecting the defendant's no-duty argument, the court noted the existence of expert testimony and applicable statutes and regulations, including the 1950s Walsh-Healey Act, which required workplace precautions to avoid take-home contamination.

In another 2016 take-home duty case, *Williams v. Placid Oil Company*,[43] a Louisiana trial court judge awarded $7 million to the family of a spouse who alleged asbestos exposure in the mid-1970s from her husband's workplace clothing as a result of his work on and around defendant manufacturer's compressors. The court, applying Louisiana products liability law, determined that the defendant was aware of the dangers of asbestos in the 1950s but failed to provide a warning with its products. This judgment was affirmed on appeal in August 2017.[44]

In *Catania v. Anco Insulations, Inc.,*[45] a federal district court, applying Louisiana law, held that an employer owed a duty of care to the niece of three of its employees. The niece spent "significant time" at the homes of the uncles, where she was exposed to asbestos from their workplace clothing. Applying Louisiana products liability law, the court also held that a duty was owed to the niece by a product manufacturer defendant.

Both defendants, in *Catania*, contended that the take-home danger was not foreseeable at the time of the alleged exposure.[46] In rejecting that argument, the court cited the existence of the 1950s Walsh-Healey Act as putting the defendants on notice of the hazards posed by asbestos, including the danger of off-site contamination from workplace clothing. The court also rejected the argument that because she was not an "immediate household family member," no duty was owed. Noting the nature of the niece's relationship with her uncles, the court held that it was sufficiently similar for a duty to extend to her.

In *Chaisson v. Avondale Industries, Inc.,*[47] a Louisiana appellate court upheld a jury's award for plaintiff of more than $3.8 million, where the alleged take-home exposure occurred from 1976 to 1978. The court noted that the exposure occurred after the issuance of the 1972 OSHA regulations pertaining to the dangers of take-home exposure from contaminated clothing. Thus, the court held, the danger was foreseeable, so a duty was owed by the defendant employer to protect the plaintiff, who was the spouse of the defendant's employee.

In *Zimko v. American Cyanamid*,[48] an appellate court – applying a foreseeability test to a premises liability claim – rejected the defendant's contention that it owed no duty to the take-home plaintiff who alleged exposure through his father's workplace clothing from 1945 to 1966. The court cited the 1950s Walsh-Healey Act as evidence that the hazard was foreseeable.[49]

❖ *Maine* ❖

There is no state court ruling in Maine on the issue of whether a duty of care is owed to prevent take-home exposure; however, Maine law on that duty was discussed in the federal appellate case of *In Dube v. Pittsburgh Corning*.[50] The issue on appeal in *Dube* was the discretionary function exception to the Federal Tort Claims Act brought by manufacturers who were seeking contribution from the U.S. Navy. The contribution sought was for settlement payments made to the daughter of a private employee who was a pipe insulator at a Navy facility, alleged to have exposed his daughter to asbestos from his contaminated workplace clothing from 1959 to 1973.

In addressing the issue on appeal, the 1st Circuit U.S. Court of Appeals discussed the applicability of Maine law to take-home claims against premises owners. It noted that the trial court held that the Navy was negligent in its operation of the shipyard and such negligence was the cause of the daughter's asbestos-related death, as the Navy knew, or should have known, no later than 1964 of the dangers posed to family members of those that

worked at its shipyard. As such, the trial court found the Navy one-third liable for the daughter's injuries; however, as the 1st Circuit noted, the trial court ultimately held that the Navy was immune from liability by application of federal law.

After a considerable analysis of the evidence presented at trial regarding the Navy's knowledge and failure to provide warnings or take any protective action to avoid take-home contamination through workplace clothing, the 1st Circuit held that the trial court erred in holding that the Navy was immune under federal law and remanded the case for entry of judgment against the Navy.

❖ *Maryland* ❖

In *Georgia Pacific v. Farrar*,[51] the Maryland Court of Appeals – the state's highest court – held that the defendant product manufacturer owed no duty to the take-home asbestos plaintiff, who alleged asbestos exposure from laundering her grandfather's workplace clothing in 1968 and 1969. The court held that a connection between asbestos-related disease and take-home exposure from workplace clothing was not generally recognized until the 1972 OSHA regulations, which addressed the issue of offsite contamination from workplace clothing. Even then, the court noted, the 1972 regulations provided only minimal written justification and lacked reference to any supportive study. The court further stated that there was no practical way for manufacturers to warn the plaintiff and others exposed off-site through workplace clothing, given the absence of computers and social media at that time. Thus, the court held that imposing a duty that either cannot easily be implemented or would have no practical effect if implemented, would be poor public policy.

In the 2017 case of *Hiett v. AC & R Insulation Co.,*[52] Maryland's intermediate appellate court applied Farrar and affirmed a summary judgment order in favor of a take-home defendant. The plaintiff, Daniel Hiett,[53] claimed that he developed mesothelioma due to exposure from his father's "asbestos-laden" clothes. Daniel's father was a worker/bystander[54] at a facility that contained asbestos products prior to 1972. The court held that defendant did not have a duty to warn the take-home plaintiff because "even if AC & R had actual knowledge of the dangers of such exposure, there was no practical way that any warning given to the worker-bystander could have avoided the danger to the household member in this case." Therefore, because a duty "cannot feasibly be implemented or, even if implemented would have no practical effect,"[55] summary judgment was appropriate.

In *Adams v. Owens-Illinois, Inc.,*[56] a case cited with approval in Farrar, a state appellate court held that an employer owed no duty to warn an employee's wife of the take-home hazards of asbestos from washing her husband's workplace clothing. The court held that the take-home claim asserted against the employer was based on negligence law that requires proof of a legally cognizable duty owed. Here, the wife was a mere stranger to the employer and, thus, was owed no duty. To hold otherwise would permit anyone who came into close contact with the employee, such as passengers in the employee's automobile, to sue the employer.

And in *Sherin v. Crane-Houdaille, Inc.,*[57] a federal District Court applying Maryland products liability law awarded summary judgment to a manufacturer of joint compound and against failure-to-warn claims arising from take-home asbestos exposure from 1968 to 1976. Following *Farrar*, the court cited the failure to provide evidence that better warnings would have prevented the alleged exposure of the wife from the contaminated workplace clothing she washed at home.

