Airing Asbestos Litigation's Dirty Laundry

By David M. Melancon

"Take-Home" Asbestos Exposure and the Ongoing Efforts to Determine the Scope of the Duty of Premises Owners and Employers

Courts continue to be split about whether an employer or premises owner owes a duty to plaintiffs with take-home asbestos exposures, generally taking one of three approaches.

Asbestos litigation has been described as the longest-running mass tort litigation in the United States. As industrial workers who were exposed to asbestos continue to age, you would anticipate that the sunset of asbestos litigation would be upon us. However, the reality is that there is a new horizon of asbestos litigation looking to the effects of asbestos exposure beyond workers who were directly exposed to asbestos-containing products. Workers' family members, typically their spouses or children, are increasingly bringing claims for asbestos-related injuries allegedly caused by their exposure to asbestos brought home by workers on their clothes or bodies. These claims are often referred to as "take-home exposure," "secondary exposure," or "nonoccupational exposure" claims.

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Courts continue to be split about whether an employer or premises owner owes a duty to plaintiffs with take-home asbestos exposures. This article addresses the three primary judicial approaches to take-home asbestos exposure and analyzes the trend in the more recent court decisions.

Duty of Premises Defendants and Employers in Take-Home Asbestos Cases

The basic fact pattern in take-home exposure cases is that a plaintiff who was never employed by the defendant or present on the defendant's premises contends that she developed an asbestos-related disease from exposure to asbestos dust brought home on a worker's clothing. The analyses of courts that have considered these claims generally are divided into three categories: (1) cases that focus on the foreseeability of the injury; (2) cases that focus on the legal relationship, or the lack of one, between the parties; and (3) cases that focus on the situs of the exposure, that is, whether the exposure occurred on the defendant's premises.

Foreseeability of Harm

Courts in many jurisdictions concentrate their analysis on the foreseeability of harm to a plaintiff when determining whether a defendant owes a duty to a plaintiff for take-home exposure. Courts in Tennessee, New Jersey, Louisiana, Washington, California, and Illinois have found that the premises defendants-employers owe a duty to the worker's household members because the danger that asbestos presented to them was foreseeable. Courts in Texas and Kentucky, however, have reached the opposite conclusion.

Duty Found Because of Foreseeability of Injury to Third Parties

In the majority of cases in which a court has used foreseeability as the primary consideration in the duty analysis, the court has recognized a duty of care in take-home asbestos exposure cases. In doing so, these courts often combine a foreseeability analysis with a consideration of public policy factors. For example, in *Satterfield v. Breeding Insulation Co.*, the daughter of an insulation worker brought a general negligence action against her father's employer claiming that the employer had negligently allowed her father to bring home asbestos-contaminated work clothes. 266 S.W.3d 347, 351–52 (Tenn. 2008). On the employer's motion for summary judgment, the trial court dismissed the case, finding that the employer owed no duty to the employee's daughter. *Id.* The appellate court reversed this determination, and the Supreme Court of Tennessee had to decide the narrow issue of whether the plaintiff's complaint "should have been dismissed solely because the defendant did not have a duty to act reasonably to prevent her from being exposed repeatedly and regularly over an extended period of time to the asbestos fibers on her father's work clothes." *Id.*

The court first considered whether the defendant's alleged actions constituted misfeasance or nonfeasance. *Id.* at 355–59. This distinction was critical, according to the court, because Tennessee law generally will not impose an affirmative duty to act in instances of nonfeasance (*i.e.*, failure to act) if no special relationship exists between the parties. *Id.* at 358. Consequently, to find that the defendant owed a duty to its employee's daughter, the court had to find that the "defendant's entire course of conduct… constitute[d] an affirmative act creating a risk of harm." *Id.* at 356.

Considering the defendant's course of conduct, the court noted that the defendant's employees worked under conditions that violated both the company's internal safety standards and federal Occupational Safety & Heath Administration (OSHA) regulations, which caused large quantities of asbestos to accumulate on the workers' clothes. *Id.* at 363. The court also found that although the employer knew of the "dangerous amounts of asbestos on its employees' clothes," it "did not inform its employees that the materials that they were handling contained asbestos or of the risks posed by asbestos fibers to the employees or to others." *Id.* Furthermore, the defendant deterred its employees from using sanitation facilities, did not provide "coveralls" to its asbestos-exposed workers, and did not clean its employees' work clothes on-site. *Id.* These factors compelled the court to conclude that the defendant had created the risk to the plaintiff and therefore may have had a duty to use reasonable care to "refrain from conduct that [would] foreseeably cause injury to others." *Id.* at 357, 364.

