

PRODUCT LIABILITY

OCTOBER 2015

IN THIS ISSUE

Asbestos and other toxic tort defendants are seeing an increasing number of claims alleging that a worker carried substances home and thereby produced disease in a family member or household visitor. This article surveys the current lay of the land for these "take-home" cases, including updates on court rulings and current appeals involving whether a take home duty even exists, and offers some insights into the viability and direction of this form of toxic tort litigation.

Take-Home Asbestos and Toxic Tort Litigation – Bringing Home More than the Bacon

ABOUT THE AUTHOR



William L. Anderson is a new member of IADC (2015) who has practiced for 27 years in product liability, toxic tort, and environmental matters that typically involve significant and complex medical and scientific issues and national coordination roles. He also serves as the vice-chair of Crowell & Moring's Torts Group. The range of cases Mr. Anderson has managed extends across birth defect litigation, alleged toxic exposure to substances in environmental media, product risk and crisis management, cutting-edge asbestos causation and expert exclusion issues, and national asbestos case management. Mr. Anderson frequently writes on the intersection of science and the law, and has authored amicus briefs on critical scientific evidentiary issues in the highest state courts of Texas, Maryland, Pennsylvania, Michigan, Virginia, Georgia, and New York, and other intermediate appellate courts. His two articles on causation theory, "[The 'Any Exposure' Theory: An Unsound Basis for Asbestos Causation and Expert Testimony](#)," *Southwestern University Law Review* (January 2008) (M. Behrens & W. Anderson), and William L. Anderson et al., "[The "Any Exposure" Theory Round II: Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008](#)," 22 Kan. J.L. & Pub. Pol'y 1 (2012), have been utilized by defense counsel to prosecute motions aimed at low-dose exposure theories. His upcoming article "The Unwarranted Basis for Today's Asbestos 'Take-Home' Case" has been accepted for publication by the American Journal of Trial Advocacy and is expected to be in print shortly. He can be reached at wanderson@crowell.com.

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Asbestos defendants have seen a significant increase in a special type of lawsuit known as *take-home* or household-exposure litigation. The theory behind these cases is that a worker becomes exposed to a substance (e.g., asbestos) in the workplace, does not change clothes before going home, and then exposes family members to the substance in the home. The plaintiff, usually the spouse who washed the work clothes, contends that plaintiff's disease – in asbestos cases, typically mesothelioma—was caused by the exposures she received. The cases have included not just household members, but mere visitors to the home or even persons with whom the worker came into contact after work. (Yes, we are talking about bartenders and restaurant clerks.) And the take-home theory is beginning to make its way into non-asbestos toxic torts as well.

This article surveys the current lay of the land with regard to whether these cases are viable and what their progress is likely to be. At least five such cases are currently on appeal to determine whether a duty based on an employee's household or non-workplace contacts even exists – one in Arizona (asbestos); one before the Third Circuit Court of Appeals with the question certified to the New Jersey Supreme Court (beryllium); and three before the California Supreme Court (all asbestos). The duty issue is in fact one of the hottest current issues in asbestos litigation –

more than twenty appellate courts have already addressed the existence of the duty in just the last decade. The decisions are mixed, but at least half of the opinions have rejected entirely the idea of a post-work, take-home duty by premises owners and employers and even by some product manufacturers.

For asbestos, the stakes are very high. Mesotheliomas caused by real asbestos exposures are declining due to the aging of the population of workers exposed to pre-OSHA levels of asbestos. Instead, many cases today, and a majority of cases brought by women, are likely spontaneously induced by the human body's own DNA transcription errors.¹ But virtually all of those spousal and family member cases can become take-home asbestos litigation through the magic of the plaintiff experts' *any exposure* theory of causation, and the ubiquity of asbestos usage in industry and in buildings. Asbestos litigation likely will not decline at all if low-dose cases like take-home litigation begin to dominate the docket. Thus, the courts that have imposed or rejected duty or other limits on these cases are at the forefront of the direction of future asbestos litigation.