While not take-home asbestos exposure cases, two other Maryland rulings are of note because they follow the reasoning of the *Farrar* decision. In a 2017 true "bystander" case — *Rockman v. Union Carbide Corp.*[58] — plaintiff was a prominent local attorney allegedly exposed while studying for the bar exam at his home during its remodeling. A Maryland trial court granted summary judgment in favor of a defendant, holding that since "no evidence indicates that additional warnings by Union Carbide could have had a 'practical effect' on preventing Mr. Rockman's alleged bystander exposures," summary judgment was appropriate.[59] And in *Doe v. Pharmacia & Upjohn Co., Inc.*,[60] the court held — on a certified question from a federal court – that no duty was owed the wife of an employee, where the take-home hazard at issue was an HIV virus.

❖ *Michigan* ❖

In *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller et al. v. Ford Motor Company)*,[61] the Michigan Supreme Court, reviewing a certified question from a Texas state appellate 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 to 1965. 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. 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 into contact with someone who has been simply on the premises owner's property would expand traditional tort principals beyond manageable bounds.

❖ *New Jersey* ❖

In its unanimous 2016 decision in *Schwartz v. Accuratus*,[62] the New Jersey Supreme Court expanded the pool of potential take-home plaintiffs beyond spouses, removing family or household member limitations. Although the take-home contaminant at issue was not asbestos, the decision is clearly applicable to asbestos claims.

In *Schwartz*, the plaintiff alleged that her chronic beryllium disease was caused by beryllium brought home on the contaminated workplace clothing of her husband, both while she was his girlfriend (and a frequent visitor to his apartment) and after they were married and living together. She also alleged exposure from her husband's roommate, who occupied the same apartment unit with her boyfriend before his marriage to the plaintiff and with both of them after their marriage. The plaintiff contended that at all relevant times she helped wash contaminated clothing and towels and helped clean the apartment.

While the plaintiff also asserted products liability claims, the only question pending before the New Jersey Supreme Court pertained to her premises liability claims and the duty owed, if any, during her alleged exposure while a girlfriend, guest, and roommate. On that issue, the trial court denied her non-spousal claims, citing the seminal *Olivo v. Owens-Illinois, Inc.,*[63] which permitted take-home claims by a spouse against a premises owner. Specifically, the trial court held that the duty recognized was focused on the particularized foreseeability of the harm to the plaintiff's wife, who ordinarily would perform typical household chores, such as laundering the workplace clothes worn by her spouse.

The trial court's ruling was appealed to the 3rd Circuit U.S. Court of Appeals, which certified the following question to the New Jersey Supreme Court:

"Does the premises liability rule set forth in *Olivo* [citation omitted], extend beyond providing a duty of care to the spouse of a person exposed to toxic substances on the landowner's premises, and if so, what are the limits on that liability rule and the associated scope of duty?"[64]

As to the certified question, the court refused to restrict take-home liability to spouses. In so ruling, it stated that its *Olivo* decision was not based on Eleanor Olivo's legal status: "*Olivo* does not state, explicitly or implicitly, that a duty of care for take-home toxic-tort liability cannot extend beyond a spouse. Nor does it base liability on some definition of 'household' member, or even on the basis of biological or familial relationships."[65]

"Last year provided several interesting take-home rulings against a backdrop of a continued decline in take-home claims generally."

In addressing the second half of the certified question, the court rejected any bright line test in favor of a case-by-case approach that includes a "refined analysis for particularized risk, foreseeability, and fairness."

Schwartz returned to the 3rd Circuit, which remanded it to the trial court for further handling. On March 30, 2017, the trial court reconsidered its dismissal, and in light of the New Jersey Supreme Court's holding, it denied the defendant's motion to dismiss, holding the allegations against it are sufficient at that stage of the proceedings.[66]

In *Kaenzig v. Charles B. Chrystal Co. Inc.,*[67] a state appellate court upheld a $1.6 million verdict for a take-home plaintiff and against a talc supplier. Plaintiffs argued that their son's mesothelioma was caused by take-home exposure – from 1965 to 1975 – to asbestos from the contaminated talc his father brought home on his person and clothing from his work at a facility that manufactured cosmetic talcum products. The defendant alleged that the plaintiff failed to provide sufficient evidence in support of the failure-to-warn claims asserted by plaintiffs. The appellate court, in rejecting the appeal on that issue, held that sufficient evidence was presented at trial showing the defendant knew that its raw talc contained asbestos – during the relevant time period – and was dangerous. That danger extended to those exposed off site through workplace clothing. Thus, the court held, the lack of a warning rendered the talc defective.

A state appellate court, in *Anderson v. A.J. Friedman Supply Co., Inc*.,[68] upheld a $7.5 million verdict for a take-home plaintiff who laundered her husband's asbestos-contaminated work clothes from 1969 to 2003. The husband was an employee of Exxon – the sole remaining defendant at the time of trial – during the relevant time period. Citing *Olivo*, the court held that employers owe a duty of care to employee's spouses for injuries caused by take-home asbestos exposure, and sufficient evidence was presented to show that the defendant was aware of the hazard of take-home exposure but failed to take sufficient precautions to protect plaintiff from it.

❖ *New York* ❖

In Matter of New York City Asbestos Litig. (*Holdampf, et al. v. A.C. & S. Inc., et al. and the Port Authority of New York and New Jersey*),[69] the Court of Appeals for New York – the state's highest court – denied the take-home asbestos exposure claim of a wife for alleged exposure from 1971 to 1996, asserted against her hus-

band's employer. The court held that the initial analysis required a determination of whether any duty was owed by the defendant to the wife, not whether plaintiff's alleged exposure and injury were foreseeable.

Foreseeability, the court noted, is only considered once a duty is determined to exist. Duties arise from a special relationship, such as master-servant or premises invitee, 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 employer/premises owner. To hold otherwise, the court further noted, would be unworkable in practice and unsound as a matter of public policy.

In so ruling, it rejected its sister state's holding in *Olivo*, noting New Jersey's greater focus on foreseeability, as well as the fact that the defendant in the instant case – unlike *Olivo* – did take precautions by providing uniform and laundry service that plaintiff's husband selectively utilized.