The court's determination that the defendant owed a duty to the plaintiff, however, did not end its review with the finding of misfeasance. *Id.* at 364–65. Instead, the court considered whether public policy factors weighed in favor of imposing a duty to protect from the risk of harm created by the defendant's conduct. *Id.* at 365. While the court found that the harm to the plaintiff was foreseeable, other considerations also supported imposing a duty to protect from the risk of harm. *Id.* at 367–68. Specifically, the court determined that the defendant's conduct created a high magnitude of harm, which the defendant could have prevented by implementing "feasible and efficacious" protective measures that would not have overly burdened the defendant's business. *Id.* at 368. Though the court did not analyze the breach, causation, or loss elements of the plaintiff's original claim due to the posture of the case, the court held that the law did not foreclose the existence of a duty between the defendant and the plaintiff and that the plaintiff's complaint stated a cognizable claim. *Id.* at 375.

Courts in many jurisdictions concentrate their analysis on the foreseeability of harm to a plaintiff when determining whether a defendant owes a duty to a plaintiff for take-home exposure.

Similarly, the New Jersey Supreme Court addressed take-home exposure in *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394, 399, 895 A.2d 1143, 1146 (N.J. 2006). There, the plaintiff brought a wrongful death claim on behalf of his wife who had allegedly died because of prolonged exposure to her husband's asbestos-tainted clothes. The plaintiff brought his claim under a premises liability theory because Exxon did not employ the plaintiff but merely

owned the refinery upon which he had performed steam-fitting and welding services. *Id.* At the trial court level, the judge granted Exxon's motion for summary judgment because "imposing an additional duty on a landowner for asbestos related injuries that occurred off of the premises would not be fair or just." *Id.* at 1147 (internal quotations omitted). The appellate court reversed the lower court's judgment, hinging its determination on the foreseeability of the risk of harm to the worker's spouse. *Id.*

In determining the landowner's liability, the court first noted that the issue of a landowner's duty toward a third party "devolves to a question of foreseeability of the risk of harm to that individual or identifiable class of individuals." *Id.* at 1148. Therefore, a duty could exist when the risk of injury is "reasonably within the range of apprehension." *Id.* at 403. Because Exxon knew of the dangers of asbestos exposure as early as 1937 but failed to provide workers with a chance to clean or to change their clothes before bringing the contaminated clothes home, Exxon should have foreseen the risk of injury to the plaintiff's wife. *Id.* at 1149.

After establishing foreseeability, the New Jersey Supreme Court then turned to public policy factors, including the "relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Id.* These factors, according to the court, weighed in favor of the plaintiff especially because of the severe "nature of the risk and how relatively easy it would have been [for Exxon] to provide warnings to workers such as [the plaintiff] about the handling of his clothing or to provide protective garments." *Id.*

Louisiana courts also recognize that employers owe a duty to protect the family members of their employees from foreseeable risk of injury. In *Zimko v. American Cyanamid*, the plaintiff brought suit against his father's former employer, alleging that the employer had exposed its workers to dangerous levels of asbestos fibers, which contaminated the workers' clothes and endangered the health of those living in the workers' homes. 905 So. 2d 465, 472 (La. Ct. App. 2005). The defendant-employer appealed the trial court's judgment for the plaintiff, arguing that it did not owe a duty to the plaintiff. *Id.* at 482. The court, however, disagreed, noting that "a 'no duty' defense in a negligence case is seldom appropriate" under Louisiana law. *Id.* at 482. In the light of the law's disfavor of a sweeping "no duty" defense, the court held that the defendant owed a "general duty to act reasonably in view of the *foreseeable* risks of danger to household members of its employees resulting from exposure to asbestos fibers carried home on its employee's clothing, person, or personal effects." *Id.* at 483 (emphasis added).

Furthermore, the plaintiff's evidence, which consisted of a 1951 federal statute imposing safety standards on private companies holding public contracts, supported the court's finding that the risk of injury was foreseeable because the statute identified the dangers of take-home exposure and directed employers to implement measures to protect against such exposure. *Id.* at 482. *See also Catania v. Anco Insulations, Inc.*, 2009 WL 3855468, at *2 (M.D. La. Nov. 17, 2009); *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171, 183 (La. Ct. App. 2006).