The Scientific Literature Involving Take-Home Disease

The scientific and medical literature does in fact demonstrate that take-home disease can

¹ The role of human DNA error in producing many cancers is described in Tomasetti, C, and Vogelstein, B., *Variation in Cancer Risk Among Tissues Can Be Explained by the Number of Stem Cell Divisions*, 347 SCIENCE 78 (Jan. 2015); and Stanley Venitt,

Mechanisms of Spontaneous Human Cancers," 104 Environ. Health Persp. 633, 633, 635 (1996), article available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1469658/>.

occur – but it is rare to cause disease in spouses or family members because of the difficulty in delivering a causative dose just from wearing work clothes home. Early industrial hygiene texts and some early regulations recommended against carrying home excessive levels of toxic substances. But asbestos was not recognized as a cause of take-home mesothelioma until the 1965 publication of the Newhouse study.² Muriel Newhouse investigated all the mesotheliomas reported to the London Hospital and found a number of them occurring in spouses and children of asbestos factory workers. The conditions these workers endured in the 1930s and earlier that are necessary to produce take-home disease in the 1960s were enormous compared to more modern standards. Even in these conditions, and even canvassing what must have been a large worker population, Newhouse still found only nine spouses with take-home disease.

The rest of the literature since then is similar. The conditions producing take-home mesotheliomas arise from very heavy workplace exposures – “asbestos miners, asbestos factory workers, shipyard/dock workers, textile workers, furnace/engine boiler room workers, railway carriage

workers, pipefitters, and insulators.”³ Documented cases of spouses and others with take-home asbestos-induced mesothelioma do exist, but they are not common and occur far less frequently in women than in men.⁴ And there is no credible scientific literature documenting take-home disease from the type of low workplace exposures being alleged in many of today’s cases.

By today – more than forty years since OSHA imposed strict workplace controls on asbestos exposures – there should be very few such asbestos-related cases still occurring. And yet if anything, the number of take-home cases on asbestos dockets may be increasing, likely due in part to the aggressive recruiting of persons with mesothelioma by plaintiff law firms. And many of today’s cases allege only minimal workplace exposure – changing brakes, removing gaskets, walking by a drywall project, even simply being present in a building with asbestos insulation. The spousal exposures from these workplace experiences would be lower by orders of magnitude, to the point of mere background.⁵

So there is large and growing gap between what is happening in litigation and what the science says should be happening. That gap is

² Newhouse, M. and Thompson, H., *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 Brit. J. Indus. Med. 261 (1965).

³ Goswami, E., et al., *Domestic Asbestos Exposure: A Review of Epidemiologic and Exposure Data*, 10 Int. J. Environ. Res. Public Health 5629 (2013) (citing studies). See also in Donovan E., *Evaluation of Take Home (Para-Occupational Exposure to Asbestos*

and Disease: A Review of the Literature, 42 Crit. Reviews in Toxic. 703, 716 (2012).

⁴ *Id.* at 935-36.

⁵ See Sahmel, J., et al., *Evaluation of Take-Home Exposure and Risk Associated with the Handling of Clothing Contaminated with Chrysotile Asbestos*, 34 Risk Anal. 1448 (2014) (laundering exposures 10 to 100 times lower than workplace simulated clothing levels).

sometimes the subject of motions to exclude expert testimony in these cases, typically challenging the *each and every exposure* theory used by plaintiffs' testifying experts to support these low-exposure cases. But that is the subject of another article – we next discuss the focus of courts on whether any duty even exists to protect family members of workers.

