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Contents

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The Source for Defense Success

The Next Wave of Asbestos Litigation: Examining the Duty of Care In Take-Home/ Secondary Asbestos Exposure Claims

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The Rise of Take-Home or Secondary Exposure Asbestos Claims

Take-home asbestos claims are asserted by or on behalf of individuals who claim an asbestos-related injury arising from exposure to asbestos fibers through others. Most commonly, these claims allege that a worker family member was exposed to asbestos in an occupational setting, who thereafter "took home" the asbestos fibers and transferred them to the household setting, thereby exposing family members and others to the toxic fibers. Though they have never set foot onto a property owner defendant's premises, and have never been employed by a defendant employer, these claimants argue that the premises owner or employer should have known about the dangers posed by asbestos and exercised reasonable care for the claimant's safety accordingly by preventing asbestos fibers from being transferred to the home environment, or otherwise warned those individuals about the risks posed by take-home exposures.

Take-home cases have considerably expanded asbestos litigation to a new generation and class of individuals, and represent a new method of significantly prolonging asbestos litigation. Furthermore, take-home claims represent one of the fastest growing types of asbestos actions filed today, resulting in significantly enhanced potential exposure and liability for asbestos defendants of all shapes and sizes. To make matters worse, looking ahead the trend of increased take-home claim filings is only set to continue, if not accelerate, as we move forward in time, especially as the population of industrial workers who were exposed to asbestos continues to age and shrink.

In recent years, the issue of whether an employer or premises owner owes a duty of care to the take-home plaintiff has been a subject of fierce litigation across the country in both state and federal courts. During this time, significant uncertainty has developed across different jurisdictions on this issue, as courts have failed to reach a consensus as to whether a duty is owed to the take-home asbestos plaintiff. Importantly, at the present time a clear divergence of opinions exists across jurisdictions as to how tort law principles should be used to determine whether an employer or premises owner owes a duty to individuals who develop asbestos-related illnesses after being secondarily exposed to asbestos fibers. The differing views across jurisdictions is attributable to the different approaches that the courts have taken to determine the existence of a legal duty in the take-home exposure context. In this regard, courts have analyzed this dispute by focusing on four primary issues: (1) foreseeability; (2) the relationship between the parties; (3) public policy concerns; and (4) statutory considerations. While the majority of courts that have tackled the issue have found that no duty exists, others have held that employers and premises owners maintain a duty to safeguard non-employee claimants from the dangers and hazards of asbestos.

Foreseeability Approach

The first approach taken by the courts in analyzing whether a duty exists for take-home asbestos cases has been to focus on the issue of foreseeability of harm to the take-home plaintiff. The key question under the foreseeability approach turns on whether the defendant employer or

premises owner actually knew, or should have known, of the nature and potential hazard of asbestos exposures during the time period over which the take-home plaintiff was allegedly exposed to asbestos fibers on a secondary basis.

Courts that apply a foreseeability-oriented approach frequently focus on the period of time over which the take-home plaintiff's alleged exposure occurred, and whether the premises owner or employer knew or should have known of the dangers and hazards of take-home exposure based on the medical information known throughout the asbestos industry during that particular time period. In addition, courts also evaluate the federal laws or regulations that were in place at the time of the exposure to determine what the defendant should have known. In particular, many courts give great weight to the Occupational Safety and Health Administration's (OSHA) 1972 regulations for employers using asbestos, which recognized the potential risk from asbestos-exposed clothing, and required employers to take the appropriate measures—including providing showers and changing facilities for workers—to minimize exposure to employees and others. In this respect, many courts are willing to find that foreseeability does not exist for exposures that took place before 1972, as the connection between asbestos-related medical conditions and take-home exposures arising from clothing worn at the workplace was not generally recognized until OSHA's regulations addressing the issue of offsite contamination from workplace clothing were introduced that year.

As a general rule, courts are willing to find that a duty was owed to the take-home plaintiff if the evidence in a given case establishes that the defendant knew or should have known that secondary asbestos inhalation caused harm at the time of the alleged exposures. However, where a lack of evidence exists to establish that intermittent and non-occupational exposure to asbestos could put people at risk of contracting serious asbestos-related conditions was generally known, and thus foreseeable, at the time of the exposure(s) in question, defendants have been successful in defeating plaintiffs' attempts to establish a duty of care. In particular, defendants have found success in persuading courts to reject a duty where the defendant can show a lack of information available in the asbestos industry regarding secondary exposure risks at the time of the plaintiff's exposure, as under such circumstances courts ordinarily find that the defendant could not have reasonably foreseen the danger of exposure to asbestos dust on workers' attire at the time of exposure.

To date, the majority of courts using a foreseeability test as their primary consideration have concluded that a duty of care exists as it relates to take-home or secondary asbestos exposure plaintiffs. Conversely, courts that have found no duty exists based on foreseeability generally have arrived at this conclusion because the fact-specific evidence of those cases fell short of demonstrating that the defendant employers/property owners knew or should have known that their conduct created a risk of injury to the take-home plaintiffs during the period of exposure.

For example, in *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008), the Tennessee Supreme Court found that a defendant owed a duty to a take-home plaintiff based primarily on a foreseeability analysis. In that case, Doug Satterfield worked at an Alcoa facility from 1973 to 1975. Prior to Satterfield's employment, beginning in the 1930s Alcoa had been aware that asbestos is a highly dangerous substance, and as a result had closely monitored the research into the dangers posed by asbestos. In addition, Alcoa became aware in the 1960s that the dangers posed by asbestos fibers extended beyond its employees who were in constant direct contact with the materials containing asbestos or the asbestos fibers in the air. Finally, the court noted that in 1972 OSHA promulgated regulations prohibiting employees who had been exposed to asbestos from taking their work clothes home to be laundered. Under these facts, the court concluded that Alcoa knew the danger that asbestos posed, and that it should have foreseen the harm that an individual, such as Satterfield's daughter—who had filed suit against Alcoa alleging secondary exposure—could suffer. Therefore, the court concluded that Alcoa owed a duty of care to the take-home plaintiff.