Courts in Washington also hinge their disposition of a plaintiff's take-home exposure claim on whether the plaintiff's injury was foreseeable. In *Rochon v. Saberhagen Holdings, Inc.*, a factory worker's wife died from mesothelioma, which she had allegedly developed after laundering her husband's work clothes. 2007 WL 2325214, at *1 (Wash. App. Div. 1 2007). At the trial court level, the plaintiffs' negligence claims were dismissed on summary judgment because the lower court had determined that "foreseeability does not independently create a duty of care… only when a duty has been found to exist, [does] foreseeability… limit the scope of that duty of care." *Id.*

On appeal, however, the court disagreed with the trial court and found that foreseeability had to be considered when determining whether or not a duty existed. *Id.* at *2. Though the court recognized that parties do not have affirmative duties to act, the court held that under Washington law, "if one chooses to act, one must do so reasonably." *Id.* at *3. Therefore, even though an employer or a landowner may not automatically have a duty to protect the spouses of its workers or invitees, the court held that "[b]ecause [the defendant] acted in this case, it had a duty to do prevent foreseeable injury from any of its unreasonably safe actions." *Id.* at *3–5.

California is another state where courts have found a duty exists because of the foreseeability of the injury. In *Condon v. Union Oil Co. of California*, a welder's wife sued her husband's employer for injuries allegedly caused by contact with her husband's clothing during the 1950s and 1960s. 2004 WL 1932847, at *1 (Cal. Ct. App. 1 Dist. 2004) (unpublished/non-citable). On appeal, the court upheld the jury's verdict in favor of the plaintiff because the employer "[knew] that a worker's clothing could be a source of contamination to others [and therefore] it was foreseeable that family members who were exposed to this clothing would also be in danger of being exposed." *Id.* The court based its foreseeability determination on the plaintiff's evidence that showed that the employer had ties with the American Petroleum Institute—an organization that had previously advised its members of the risks associated with asbestos exposure. *Id.* at *4. Furthermore, testimony from a public health expert indicated that as early as 1948, oil-industry hygienists had advised that refinery workers change out of their work clothes before heading home and that the employers launder their employees work clothes "to avoid contaminating the worker's home with carcinogenic materials." *Id.* at *4–5.

In *Simpkins v. CSX Corp.*, an Illinois court reached a similar result. There, a deceased woman's heirs brought suit against their father's employer after their mother had developed mesothelioma from prolonged exposure to her husband's work clothes. 929 N.E. 2d 1257, 1263–64 (Ill. App. Ct. 2010), *judgment affirmed but criticized*, 65 N.E.2d 1092, 1100 (Ill. 2012). The appellate court began its analysis by noting that under Illinois' general negligence law, the foreseeability of harm to the plaintiff's mother was one of four factors used to determine "whether a relationship exists between the parties that will justify the imposition of a duty." *Id.* at 1262. Consequently, the defendant argued that it was unaware of the dangers of take-home asbestos exposure during the time that the plaintiff's father worked for it during the 1950s and 1960s.

The court, however, rejected this argument and instead held that the relevant question "is not whether the employer

actually foresaw the risk to [the plaintiff's mother]; rather, the question is whether, through reasonable care, it *should have* foreseen the risk." *Id.* at 1263 (emphasis in original). Additionally, though the parties had presented conflicting evidence regarding the employer's scienter during the relevant time, the court accepted the plaintiff's pleadings as true because of the procedural posture of the case and held that the risk of harm to the plaintiff's mother was foreseeable. *Id.* at 1264. Ultimately, the court reversed the lower court's dismissal of the plaintiff's complaint because, in addition to foreseeability, the likelihood of serious injury was substantial, protecting the plaintiff's mother against the risk of take-home exposure would not have been unduly burdensome when compared to the severity of the risk, and the scope of the defendant's liability would be "inherently limited by the foreseeability of the harm. *Id.* at 1265.