Take-Home Duty Rulings and the State of the Law

The landscape of cases decided to date regarding take-home exposures reveals a significant split in jurisdictions driven largely by whether the state makes its “duty” decisions based on foreseeability.⁶ To return everyone to first-year Torts class for a moment (painful as that may be), the duty element of a negligence case came into play as a means of restricting the otherwise endless game of foreseeability. Foreseeability is limited pretty much only by the creativity of a plaintiffs' lawyer working under twenty-twenty hindsight. Thus, in take-home cases, plaintiffs' experts routinely testify that

companies should have known about asbestos take-home disease in the 1930s and earlier, even though the first published study documenting such disease is the 1965 Newhouse study.⁷

Due to the arguably limitless nature of foreseeability, many states look beyond foreseeability to determine whether a duty exists – instead, they look to public policy factors and the relationship of the parties. Courts, of course – remember your torts class – get to make the duty decision. Duty limits may presumably deprive at least some theoretically foreseeable plaintiffs of recovery, but restraint is necessary to keep liability within reasonable limits. At least ten such appellate courts have rejected *any form* of take-home duty for premises owners (and one product manufacturer).⁸ In fact, to date, no state that eschews foreseeability as its duty benchmark has adopted take-home liability.

Contrast that with foreseeability states, which have almost uniformly adopted at least the

⁶ For a recent review of the duty case law, see Flinn, Meghan E., *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 Wash. & Lee L. Rev. 707 (2014).

⁷ See, e.g., *Alcoa v. Behringer*, -- S.W.3d --, 2007 WL 2142988 at *4 (Tex. App., July 27, 2007); *Georgia-Pacific v. Farrar*, 69 A.3d 1028, 1035-36 (Md. 2013).

⁸ See *Beckering v. Shell Oil Co.*, 2014 WL 6611088 (Cal. App., Nov. 21, 2014), review granted Feb. 11, 2015); *Haver v. BNSF Ry. Co.*, 172 Cal. Rptr. 3d 771 (Ct. App. 2014), review granted Aug. 20, 2014; *Price v. E.I. du Pont de Nemours & Co.*, 26 A.3rd 162

(Del. 2011); *CSX Transp. V. Williams*, 608 S.E.2d 208 (Ga. 2005); *In re Certified Question from Fourteenth Dist. Ct. of Appeals of TX (Miller et al. v. Ford Motor Co.)*, 740 N.W.2d 206 (Mich. 2007); *In re New York City Asbestos Litig. (Holdampf, et al. v. A.C.&S. Inc.)*, 806 N.Y.S.2d 146 (N.Y. 2005); *Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15, 34 (Cal. App. 2012), review granted; *Van Fossen v. Mid Am. Energy Co.*, 777 N.W.2d 689 (Iowa 2009); *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448, 453 (Ohio 2010); *Estate of Holmes v. Pneumo Abex*, 955 N.E.2d 1173 (Ill. App. 2011); *Nelson v. Aurora Equip. Co.*, 909 N.E.2d 9331 (Ill. App. Ct. 2009).

possibility of such a duty.⁹ In such opinions, the ultimate call as to whether the duty exists is driven by the expert and other evidence documenting the earliest knowledge of possible asbestos take-home disease. This is, arguably, an incredibly fact and expert intensive inquiry, given the lengthy and labyrinthine history of asbestos medicine. Some courts – *Behringer* and *Farrar*, for instance – have engaged in detailed review of the studies and concluded that no such duty could have existed prior to either Newhouse (1965) or the OSHA 1972 regulations that imposed clothes-changing requirements on employers. But not all courts engage in this type of detailed analysis of the evidence. Some instead (e.g., *Kesner*) have inferred the duty largely by adopting, unchallenged, the testimony of plaintiffs’ experts.

States with foreseeability standards for duty determinations are very difficult for defendants. Yes, defendants can win – *if* the plaintiff household member was exposed before OSHA’s advent, *if* the court is willing to wade through the literature, and *if* the defendant incurs the enormous cost of full fact and expert discovery to create the record necessary for a summary judgment motion based on foreseeability. The non-foreseeability states offer a better motion opportunity – defendants may be able to

move on the pleadings, and they do not need an extensive record to argue that a relationship state would not recognize the amorphous and wide-spreading take-home duty.