In a New York state trial ruling, *In re Eighth Judicial District Asbestos Litigation* (*Rinfleisch v. AlliedSignal, Inc.*),[70] a wife's take-home asbestos exposure claim – alleging exposure from washing workplace clothing from 1984 to 1990 – was dismissed, citing In re New York Asbestos Litigation with approval. The court was not swayed by the plaintiff's evidence that the employer/premises owner did not comply with the 1972 OSHA regulations regarding steps to be taken to avoid take-home exposures.

❖ *North Dakota* ❖

In a 2016 case of first impression, *Palmer v. 999 Quebec, Inc.,*[71] the North Dakota Supreme Court unanimously held that the defendant employer owed no duty to warn the son of its employee of the take-home hazards of asbestos. The son was allegedly exposed to asbestos from his father's workplace clothing from 1961 to 1965 and again from 1974 to 1999.

The trial court granted summary judgment for the defendant, holding that no duty was owed to the son by the employer because there was no special relationship between them.

The North Dakota Supreme Court held that whether a foreseeability or relationship test was employed, no duty was owed. As to the former, the court said no evidence was presented to the trial court showing that the defendant had knowledge of the hazard at issue during the father's first period of employment. As to the second period of employment, there was no evidence of any asbestos use that would have been tracked home on the father's clothing. In regard to the relationship test, the court agreed with the trial court's conclusion that there simply was no special relationship between the defendant and its employee's son.

❖ *Ohio* ❖

In *Boley v. Goodyear Tire & Rubber Co.,*[72] the Ohio Supreme Court held that O.R.C. 2307.941 barred the plaintiff's take-home premises liability claim arising from a wife's laundering of her husband's asbestos-contaminated workplace clothing from 1973 to 1983. The court noted that the legislation was part of a revision of Ohio law to address what the Ohio General Assembly characterized as an unfair, inefficient asbestos personal injury litigation system that is imposing a severe burden on litigants and taxpayers.

O.R.C. 2307.941 states that "a premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property unless the exposure occurred at the owner's property."

That language, when taken in context of the legislative intent, the court held, bars all tort actions against premises owners relating to exposure originating from asbestos on the premises owner's property.

❖ *Oklahoma* ❖

The take-home case law in Oklahoma has been developed by federal courts, as no Oklahoma state court has directly ruled on the issue of the duty of care; those federal courts have ruled that no duty is owed, both in the context of take-home claims asserted against employers and product manufacturers.

The duty of care in the context of claims asserted against an employer for alleged take-home asbestos exposure to the employee's spouse was addressed in *Bootenhoff v. Hormel Foods Corp.,*[73] where it was claimed that Norma Bootenhoff was exposed to asbestos from her husband Eugene's workplace clothing.

Eugene was employed by predecessors of defendant International Paper Corporation (IPC) from 1958 to 1966 and again from 1972 to 1976. It was alleged that he first worked with or around asbestos at his place of employment in 1959 when he removed and installed pipe insulation on two separate occasions for 1-2 hours each time. All other exposures were alleged to have occurred from being around asbestos as a supervisor beginning in 1966.

The employer moved for summary judgment, contending it owed no duty to its employee's spouse. In granting the employer's motion, the federal trial court held that under Oklahoma law, a duty of care analysis is multi-factored; however, the most important factor is foreseeability. Key in a determination of foreseeability is the type, frequency, and time period of exposure. In that determination, the court rejected the plaintiff's offer of the 1950s Walsh-Healey Act and 1972 OSHA regulations as evidence. As to the former, it did not address take-home exposures, and as to the latter, the regulations addressing take-home exposures

were only applicable where fiber levels at the workplace were exceeded, and there was no such evidence presented as to the husband's place of employment.

The court similarly rejected the plaintiff's offer of medical evidence as showing foreseeability, noting that the studies offered did not address the type of exposures at issue, which the court described as being only "intermittent" and "non-occupational." The court also rejected claims that IPC had actual knowledge of the take-home danger, noting that IPC's knowledge showed only a general understanding of asbestos hazards, not a specific hazard of take-home exposure of the type and manner alleged to have injured Norma Bootenhoff.

The same court – one day later – awarded summary judgment in favor of two other employer defendants (the Meed Defendants)[74] and a boiler manufacturer, Cleaver-Brooks.[75] In its rulings, the court cited plaintiffs' failure to offer any additional foreseeability evidence and their lack of any evidence of direct asbestos exposure to Eugene Bootenhoff while he was employed with Meed or from a Cleaver-Brooks boiler.

In the *Bootenhoff* rulings referenced above, the court cited other federal court decisions as precedent, including *Rohrbaugh v. Owens Corning Fiberglas Corp.,*[76] where the 10th Circuit U.S. Court of Appeals vacated and remanded a jury's award in favor of plaintiffs who alleged their mother died as a result of exposure to asbestos from Owens Corning Fiberglass (OCF) products tracked home on her husband's workplace clothing.

The 10th Circuit, in *Rohrbaugh*, held that Oklahoma products liability law extends to ordinary purchasers and users of products, but here it was clear the mother was not a purchaser or user of the product. The court also held that the defendant could not have known the danger associated with its asbestos-containing products before 1969, the last date of any alleged exposure. Key in that determination was the lack of evidence that the types of asbestos in the products at issue – amosite and chrysotile – were known to cause mesothelioma prior to 1969.

On remand the plaintiffs offered no additional evidence, and the trial court granted OCF's motion for summary judgment. Plaintiffs appealed. In *Rohrbaugh v. Celotex Corp.,*[77] citing law of the case, the 10th Circuit upheld the trial court's dismissal of OCF.

The final case take-home duty cited with approval in *Bootenhoff* was *Carel v. Fibreboard Corp.*[78] In *Carel*, the 10th Circuit – citing both of its *Rohrbaugh* decisions as precedent – upheld the trial court's grant of summary judgment in favor of the defendants and against the plaintiffs' product liability claims arising from Mary Ann Lowry's alleged exposure to asbestos as a result of washing her spouse's workplace clothing from 1950 to 1977.

❖ *Pennsylvania* ❖

In *Gillen v. Boeing Co.,*[79] the United States District Court for the Eastern District of Pennsylvania, refused to extend a duty in premises and employer liability cases to take-home plaintiffs under Pennsylvania law, based in large part on what the court referenced as "the specter of limitless liability." The court explained that while no Pennsylvania appellate court had directly considered the issue, its holding was consistent with lower court decisions applying Pennsylvania negligence law.