Most recently, in *Bobo v. Tennessee Valley Authorit*y, No. CV-12-S-1930-NE, 2015 WL 5693609, ____ F. Supp. 3d ____ (N.D. Ala. Sept. 29, 2015), the U.S. District Court for the Northern District of Alabama held that an employer owed a duty to a nonemployee spouse who was exposed to asbestos while laundering her husband's work clothing. The court noted that in Alabama "the 'key factor' for determining whether a duty should be imposed as a matter of law in novel factual circumstances is the 'foreseeability' of the harm that might result if care is not exercised." *Id.* at *18. The court then found that the defendant employer knew that asbestos is a carcinogen and its employees were taking the asbestos fibers home to their families, and it was foreseeable that its employee's spouses, who ordinarily would perform typical household chores that would include laundering their husbands' work clothes, would be exposed to asbestos.

No Duty Found Because Injury to Third Parties Was Not Foreseeable

As in the cases discussed above, courts in Texas and Kentucky focus on the foreseeability of the risk of harm to the plaintiffs when determining whether employers and landowners owe a duty to nonemployee third parties. Nevertheless, the courts in the cases reach the opposite conclusion typically because the evidence presented by the plaintiffs failed to show that the employers and landowners knew or should have known that their conduct created a risk of harm to the plaintiffs.

For example, in *Alcoa v. Behringer*, a Texas court of appeal overruled the lower court's judgment because of the lack of foreseeability of harm to the plaintiff. 235 S.W.3d 456, 462 (Tex. App. 2007). The plaintiff, who had been married to an employee of the defendant for four years during the 1950s, alleged that she developed mesothelioma from handling her husband's asbestos-contaminated work clothes. *Id.* at 458. In its analysis, the court first noted that under Texas law courts must consider the foreseeability of the injury (among other factors) to determine whether a defendant owed a duty to a plaintiff. *Id.*at 460. Consequently, the central inquiry focused on whether the plaintiff had offered sufficient evidence to establish that it was "generally foreseeable in the 1950s, to an ordinary employer that used, but did not manufacture, asbestos, that intermittent, non-occupational exposure to asbestos could put people at risk of contracting a serious illness." *Id.* at 461–62.

Turning to the record, the evidence established that as early as the 1930s, employers knew of the danger that prolonged asbestos exposure might present to their employees. *Id.* at 462. But employers' "general knowledge" of the danger of prolonged occupational exposure at that time, the court reasoned, did not apply to the class of individuals in which the plaintiff fell (*i.e.*, intermittent, nonoccupational individuals). *Id.* at 461–62. Instead, the court noted that the first study of nonoccupational asbestos exposure had not been published until 1965 and determined that the plaintiff's evidence failed to show that the employers knew or should have known of the risks associated with nonoccupational exposure. *Id.* at 461 (emphasis in original). Therefore, despite the fact that Texas courts consider other factors when deciding whether to establish a duty, these factors "[could not], as a matter of law, outweigh a complete lack of foreseeability of any danger to one in [the plaintiff's] situation." *Id.* at 462.

Similarly, in *Martin v. Cincinnati Gas & Elec. Co.*, the United States Court of Appeals for the Sixth Circuit considered whether the employer owed a duty to the son of one of its employees. 561 F.3d 439, 446 (6th Cir. 2009) (interpreting KY law). The employee had worked for the defendant's company as a laborer for nearly 40 years and had been "intermittently" exposed to asbestos for slightly over one decade. *Id.* at 441. After work, the employee would occasionally leave his work clothes in the laundry room where the plaintiff's son would enter. *Id.*

The majority of cases in which courts have concentrated their analysis on the foreseeability of the risk of harm of asbestos exposure to members of the household of an industrial worker have recognized a duty of care in take-home exposure cases.

According to the Sixth Circuit, the most important factor for determining whether a duty existed was foreseeability, which was "based on what the defendant knew at the time of the alleged negligence… [and] includes… matters of common knowledge at the time and in the community." *Id.* at 444 (citations omitted). Examining the record, the court noted that the plaintiff's own expert testimony showed that the first studies of the effects of secondary bystander exposure did not exist until 1965. *Id.* at 445. The court also pointed out that the employee's work near asbestos-laden products ended in 1963. *Id.* Therefore, because the plaintiff could not offer "any published studies or… evidence of industry knowledge of bystander exposure, there is nothing that would justify charging [the premise owner] with such knowledge during the time that

[the employee] was working with asbestos. *Id*. at 445–46.