This fight will go on for some number of years, as the litigants take their arguments into additional state and federal courts. Which takes us to the cases currently on appeal.

Current Appellate Cases Involving Take-Home Duty

For those who like to follow such things, five cases involving take-home liability are currently on appeal, at least to the author’s knowledge. Here’s the roster:

The Arizona Quiroz Case (Quiroz v. Alcoa, No. 1-CA-CV 15-0083 (Ariz. Ct. App.)). Dr. Ernest Quiroz, who has mesothelioma, contends that he was exposed to asbestos brought home by his father, who worked with asbestos products at a Reynolds aluminum plant. The alleged exposures involve a fair number of old insulation products. Dr. Quiroz claims that he “usually greeted his father by giving him a bear hug” and that he helped his mother launder the clothes. These are common allegations in cases involving children and other, non-spousal plaintiffs. Reynolds

⁹ *Chaisson v. Avondale Indus.*, 947 So.2d 171 (2006), writ denied, 954 So.2d 145 (2007); *Satterfield v. Breeding Insul. Co.*, 266 S.W.3d 347 (Tenn. 2008); *Rochon v. Saberhagen Holdings*, 2007 WL 2325214 (Wash App. Div. 1, Aug. 13, 2007); *Martin v. Cincinnati Gas & Elec.*, 561 F.3d 439, 444-46 (6th Cir. 2009); *Georgia-Pacific v. Farrar*, 69 A.3d 1028 (Md. 2013); *Alcoa v. Behringer*, 235 S.W.3d 456 (Tex. App. 2007);

Alcoa v. Behringer, -- S.W.3d --, 2007 WL 2142988 at *4 (Tex. App., July 27, 2007); *Hoyt v. Lockheed Martin Corp.*, No. 13—35573, 2013 WL 4804408 (9th Cir. Sept. 10, 2013); *Olivo v. Owens-Ill.*, 895 A.2d 1143 (N.J. 2006); *Kesner v. Superior Court*, 171 Cal. Rptr. 3d 811 (Cal. App., May 15, 2014), review granted 175 Cal. Rptr. 3d 810 (Cal. 2014).

moved for summary judgment, and the trial court granted the motion because Arizona does not rely on foreseeability for its duty determinations. Thus, there is no household duty for a premises owner under current Arizona law. The case is up before the intermediate Arizona appellate court, with briefing to be largely completed by the time of this article's publication.

Note that this case does *not* involve a spouse. Cases involving children, nephews, nieces, and even grandchildren are being filed and becoming more common. The extension to at least two generations of potential plaintiffs younger than the worker will generate asbestos lawsuits for several more decades, if the cases are allowed to proceed.

The Third Circuit's Schwartz Case, on Certified Question to the New Jersey Supreme Court (Schwartz v. Accuratus Corporation, No. 14-4002 (3rd Cir.), No. 076195 (N.J.S.Ct.). Plaintiff Brenda Schwartz contends that she incurred beryllium disease when her then boyfriend worked in a beryllium plant and brought dust home, and later (after she married said boyfriend) when she lived with a roommate who worked at a different plant. The *Schwartz* case started out in federal court in Pennsylvania, applying New Jersey law. New Jersey is a foreseeability state and has determined in the *Olivo* case that spouses laundering clothes are within an employer's duty obligations. The district court limited *Olivo* to its facts and findings and held that an unmarried girlfriend and roommate was not entitled to protection. The Third Circuit Court of Appeals kicked the case to the New Jersey

Supreme Court, certifying the question: "Does the premises liability rule set forth in *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006), 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." Briefing is completed, and the New Jersey court will soon hear argument.