The plaintiff alleged that her mesothelioma was caused by asbestos tracked home on her husband's workplace clothing that she laundered from 1966 to 1970 and 1973 to 2005, when he was employed as a machinist with defendant Boeing at its facility.

The court's analysis examined the relationship between the parties, the social utility of the actor's conduct, the nature of the risk imposed and foreseeability of the harm incurred, the consequences of imposing a duty on the actor, and the overall public interest in the proposed solution. It held that the relationship between the parties – which were "legal strangers" under Pennsylvania law – weighed in the defendant's favor, in contrast to the social utility analysis, which it called "equipoise" (not favoring either side).

On the nature of the risk and foreseeability of the harm – which the court noted was not a dominant factor under Pennsylvania law – the court held that the plaintiff failed to establish that the defendant knew, or should have known, that the plaintiff could be exposed to asbestos from washing her husband's workplace clothing. Thus, this factor weighed in the defendant's favor.

In considering the consequences of imposing a duty on the defendant and overall public interest in the proposed solution, the court reasoned that the imposition of duty would mean that liability for take-home exposure would essentially be infinite, noting that the majority of courts had declined to recognize such a duty. Thus, these considerations also weighed in the defendant's favor.

In *Hudson v. Bethlehem Steel Corp.,*[80] the plaintiff brought strict liability and negligence claims against defendant Bethlehem Steel based on his late wife's exposure to asbestos from laundering her father's contaminated workplace clothing for some 20 years, ending around 1960. The trial court granted the defendant's motion for summary judgment, holding that strict liability could not be asserted where – as here – a defendant is not a seller or supplier of the asbestos product at issue. With respect to the negligence claim against Bethlehem, the court concluded that foreseeability could not be established in light of the time period of the alleged exposure because the first sci-

entific publication addressing a take-home asbestos risk was not published until 1965. Here, the court held, there was no evidence presented that Bethlehem had any knowledge of such risk before 1960.

A different Pennsylvania trial court reached a different result in *Siemon v. A.O. Smith*,[81] where it denied a premises-owner defendant's motion for summary judgment that argued that it owed no duty to the take-home plaintiff, a spouse alleging exposure through her husband's workplace clothing. The court held that, unlike Hudson, the plaintiff did provide evidence that the defendant knew or should have known of the take-home danger during the relevant time period (1952-1983).[82]

A Delaware trial court, applying Pennsylvania law in *In re Asbestos Litig.* (*McCoy v. PolyVision Corp*.),[83] granted summary judgment to a premises owner/employer, holding that the defendant did not owe a duty to the take-home plaintiff, a spouse who alleged take-home asbestos exposure from her husband's workplace clothing from 1974 to 1983. The court held that under Pennsylvania law, many factors must be examined to determine whether a duty exists; however, the relationship analysis is the "most persuasive factor" in that analysis, and here the plaintiff and the defendant were mere "legal strangers."

See also Jesensky v. A-Best Prod. Co.,[84] where a federal magistrate's grant of summary judgment to premises defendant Duquesne Light Co. was adopted by the trial court in a case brought by the daughter of a tradesman who worked in the 1950s at the Shippingport Atomic Power Plant, operated by the defendant.[85]

❖ *Rhode Island* ❖

In a case of first impression issued in April 2018, a Rhode Island appellate court held an employer may owe a duty to an employee's family members under application of a foreseeability test."[86] In *Nichols,* the wife of a former Crane Co. employee developed and succumbed to mesothelioma that was allegedly caused by her exposure to asbestos while laundering her husband's work clothes.

Even though it noted that the existence of a take-home duty must be analyzed on a case-by-case basis, the court held that the Plaintiffs in the instant case had done enough to show that a duty was owed to them. In coming to this conclusion, the court weighed factors for and against the existence of a take-home duty. First, the court held that injury due to take-home exposure was foreseeable during the time period of the alleged exposure (late 1970s), which weighed in favor of finding a duty.[87] Second, the court noted that there was a close connection between defendant's allegedly negligent conduct (not mandating protective clothing etc.) and the injury at issue, which again weighed in favor of a duty.[88] But, the court also noted that it "joins other jurisdictions that have addressed and rejected the argument that public policy concerns require the finding that no duty was owed in take-home exposure cases."[89] The court ultimately denied Crane Co.'s Motion for Summary Judgment.

❖ *Tennessee* ❖

In *Satterfield v. Breeding Insulation Co.,*[90] the Tennessee Supreme Court held that a duty extended to the take-home plaintiff, whose father was alleged to have exposed her through asbestos-contaminated workplace clothing during the 1970s and 1980s. The court held that during that period the dangers of asbestos were known and OSHA regulations existed to help guard against take-home exposure; however, the defendant failed to warn or follow the applicable regulations.

A 2017 Tennessee appellate court ruling, *Stockton v. Ford Motor Co.,*[91] applied *Satterfield* in addressing the duty owed to a take-home plaintiff under Tennessee law. Although never directly working with asbestos-containing products, the plaintiff, Mrs. Stockton, was allegedly exposed to asbestos when she cleaned an auto repair shop twice a week and when she laundered her husband's clothes. The court remanded the case on issues of breach and causation but affirmed the trial court's duty determination: "[b]ased on the holding in Satterfield, which adopts (in part) the Restatement (Third) of Torts, we conclude that the court's decision to allow the case to go forward on the element of duty was not error."

Applying Tennessee law in *Millsaps v. Aluminum Co. of Am.,* MDL 875,[92] the United States District Court, Eastern District of Pennsylvania, held that take-home asbestos-exposure plaintiffs need not be residents of the same household to establish a duty of care. Citing Satterfield, the court held that the class of foreseeable people includes persons who "regularly and for extended periods of time" come into close contact with the asbestos-contaminated workplace clothing of employees.

The court denied the defendants' motion for summary judgment because of evidence presented that the plaintiff spent a great deal of time at her father-in-law's home, hugged him while he was in work clothes, and did laundry, including her father-in-law's dusty work clothes, at the home.