In sum, the majority of cases in which courts have concentrated their analysis on the foreseeability of the risk of harm of asbestos exposure to members of the household of an industrial worker have recognized a duty of care in take-home exposure cases. In those cases that use a foreseeability standard yet conclude that the defendant did not owe a duty to the plaintiff, the courts typically find that the plaintiff's evidence failed to show that the defendant knew or should have known (evidence of industry knowledge) of the risks associated with take-home exposure.

Other states focus primarily on the relationship between the employer or the landowner and its employees' household members, as opposed to the foreseeability of harm to employees' relatives, when considering take-home exposure claims.

No Duty Found Because of Insufficient Relationship Between the Parties

Other states focus primarily on the relationship between the employer or the landowner and its employees' household members, as opposed to the foreseeability of harm to employees' relatives, when considering take-home exposure claims. For example, in *Campbell v. Ford Motor Co.*, the plaintiff brought suit against Ford claiming that she had developed mesothelioma from the asbestos-contaminated belongings that the plaintiff's father and brother had brought home from work. 141 Cal. Rptr. 3d 390, 393 (Cal. Ct. App. 2 Dist. 2012). After the trial, the jury found Ford 5 percent liable for the plaintiff's injury. *Id.* at 395.

Determining Ford's liability, the appellate court acknowledged that California law imposes a general duty on individuals to act with reasonable care. *Id*. at 398. In certain circumstances, however, public policy mandates that the law exempt "entire categor[ies] of cases from that general duty rule." *Id.* After balancing the policy factors, the court held that Ford owed no duty to the plaintiff's wife and reasoned,

> Even if it was foreseeable to Ford that workers on its premises could be exposed to asbestos dust… the 'closeness of the connection' between Ford's conduct in having the work performed and the injury suffered *by a worker's family member* off of the premises is far more attenuated.

Id. at 402 (emphasis in original).

Likewise, in *Riedel v. ICI Americas Inc.*, the plaintiff brought a claim against her husband's employer, who owned an explosives manufacturing company, alleging that the employer had negligently failed to stop her husband from bringing home asbestos-contaminated clothing and had failed to warn its employees' family members of the dangers of asbestos exposure. 968 A.2d 17, 19 (Del. 2009). The plaintiff's husband, who had worked for the defendant-company for nearly 30 years, first became exposed to asbestos when the company incorporated asbestos in its research and development sector. *Id.* At trial, the district court granted summary judgment in favor of the employer on the basis that the employer and the wives of its employees "did not share a legally significant relationship that would create a duty… owed [to the employees' wives]." *Id*. at 18.

Before determining whether the trial court had correctly found that the employer owed no duty to its employees' wives, the court acknowledged the recent decision of the Tennessee Supreme Court in *Satterfield*. *Id.* at 20. The Delaware court of appeal, however, declined to follow the newest Restatement (Third) of Torts, which was the basis for the *Satterfield* court's reasoning, because it "create[d] duties in areas where [Delaware courts] have previously found no common law duty and have deferred to the legislature to decide whether or not to create a duty." *Id.*

The court, therefore, turned to its previous jurisprudence, which held that "one who merely omits to act generally has no duty to act, unless there is a special relation between the actor and the other which gives rise to the duty." *Id.* at 22 (internal citations omitted). Because the wife had failed during the trial to allege that the employer's action constituted misfeasance, on appeal, the court refused to consider whether the employer's acts were appropriately characterized as misfeasance or nonfeasance. *Id.* at 24. Consequently, the court held that no special relationship existed between the two parties to create a duty owed by the employer to its employees' wives. *Id.* at 24–26.

The Iowa Supreme Court in *Van Fossen v. MidAmerica Energy Co.*, considered whether a premises owner could be liable for the wrongful death of the wife of an employee who was not employed by the premise owner, but rather was the employee of an independent contractor hired to work on the premises. 777 N.W.2d 689, 691 (Iowa 2009). In analyzing the issue, the court explicitly adopted the Restatement (Third) of Torts' framework under which "the foreseeability of physical injury to a third party is not considered in determining whether an actor owes a general duty to exercise reasonable care." *Id.* at 696. The court also adopted the Restatement's position that all individuals owe a broad duty to exercise reasonable care, except in extraordinary circumstances when public policy warrants an exception to the general duty rule. *Id.* Applying this framework, the court held that "one who employs an independent contractor owes no general duty of reasonable care to a member of the household of an employee of the independent contractor." *Id.* at 697.