Schwartz, if a duty is found, would extend the world of potential plaintiffs exponentially. If mere visitors to a house (Ms. Schwartz did not live with her boyfriend) is good enough, then the duty is more than a household duty and would encompass housekeepers, plumbers, friends, neighbors, the obnoxious kid next door who kept coming over, and a long list of others. Note also that *Schwartz* is *not* an asbestos case. In the states that allow these cases, the take-home theory of liability will undoubtedly soon encompass other types of toxic substances that are commonly the source of litigation today.

The California Haver, Kesner and Beckering Cases (Haver v. BNSF Ry. Co. 172 Cal. Rptr. 3d 771, 775 (Cal. Ct. App. 2d Dist. Div. 5 2014), review granted Aug. 20, 2014); Kesner v. Superior Court, 171 Cal. Rptr. 3d 811 (Cal. Ct. App. 1st. Div. 3 May 15, 2014)), review granted and opinion superseded, 175 Cal. Rptr. 3d 810 (Cal. 2014); Beckering v. Shell Oil Co., 2014 WL 6611088 (Cal. App., Nov. 21, 2014), review granted Feb. 11, 2015). These three California cases tee up the issue for the California Supreme Court. *Haver* involves a claim by the wife of a railroad worker, and the

court relied heavily on public policy considerations in rejecting the duty. *Haver* followed the previous *Campbell* California appellate court case in denying a duty for take-home exposures. *Kesner* took the opposite view. *Kesner* involves the nephew of a worker employed in manufacturing brake linings. The intermediate court decided that the “likelihood of causing harm to a person with such recurring and non-incident contact with the employers’ employee” was enough to create the duty for a product manufacturer – in the process distinguishing *Campbell* as a premises owner case. *Beckering* is a more traditional take-home case involving a spouse laundering the clothes of a long-time Shell machinist. The *Beckering* court followed *Campbell* but the opinion generated a vigorous dissent that would rely on foreseeability and follow the New Jersey *Olivo* opinion.

Once decided, these appeals will likely add three more states and a federal appellate court to the list of courts determining whether a duty exists. More to come, no doubt.

Where Take-Home Litigation Is Headed

Take-home litigation has more than a foothold right now in asbestos litigation due to the states that have agreed to create the duty. Most jurisdictions and many defendants now see such cases on their dockets. A few involve the old, heavy asbestos exposures of the pre-1970s, but many (as noted above) involve only speculative or tangential workplace exposures and virtually no exposure at home. If defendants cannot

dismiss these low-exposure take-home cases on the pleadings, these cases can create significant risk of a jury verdict. As any asbestos defense lawyer will report, it is difficult to try a case involving a thirty-five year old with children who never worked with asbestos but nevertheless has mesothelioma. The defense of such a case may hinge on convincing the jury of the reality of spontaneous mesothelioma, including in cases involving trivial but incidental asbestos exposure.

The future of take-home cases and others like them involving minimal exposures may in fact dictate whether asbestos litigation comes to some reasonable end soon or will instead employ our own children as attorneys someday. Mesotheliomas – despite the decline in workers truly exposed to asbestos due to aging – is in fact *not* declining. The problem is that mesotheliomas can be produced by the human body without any outside carcinogenic influence. These are called *spontaneous* cases, and the number of such cases is increasing because humans simply have more of all kinds of cancer the older we live as a population. So the trend line for mesotheliomas is steady or even up, and the trend line for asbestos-exposed workers is down. Yet many of these spontaneous mesotheliomas will still be asbestos lawsuits because of the one-two punch of the take-home duty and the *any exposure* theory. That is why asbestos defendants today are so focused on these duty rulings – the rulings will either stop this form of litigation, or allow it to proliferate.



The good news (for defendants at least) is that many courts, even those in foreseeability states, seem to recognize the problem with allowing unrestrained take-home liability. And some of the cases being filed involve such minimal claims of exposure or tangential relationships that they make inviting targets for a motion practice. Defendants should identify these opportunities and consider the value of motions practice in such cases.

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