❖ *Texas* ❖

In *Alcoa Inc. v. Behringer*,[93] a Texas appellate court overturned a multimillion-dollar jury award for a take-home plaintiff, holding that the risk was not foreseeable by the defendant employer at the time of her exposure in the 1950s. The take-home plaintiff was the wife of an Alcoa employee who allegedly tracked home asbestos on his clothing that she washed from 1951 to 1955 and again from 1957 to 1959, which asbestos was from insulation he worked around at Alcoa's plant in Rockdale, Texas.

The court noted that under Texas negligence law, a legal duty must be found to exist, and, of the several factors in that

analysis, the most important is foreseeability, which requires a showing of both the foreseeability of the general danger and that a particular plaintiff, or one similarly situated, would be harmed by that danger.

Applying that standard, the court reviewed the evidence, which showed that the first study of non-occupational exposure was in 1965 and the first regulations regarding it were by OSHA in 1972. The court rejected the 1950s Walsh-Healey Act and a 1958 Texas workplace atmospheric contamination regulation as evidence of foreseeability of the hazard because they pertained only to worker/workplace safety, not non-occupational exposures.

In so ruling, the court – in a footnote – said Alcoa's status as an employer differed from that of a manufacturer of an asbestos-containing product, which is subject to strict liability that does not require proof of foreseeability.[94]

See also Exxon Mobile Corp. v. Altimore,[95] where an appellate court held that the plaintiff's take-home claim against her husband's employer was not foreseeable during the time period at issue, which exposure period ended in 1971.

In *Fuller-Austin Insulation Co., Inc. v. Bilder*[96] a Texas appellate court – applying Texas products liability law – affirmed a take-home[97] plaintiff's judgment against an insulation supplier.

Plaintiff alleged her step-father brought asbestos home on his clothing as a result of his use of the insulation during the 1956-'60 time period, which she further alleged was the cause of her mesothelioma. The jury held the supplier was strictly liable for a defect its marketing of the asbestos insulation and negligent for its failure to warn of the insulation's dangers.

The appellate court held that under Texas products liability law, recovery is not limited to users and consumers; rather, it extends to innocent people — like the step-daughter — to whom it was foreseeable could be exposed the product's hazards. The appellate court further held that in the underlying case, sufficient evidence was presented showing the risks posed by asbestos were foreseeable in '56-'60. Thus, a duty to warn of the product's dangers existed, which the supplier failed to provide.[98]

❖ *Virginia* ❖

In October of 2018, the Supreme Court of Virginia held, for the first time, that an employer "owed legal duty of care to employer's daughter, actionable in negligence."[99] In *Quisenberry*, Plaintiff (who was the daughter of a longshoreman), was diagnosed with malignant pleural mesothelioma in 2013 and succumbed to the illness three years later. The Federal Court in the Eastern District of Virginia certified a question to Virginia Supreme Court because Virginia Law was previously unsettled on the existence and scope of an employer's duty to the family member of an employee.

The Court relied on several distinct points in determining there was indeed a duty owed by an employer to the daughter of an employee. First, it concluded that "[t]he pleadings support a 'recognizable risk of harm' to a class of persons 'within a given area of danger' of defendant's conduct, including Wanda [the daughter] and the class of persons similarly situated."[100] Second, the court rejected an argument from the shipyard that "no duty can lie because asbestos dust traveled on the backs of employees," holding that this argument was simply a "distinction without a difference."[101]

Finally, the Court attempted to soften the novel nature of its holding by claiming "[t]his case relies on an existing duty of care, firmly established in Virginia law and well-rooted in common law, establishing liability to those members of a class of persons facing a recognizable risk of harm from one's conduct."

Nevertheless, for the first time, the highest Court in Virginia has recognized the existence of a take-home duty so long as the plaintiff alleging the breach of the duty is part of an employee's family.

❖ *Washington* ❖

In *Jack v. Borg-Warner Morse Tec, LLC*,[102] plaintiff asserted a take-home claim – in federal district court applying Washington law – against Union Pacific, who employed plaintiff's father. The plaintiff alleged take-home exposure through his dad's workplace clothing[103] in the late 1940s — and into the 1950s — concluding when the plaintiff graduated from high school in 1955. Citing *Hoyt*, infra, the court held that the danger of take-home exposure was not foreseeable in the 1950s.

In a January 2017 unpublished opinion in *Estate of Brandes v. Brand Insulations, Inc.,*[104] a Washington appellate court affirmed a jury's 2015 award of $3.5 million based on the asbestos-related injuries to the decedent arising from her laundering of her husband's contaminated workplace clothing from 1971 to 1975. The award was against defendant Brand Insulations, a contractor that selected, ordered, supplied, and sold asbestos-containing insulation at the husband's workplace. The husband had both direct exposure (from cutting it) and bystander exposure (during its installation) to the insulation in question. The insulation came to Brand with warnings; however, the court noted that Brand did not pass the warnings on to anyone at the workplace and took no steps to ensure that its installation did not create a hazard to others.

The defendant contended that Washington law extended a take-home duty only where the defendant did not have control over the actions of the individual exposed to asbestos, and it further argued that to extend the duty beyond that would result in a slippery slope of liability.

Rejecting Brand's argument, the court held that a duty is owed under Washington negligence law where, as here, evidence (medical, scientific, and industry/trade literature) establishes that the risk to the decedent was foreseeable at the time in question.

In *Rochon v. Saberhagen Holdings Inc.,*[105] a Washington appellate court upheld the trial court's dismissal of plaintiff's take-home asbestos exposure claims based on premises and employer liability; however, the appellate court reversed the trial court's holding that no duty of care was owed under a general negligence theory.

The plaintiff was the spouse of an employee of a predecessor-in-interest of Kimberly-Clark from 1956 to 1996, where it was alleged that he was exposed to asbestos that he tracked home on his clothing, which his spouse laundered. In upholding the dismissal of the claims against Kimberly-Clark based on premises and employer liability, the court held that there was no showing of a special relationship between the plaintiff and the defendant that would create a duty of care extending to her.

In reversing and remanding on the plaintiff's general negligence claim, the court stated that the trial court improperly excluded a consideration of foreseeability from its duty analysis. Under Washington law, it noted, foreseeability of harm is part of the determination of whether a duty exists, not something to be considered separate and apart from it. Thus, the question to be resolved by the trial court is whether the defendant operated and maintained its facility in an unsafe manner. That analysis requires considering whether the defendant knew or should have known of the hazards of asbestos during the relevant time period, what precautions it should have taken to prevent any resulting harm, and whether the plaintiff was a foreseeable victim.