In *Adams v. Owens-Illinois, Inc.*, a Maryland court of appeal consolidated several asbestos claims, one of which was a take-home exposure claim. 705 A.2d 58, 60, (Md. App. 1998). The claim alleged that the wife of a shipyard worker had died because of her exposure to the asbestos on her husband's clothing. *Id.* at 407. The court, however, rejected the wife's claim and found that the employer did not owe a duty to its employees' wives. *Id.* at 411. In so holding, the court reasoned that "[i]f liability for exposure to asbestos could be premised on [the wife's] handling of her husband's cloth-

ing, presumably [the employer] would owe a duty to others who came in close contact with [the employee], including other family members, automobile passengers, and co-workers." *Id.* Fearing the broad specter of liability that imposing a duty on employers to their employees' relatives could create, the court held that the employer "owed no duty to strangers based upon providing a safe workplace for employees." *Id.*

In *In re Certified Question from Fourteenth District Court of Appeals of Texas*, the Michigan Supreme Court considered the plaintiff's claim, which alleged that the decedent had developed mesothelioma from washing her stepfather's clothes. 479 Mich. 498, 501 (Mich. 2007). The stepfather had worked for an independent contractor that the defendant-property owner had hired to restore blasts furnaces, which required the use of asbestos-containing materials. *Id.* Consequently, the court had to determine whether, under Michigan law, an owner of a property containing asbestos products owed a duty to the stepchild of an independent contractor's employee to protect the stepchild from asbestos exposure. *Id.* at 502.

Framing the issue, the court first noted that the duty inquiry involved a balancing of policy considerations, which included the foreseeability of the harm, the relationship between the parties, the burden to the defendant, and the nature of the risk presented by the conduct in question. *Id.* at 505. Additionally, Michigan law placed the most weight on the relationship factor. *Id.* Assessing these factors, however, merely provided a path to the "ultimate inquiry in determining whether a legal duty should be imposed [, which] is whether the social benefits of imposing that duty outweigh the social costs of imposing a duty." *Id.* at 515. Ultimately, the court largely based its social utility determination on the "highly tenuous" relationship between the landowner and the stepchild of an independent contractor working on its premises. *Id.*

New York's highest court also focuses primarily on the relationship between the parties when adjudicating take-home asbestos exposure claims. *See In re New York City Asbestos Litigation,* 806 N.Y.S. 2d 146 (N.Y. 2005). The plaintiff in *In re New York City Asbestos Litigation* was a former employee of the Port Authority of New York and New Jersey (the Port), who brought a take-home exposure claim against the Port after his wife developed mesothelioma. *Id.* at 148. The plaintiff sought to recover under two theories of liability, arguing that the Port owed his wife a duty of care as his employer and owed a separate duty as a landowner. *Id.* at 494, 496.

In determining whether the Port owed a duty to its employee's wife as an employer, the court first held that under New York law, foreseeability does not play a role in determining the existence of a duty. *Id.* at 494. Rather, "[t]he 'key" consideration critical to the existence of a duty in these circumstances is "that the defendant's relationship with… the plaintiff places the defendant in the best position to protect against the risk of harm." *Id.* The court, therefore, found that the Port did owe its employees a duty to provide a safe place to work, however, that duty extended only to employees. *Id.*

Addressing the plaintiff's argument that the Port owed the plaintiff's wife a duty of care as a landowner, the court distinguished its case from the *Olivo* case in which the Supreme Court of New Jersey imposed a duty on the premise-owner to protect its employee's wife from take-home asbestos exposure. *Id.* at 497. The court stated that, unlike New Jersey law, New York law does not rely on foreseeability to establish duty. *Id.*

Finally, a Delaware court of appeal in *In re Asbestos Litigation* had to construe Pennsylvania law to determine whether the state would recognize a take-home exposure claim. 2012 WL 1413887, at *1 (Del. Super. 2012). According to the court, the determination of whether a duty existed under Pennsylvania law requires courts to balance several factors, including: "the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." *Id.* at*2. After giving "heavy weight" to the relationship factor and noting that an employer and an employees' wife were "legal strangers in the context of negligence," the court found that on balance, the factors weighed in favor of imposing no duty on the employer toward its employee's wife. *Id.* at *4.