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Conversely, in *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009), the Sixth Circuit Court of Appeals held that an employer did not owe a duty to a take-home plaintiff exposed to asbestos by a former employee. In that case, Dennis Martin's son filed a take-home asbestos exposure suit against, among other entities, Cincinnati Gas & Electric Company. Martin worked for CG&E for almost forty years, and had been "intermittently" exposed to asbestos for just over a decade. In its analysis, the Sixth Circuit noted that 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 included matters of common knowledge at the time and in the community. Importantly, the court also highlighted the fact that the plaintiff's own expert established that the first studies regarding the impact of secondary bystander exposure did not originate until 1965. Martin's employment with CG&E, however, ended in 1963. As such, because the plaintiff was unable to point to any published studies or evidence of industry knowledge of bystander exposure, there was nothing that would justify charging the premises owner with such knowledge during the time the employee was working with asbestos. Consequently, the court held that no duty of care existed in connection with the take-home plaintiff.

Party Relationship Approach

The second primary approach taken by the courts is has been to focus on examining the relationship of the parties. Where no relationship between the take-home plaintiff and the defendant exists, no duty will be imposed.

Courts using the relationship test have generally found that no sufficiently close relationship exists between the premises owner or employer and the take-home plaintiff, and as such have rejected the existence of a duty owed to the take-home individual. In many cases, such as *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005), courts will analyze the issue by employing a basic relationship test and, in doing so, will find that because a take-home plaintiff was neither an employee of the defendant nor exposed to any danger on the defendant's premises, no duty was owed to the take-home plaintiff. Likewise, in *In re Asbestos Litigation*, C.A. No. 04C-07-099-ASB (Del. Super. 2007), a Delaware court found that the relationship factor weighed against finding a duty because the employer did not have a "legally significant relationship" to its employee's family.

Finally, plaintiffs have also attempted to assert relationship-oriented arguments which focus on an employer's purported negligence in failing to ensure a safe work environment for its employees, which thereafter caused the plaintiff's take-home asbestos exposure. This argument has also been uniformly rejected by the courts based on a refusal to stretch an employer's duty of care to maintain a safe work environment beyond employees and to third parties.

Public Policy Concern Approach

Third, many courts also consider public policy concerns in determining whether a duty exists in take-home cases. When doing so, these courts often combine an evaluation of public policy factors with additional considerations of foreseeability and/or the relationship between the parties.

Courts have used many different factors in analyzing the issue of public policy, including: (1) the foreseeable probability of harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct of the defendant; (5) the opportunity and ability to exercise care; (6) the foreseeability of alternative conduct that is safer; (7) the relative costs and burdens associated with that safer conduct; (8) the relative usefulness of the safer conduct; (9) the relative safety of alternative conduct; (10) the public interest in the proposed solution; and (11) the need to limit the consequences of wrongs to a controllable degree.

In general, courts find the public policy aspect of take-home claims troublesome. In this respect, while the hazardous nature of asbestos concerns the courts and provides motivation to allow recovery for take-home victims, courts are also cognizant of the potential adverse consequences that may result from stretching the liability of premises owners and employers too far, especially where asbestos litigation has already run hundreds of companies into

bankruptcy. Ultimately, however, courts that have focused on public policy considerations have generally held that no duty is owed to the take home-plaintiff, based on the reasoning that potentially "limitless liability" is too troublesome to find in favor of the existence of a duty.

For example, in *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 479 Mich. 498 (Mich. 2017), the Michigan Supreme Court examined public policy considerations and concluded that no duty existed to exercise reasonable care for the safety of a take-home plaintiff. In doing so, the court highlighted the development of a litigation crisis that had formed as a result of the state's existing asbestos docket, and from there concluded that expanding a duty of care to any individual who may come in contact with someone who has merely been on a premises owner's property would expand traditional tort principles beyond manageable bounds and create an "almost infinite universe" of potential claimants. As such, these policy considerations (along with a "highly tenuous" relationship between the defendant and the take-home plaintiff) compelled the court to decline to extend the scope of duty to the take-home context.

Statutory Considerations Approach

Finally, some state courts are bound in their duty determination by statutes or other regulations promulgated by state legislatures. For example, in Kansas, K.S.A. § 60-4985(a)—which provides that "[n]o premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property"—precludes take-home claims in that state. Likewise, in Ohio, Ohio Revised Code § 2307.941(A)(1)—which provides 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"—also bars take-home claims from being pursued in that state as well.

The Final Word

As traditional asbestos plaintiffs—those exposed to asbestos in an occupational setting—continue to dwindle, more and more plaintiffs' attorneys will inevitably turn to secondary exposure cases with more frequency. Fortunately, at this time the majority of courts that have considered the issue of duty in the take-home claim context have rejected plaintiffs' attempts to establish a duty in this particular context. With that said, a significant split still currently exists regarding the viability of negligence-based take-home exposure claims. As such, given the significant uptick and increasing importance of take-home claims in the context of asbestos litigation, asbestos defense practitioners are well-advised to become well-versed both in the specific law that applies in a particular jurisdiction, as well as with the various rationales used across the nation for evaluating and determining the issue of whether a duty exists on the part of employers and premises owners for take-home asbestos exposure claims.

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