In *Arnold v. Saberhagen Holdings, Inc.,*[106] an appellate court reversed the trial court's dismissal of take-home asbestos exposure claims asserting premises liability asserted by the wife and son of an insulator who worked at defendant's shipyard in the 1960s.

While the focus of the appellate decision was on the defendant's duty to the employee of a contractor, the court held that questions of material fact existed as to take-home claims. Interestingly, the court held that the Walsh-Healey Act did not create a duty on the part of the shipyard defendant that extends to third parties like the wife; however, a Washington workplace statute may and can be considered on remand.

In *Hoyt v. Lockheed Shipbuilding Co.,*[107] the United States District Court, Western District of Washington – applying Washington law – awarded summary judgment to an employer defendant in a take-home asbestos exposure case alleging take-home asbestos exposure from 1948 to 1958.

The plaintiff claimed that exposure resulted from her contact with the workplace clothing, tools, and hair of both her father and ex-husband who both worked for the same employer at the same shipyard. She further claimed that the employer was negligent in failing to provide its employees with a safe workplace environment and that it was reasonably foreseeable that such negligence would result in exposure to employees' family members when the clothing came home.

The District Court – after first noting there was no Washington State Supreme Court ruling on the issue – looked at Washington state appellate decisions and those from other jurisdictions. It cited *Rochon* and *Arnold* in support of the proposition that the Washington Supreme Court would recognize a company's duty to take reasonable precautions to protect family members from take-home asbestos exposure.

Turning to the question of the foreseeability of harm in the case before it, the court held, as noted, that no duty was owed to the plaintiff in light of the fact that the last alleged exposure was in 1958. In so holding, it rejected the plaintiff's offering of the Walsh-Healey Act, a report of Dr. Barry Castleman, and 1945 shipyard safety conference minutes as evidence that the defendant knew or should have known, since the first studies of an asbestos take-home hazard did not appear until the 1960s and the regulations and conference minutes related only to occupational hazards to workers. It held that there was no evidence showing any general or specific knowledge Lockheed should have had or did have of the take-home hazard during the relevant time period.

It also rejected the plaintiff's argument that even if Lockheed could not have foreseen that she would be harmed by take-home exposure, the harm suffered was within a foreseeable "general field of danger." The trial court held that foreseeability is based on the risk posed by the particular hazardous material in question to the class of people in the plaintiff's position, not the risks posed by all hazardous materials to all people.

The plaintiff appealed the District Court's dismissal of her claim. In an unpublished opinion, the 9th Circuit U.S. Court of Appeals affirmed the trial court on the lack of foreseeability issue but did not reach the issue of whether Washington law recognizes a duty of care to prevent harm from take-home asbestos exposure.[108]

In *Lunsford v. Saberhagen Holdings, Inc.,*[109] an appellate court reversed the trial court's grant of the defendant's motion for summary judgment where product liability claims were asserted by a son alleging take-home asbestos exposure from the defendant's products tracked home in 1958 by his father, an insulation installer. The defendant – who provided asbestos-containing insulation to the

workplace in question – argued that the son was not a product "user" under Restatement (Second) of Torts § 402A.

The court, after noting that it was a matter of first impression, considered the policy considerations for imposing strict liability, including forced reliance on sellers by consumers, placing the burden of accidental injuries caused by products on those who market them as a cost of production, and the need for consumer protection generally. It held that policy considerations support application of strict liability to a household family member of a user of an asbestos-containing product if it is reasonably foreseeable that household members would be exposed in this manner. That, the court held, was a question for the jury to determine.

On remand, the trial court granted the defendant's motion for partial summary judgment as to the strict products liability claim because it arose from asbestos exposure before Washington's adoption of strict liability. The appellate court, however, reversed and remanded on grounds that strict liability retroactively applied to the action, and the Washington Supreme Court affirmed that holding and remanded it to the trial court, yet again.[110]

❖ *Wisconsin* ❖

In *Heuvel v. Albany Intern. Corp.,*[111] a Missouri trial court applied Wisconsin law in denying an employer's motion for summary judgment in a take-home claim where it was alleged that the decedent was exposed from 1951 to 2003 from the workplace clothing of multiple family members employed with the defendant's predecessor-in-interest.[112]

After noting that there were no published cases in Missouri (where the case was filed) or Wisconsin (where the alleged exposures occurred), the court acknowledged the split in authority in other jurisdictions on the issue before it: whether asbestos-related diseases in family members of employees are reasonably foreseeable to the employer.

In denying the defendant's motion for summary judgment, the court held that under Wisconsin law everyone owes a duty of care to the world at large to protect others from foreseeable harm. And, in the case of an employer, that duty extends to the foreseeable risks of danger to household members from take-home exposures.

Further, the court stated, assuming the defendant knew or should have known of the dangers of take-home exposure to family members who routinely come into contact with employee clothing and personal effects, such knowledge would certainly fall within the range of foreseeable harm that may result from an employer's negligence.

Conclusion

Last year provided several interesting take-home rulings against a backdrop of a continued decline in take-home claims generally. In the context of take-home claims based on negligence against premises owners, employers, and contractors, what was an emerging no-duty trend — in states addressing the issue — appears to have stalled. As we look ahead to 2020, it will be interesting to look for trends in both filings and duty rulings.

Endnotes

[1] "Bystander" claims more accurately describes direct asbestos exposure arising from working with/around an asbestos-containing product rather than from off-site contamination, such as through workplace clothing.

[2] Such claims include failure-to-warn and product defect claims. Excluded from discussion in this article are take-home products liability decisions focused on product identification, the Substantial Factor Test, and other aspects of take-home claims that do not directly address the duty question.

[3] KCIC Consulting, filings received through 1/31/20, which KCIC references as "secondary claims."

[4] 138 F. Supp. 3d 1285 (N.D. Ala. 2015).

[5] The Memorandum Opinion and Order can be found at 2014 WL 4269128 (N.D. Ala. 2014).

[6] 855 F.3d 1294 (11th Cir. 2017) (while affirmed on the take-home duty – and other issues – the case was remanded on the issue of damages).

[7] 2019 WL 3937413 (Wash. Ct. App. 2019).