No Duty Found Because Exposure Occurred Off-Premises

Though applying different legal standards, the supreme courts of Georgia and Ohio have held that employers or landowners do not owe a duty of care to nonemployees because the nonemployees' asbestos exposure occurred away from the employer's or the landowner's premises.

In *CSX Transp., Inc. v. Williams*, the Georgia Supreme Court considered whether the employer owed a duty to protect the wives and children of its employees from take-home asbestos exposure. 608 S.E.2d 208 (Ga. 2005). The court rejected the notion that the foreseeability of harm alone sufficed to extend an employer's duty of care to exposure locations away from the workplace. *Id.* at 209. Additionally, the court found that the jurisprudence regarding a landowner's duties in cases in which the landowner created a dangerous situation did not apply because the case before the court did "not involve [the employer] itself spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." *Id.* at 210. Consequently, the court held that the employer's duty to provide a safe workplace, in this case, did not extend to individuals who may experience exposure in locations beyond the employer's premises. *Id.*

In *Boley v. Goodyear Tire & Rubber Co.*, the executors of a deceased woman's estate sought to recover under several theories of liability after the woman died from mesothelioma. 929 N.E.2d 448, 449 (Ohio 2010). The plaintiffs attributed the woman's death to her exposure to asbestos while washing her husband's work clothes. *Id.* The court, however, rejected the plaintiffs' claims because of an Ohio statute regulating the liability of premises owners. *Id.* at 452. According to the court, the legislative intent of the statute was to "to limit the liability of a premises owner to instances in which the exposure occurred *at* its property." *Id.* (emphasis in original). The court, therefore, determined that the statute barred recovery for the plaintiffs' take-home exposure claims because the wife's exposure did not occur on the employer's premises *Id.* at 453.

Conclusion

An examination of the take-home exposure case law indicates that the major-

ity of courts do not recognize take-home exposure claims. These "no duty" courts have generally found that a duty does not exist because of the lack of foreseeability and have based their foreseeability determination on the failure of the evidence to demonstrate that at the relevant time, employers generally knew of the dangers of asbestos exposure to nonemployees. "No duty" courts have also based their determination on the lack of a legal relationship between the parties or the fact that the injury occurred at locations away from an employer's or a landowner's work site.

Recent decisions from appellate courts in California, however, exemplify the continued prevalence of the split between courts deciding the viability of take-home asbestos exposure claims. *Compare Kesner v. Superior Court*, 171 Cal. Rptr. 3d 811, 818 (Cal. Ct. App. May 15, 2014) (finding that the employer had a duty to protect its employee's nephew from take-home asbestos exposure in part because the harm was foreseeable), *with Haver v. BNSF Railway Co.*, 172 Cal. Rptr. 3d 771 (Cal. Ct. App. June 23, 2014) (finding that the employer owed no duty to wife of a former employee). The California Supreme Court has granted a petition to resolve the split within its appellate courts, which could provide further clarity to courts attempting to adjudicate the matter. *See Haver v. BNSF R. Co.*, 331 P.3d 179 (Cal. 2014).

Although courts will continue to consider their state's law and public policy in determining the existence and scope of a duty owed to workers' household members, with the exception of the *Bobo* decision in Alabama, the decisions appear to be trending toward a finding of no duty. For example, a United States District Court in Pennsylvania recently held that the employer did not owe a duty to its employee's wife. The court based its finding of a lack of relationship between the employee's wife and the defendant's on the fact that the exposure did not occur on the employer' premises—a line of reasoning similar to the decisions of the supreme courts of Georgia and Ohio. *Gillen v. Boeing Co.*, 40 F.Supp.3d 534, 538, (E.D. Pa. 2014) (construing Pennsylvania law). *See also* Pypcznski & Kaplan, *Rise or Demise of Take-Home Asbestos Exposure Claims?*, LNJ's Product Liability Law & Strategy (May 2015) (noting that "there are implications [and] trends suggesting that more and more courts are reluctant to extend liability to arguably unknown limits under circumstances presented with take-home exposure claims.").

Considering the rising number and importance of take-home exposure cases in the asbestos litigation arena, skillful asbestos defense attorneys should be familiar with not only the law of their particular states, but also the various rationales used by courts throughout the country for determining the duty of premises owners and employers in take-home asbestos exposure cases.