[8] The defendant previously argued in a motion for summary judgment that it had no duty to the plaintiff, but it was denied applying Washington law. *Hoffman*, 2015 WL 12567684 (Wash. Super. 2015).

[9] *Quiroz v. ALCOA Inc.*, 416 P.3d 824 (2018)

[10] *Id.* (the Supreme Court – while affirming the appellate court ruling, vacated its reasoning).

[11] Although 2018 was a quiet year for take home cases in California, at least one California Appellate Court granted Summary Judgment in favor of Defendant in a take-home exposure Case. *See Foglia v. Moore Dry Dock Co.*, No. A142125, 2018 WL 1193683, at *12 (Cal. Ct. App. Mar. 8, 2018). This shows that Summary Judgment is still a viable option for defendants in a post-Kessler era.

[12] 384 P.3d 283 (Cal. 2016).

[13] *Kesner*, 384 P.3d at 292.

[14] California decisions addressing employers and premises owner take-home liability prior to the time period addressed in *Kesner* include *Horner v. Ford Motor Co.,* 2007 WL 2985271 (Cal. App. 2007) (unpublished/non-citable) (sufficient evidence of foreseeability by

1945 to warrant reversal of summary judgment); *Condon v. Union Oil of California*, 2004 WL 1932847 (Cal. App. 2004) (unpublished/non-citable) (sufficient evidence of foreseeability to support jury verdict for plaintiff who alleged take-home exposure from 1948 to 1966); *Orona v. A.W. Chesterton*, 2012 WL 10646823 (Cal. Super. 2012) (sufficient evidence of foreseeability prior to 1971 or 1972 – when plaintiff left his parent's home – to warrant denial of motion for summary judgment); and *Bennett v. A.W. Chesterton, Inc.* (a premises/employer take-home case cited and discussed *infra*, where product liability claims were also asserted and alleged take-home exposure was from 1961 to 1965).

[15] 443 P. 2d 561 (Cal. 1968).

[16] 13 Cal. App. 5th 261(Cal. Ct. App. 2017), *reh'g denied* (July 31, 2017), *review denied* (Sept. 20, 2017).

[17] 2017 WL 3205751 (Cal. Ct. App. July 28, 2017)(unpublished/non-citable), *as modified on denial of reh'g* (Aug. 17, 2017), *review denied* (Oct. 11, 2017).

[18] 2017 WL 2417907 (Cal. Ct. App. June 2, 2017).

[19] 2013 WL 8103803 (Cal. Super. 2013).

[20] 2008 WL 8957253 (Cal. Super. 2008).

[21] 2014 WL 1246400 (Cal. Super. 2014).

[22] 2014 WL 1246373 (Cal. Super. 2014).

[23] 2019 WL 1253683 (D. Colo. 2019).

[24] The court makes no mention of *Gergely*, infra, but does cite to *Kesner v. The Superior* Court, 384 P. 3d 283 (Cal. 2016) and *Bobo v. Tennessee Valley Authority*, 138 F. Supp. 3d 1285 (N.D. Ala. 2015), supra, for support.

[25] *Gergely v. ACE Hardware Corp.*, No. 2016CV33137, 2016 Colo. Dist. Lexis 812 (Denver Dist. Ct. Dec. 16, 2016).

[26] 2015 WL 4380102 (Conn. Super. 2015) (unpublished).

[27] 189 A.3d 1255 (Del. 2018) *reversing Riedel v. ICI Americas Inc*, 968 A. 2d 17 (Del. 2009) and *Price v. E.I. DuPont Nemours & Company*, 26 A. 3d 162 (Del. 2011).

[28] *Id*. at 1261.

[29] *Id*.

[30] 794 S.E.2d 641 (Ga. 2016).

[31] 608 S.E.2d 208 (Ga. 2005).

[32] 168 F. Supp. 3d 1116 (N.D. Ill 2016), *reconsideration denied*, 2016 WL 3059082 (N.D. Ill. May 31, 2016) ("Her proposed amendment would not cure the legal defect inherent in her complaint.").

[33] 965 N.E. 2d 1092 (Ill. 2012).

[34] The dissenting opinion said the case should not be remanded; rather, the Illinois Supreme Court should hold no take-home duty exists.

[35] 909 N.E. 2d 931 (Ill. App. 2009), *appeal denied*, 919 N.E. 2d 355 (Ill. 2009).

[36] 955 N.E. 2d 1173 (Ill. App. 2011), *appeal denied*, 968 N.E. 2d 1066 (Ill. 2012).

[37] 957 N.E. 2d 107 (Ill. App. 2011), *appeal denied*, 968 N.E. 2d 1073 (Ill. 2012).

[38] 767 N.E. 2d 974 (Ind. 2002).

[39] 768 N.E. 2d 426 (Ind. 2002).

[40] 777 N.W. 2d 689 (Iowa 2009).

[41] 561 F.3d 439 (6th Cir. 2009).

[42] 193 So. 3d 1178 (La. Ct. App. 2016), *cert. denied*, 206 So. 3d 208 (La. 2016).

[43] Case No. 76,787, 2016 WL 2606530 (La. 10th Dist. 2016).

[44] *Williams v. Placid Oil Co*., 224 So. 3d 1101 (La. App. 3 Cir. 8/2/17), *writ denied*, 229 So. 3d 929 (La. 11/17/17).

[45] 2009 WL 3855468 (La. M.D. 2009).

[46] The take-home time period was not stated in the opinion.

[47] 947 So. 2d 171 (La. Ct. App. 2006).

[48] 905 So. 2d 465 (La. Ct. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006).

[49] In *Thomas v. A.P. Green Industries, Inc.,* 933 So. 2d 843 (La. Ct. App. 2006), a concurring opinion urged caution in citing *Zimko* in light of its procedural history.

[50] 870 F.2d 790 (1st Cir. 1989).

[51] 432 Md. 523(Md. 2013); *see also Estate of Schatz v. John Crane, Inc.*, 239 Md. App. 211 (Md. 2018) ("manufacturer owed no duty to wife to warn wife of latent dangers of household exposure to asbestos").

[52] 2017 WL 382908 (Md. Ct. Spec. App. Jan. 27, 2017), *cert. denied sub nom., Hiett v. AC & R Insulation*, 453 Md. 16 (2017).

[53] Interestingly, plaintiff in this case was a prominent attorney.

[54] While the exposure is referenced as "bystander" exposure (at the worksite from others handling asbestos), because plaintiff alleged exposure at home from his father's clothing, it is, in fact, a take-home exposure case.

[55] *Id.* (citing *Farrar*, 432 Md. at 540).

[56] 705 A.2d 58 (Md. App. 1998).

[57] 47 F. Supp. 3d 280 (D. Md. 2014).

[58] 2017 WL 3022969 (D. Md. July 17, 2017).

[59] *Id.* (citing *Sherin*, 47 F.Supp.3d 280 at 297).

[60] 879 A.2d 1088 (Md. App. 2005).

[61] 740 N.W. 2d 206 (2007), *reh'g denied*, 739 N.W. 2d 78 (2008).

[62] 139 A.3d 84 (N.J. 2016); *see also Schwartz v. Accuratus Corp.*, 294 F. Supp. 3d 386, 398 (E.D. Pa. 2018) ("a girlfriend making frequent visits and having

physically intimate contact with an Accuratus employee 'is not as a matter of law too remote to entail foreseeability and create a duty'") (applying New Jersey law).

[63] 895 A.2d 1143 (N.J. 2006).

[64] 139 A.3d 84, 86.

[65] *Id.* at 91.

[66] Case No. 12-6198 (E.D. Pa. 2017).

[67] 2015 WL 1365589 (N.J. App. 2015) (unpublished).

[68] 3 A.3d 545 (N.J. App. 2010).

[69] 5 N.Y.3d 486 (N.Y 2005); *see also Campanelli v. Long Island Lighting Co.*, 84 N.Y.S.3d 531, 534 (N.Y. App. Div. 2018) (holding that any duty an employer has to provide a safe workplace does not encompass "individuals who were not employed at the worksite").

[70] 12 Misc. 3d 936, 815 N.Y.S 2d 815 (2006).

[71] 874 N.W. 2d 303 (N. Dak. 2016).

[72] 929 N.E. 2d 448 (Ohio 2010).

[73] 2014 WL 3744011 (W.D. Okla. 2014).

[74] 2014 WL 3810383 (W.D. Okla. 2014).

[75] 2014 WL 3810329 (W.D. Okla. 2014).

[76] 965 F.2d 844 (10th Cir. 1992).

[77] 53 F. 3d 1181 (10th Cir. 1995) (unpublished).

[78] 1996 WL 3917 (10th Cir. 1996).

[79] 2014 WL 4211354 (E.D. Pa. 2014).

[80] 1995 WL 17778064 (Pa. Com. Pl. 1995).

[81] 2006 WL 4469603 (Pa. Com. Pl. 2006).

[82] The trial court ruling is sparse on facts. The alleged dates of exposure and other facts were determined from a review of the summary judgment filings. *See* 2006 WL 6599056 and 2006 WL 4476093 for plaintiff's and defendant's filings.

[83] 2012 WL 1413887 (Del. Super Ct. 2012).

[84] 2003 WL 25518083 (W.D. Pa. 2003), adopted, 2004 WL 5267489 (W.D. Pa. 2004), *aff'd on other grounds*, 287 F. App'x 968 (3rd Cir. 2008) (upheld dismissal based on insufficiency of the pleadings due to assertion of the failure-to-warn claims as products claims rather than as a negligence premises liability case), *cert. denied*, 129 S. Ct. 1614 (2009).

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[85] Supplemental information regarding the plaintiff's claims was located at 2008 WL 5182891 (Petition for Writ of Certiorari).

[86] *Carolyn Nichols, as Executrix of the Estate of Iva Pearl Jones, et al. v. Allis Chalmers Product Liability Trust, et al.*, C.A. No. PC-2008-1134.

[87] *Id.* at 11.

[88] *Id.* at 14-15.

[89] *Id.* at 18.

[90] 266 S.W. 3d 347 (Tenn. 2008).

[91] 2017 WL 2021760 (Tenn. Ct. App. May 12, 2017).

[92] 2013 WL 5544053 (E.D. Pa. 2013).

[93] 235 S.W. 3d 456 (Tex. Ct. App. 2007), *pet. for review denied*, 2008 Tex. LEXIS 1084 (2008).

[94] Compare *Baker v. The University of Texas-M.D. Anderson Cancer Center, Inc.,* 401 S.W. 3d 246 (Tex. App. 2012) (permits take-home lead contamination claim but – at fn. 13 — notes differing foreseeability analysis for lead that "markedly" distinguishes it from asbestos take-home cases.).

[95] 2006 WL 2165725 (Tex. App. 2007), *withdrawn and superseded on other grounds*, 265 S.W. 3d. 415 (Tex. App. 2008).

[96] 960 S.W. 2d 914 (Tex. App. 1998), *abrogated on other grounds by Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W. 2d 507 (Tex. 1998).

[97] The court uses the term "bystander" exposure, but it clearly is referencing take-home exposure, and this summary is not addressing the consortium plaintiff's claims.

[98] *Exxon Mobile Corp v. Altimore*, supra., distinguished *Fuller* as a products liability not an employer case.

[99] *Quisenberry v. Huntington Ingalls Inc.*, 818 S.E.2d 805 (Va. 2018)

[100] *Id.* at 812.

[101] *Id.*

[102] 2018 WL 4700525 (W.D. Wash 2018).

[103] Plaintiff also allege direct exposure from yearly job site visits, but the court held there was insufficient evidence of direct asbestos exposure during those visits.

[104] 2017 WL 325702 (Wash. Ct. App. 2017) (unpublished/non-citable).

[105] 2007 WL 2325214 (Wash. Ct. App. 2007) (unpublished/non-citable).

[106] 240 P.3d 162 (Wash Ct. App. 2010), *petition for rev. denied*, 249 P.3d 1029 (Wash. 2011).

[107] 2013 WL 3270371 (W.D. Wash. 2013), *aff'd sub nom.,* 2013 WL 4804408 (9th Cir. 2013).

[108] 540 Fed. Appx. 590 (9th Cir. 2013).

[109] 106 P.3d 808 (Wash. Ct. App. 2005).

[110] 208 P.3d 1092 (Wash. 2009).

[111] 2014 WL 4654947 (Mo. Cir. 2014).

[112] Interestingly, one form of alleged take-home exposure resulted from a toupee worn at the workplace and cleaned at home.