dri The Voice of the Defense Bar™

The Voice

December 21, 2016 Volume 15 Issue 51

Legal News

"Take-Home" Asbestos Claims Rulings by California and Georgia Supreme Courts Impact Claim Viability
By Daniel J. Kelly, Carter E. Strang, and Karen E. Ross



The Supreme Courts of California and Georgia recently—in rulings dated 12/1/16 and 11/30/16, respectively—provided finality to questions surrounding the viability of take-home asbestos claims in those states. Take-home claims are those asserted by plaintiffs who never set foot on the premises or used the asbestos-containing product in question but who allege exposure through others, most commonly through a spouse or other family member's workplace clothing.

A unanimous California Supreme Court ruled in *Haver v. BNSF* and *Kesner v. Abex*, Case Nos. S219534 and S219919, that the duty of employers and premises owners using asbestos includes preventing secondary exposure to asbestos carried home on the bodies and clothes of on-site workers. California appellate courts previously had been split on the issue. The *Haver/Kesner* decision provides a clear path to a viable take-home claim in California.

Dealing with a product take-home claim, a unanimous Georgia Supreme Court, with one concurring opinion, ruled in *CertainTeed v. Fletcher* 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, a position consistent with other state rulings on the issue.

***Haver v. BNSF* and *Kesner v. Abex*: California Supreme Court**

In *Haver*, the plaintiff—the wife of a railroad employee—alleged she was exposed to asbestos from washing her husband's clothing that was contaminated during his work as a 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 the dismissal, finding that a premises owner did not owe a duty of care to household members for take-home exposure under a premises liability theory.

The plaintiff in *Kesner* alleged asbestos exposure as a result of his 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 the appellate court reversed and ruled that Abex owed a duty to protect the take-home plaintiff from the hazard.

In the consolidated appeals, the California Supreme Court noted that its task was to determine whether household exposure was "categorically unforeseeable" and whether the law should recognize such claims. 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 that use asbestos in the workplace owe a general duty of care to protect household members from secondary exposures. The court focused on the general foreseeability of potential exposure and 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."

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 they 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 earlier regulatory standards and documentation in scholarly journals recognizing 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.

Recognizing that finding a duty 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 its duty analysis under *Rowland v. Christian,* 69 Cal.2d 108 (1968), in that the finding of foreseeability "turned on the fact that a worker can be expected to return home each day and to 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 the duty, causation, and damages. It also explained that a number of 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.

***CertainTeed v. Fletcher*: Georgia Supreme Court**

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

The Georgia Supreme Court reversed the appellate court's ruling on the plaintiff's failure-to-warn claim. The court held it is not reasonable to require product warnings by manufacturers to take-home plaintiffs—who do not see or use the products in question—about possible hazards of asbestos dust from their products.

Explaining its holding, the court said, "[w]e think it unreasonable to impose a duty on CertainTeed to warn all individuals in Fletcher's position, whether those individuals be family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless."

The court—which in *CSK Trans. v. Williams*, 278 Ga. 888, 608 SE 2d 208 (2005), barred take-home claims against employers—upheld the appellate court's ruling on the plaintiff's product defect claim because CertainTeed failed to meet its burden of showing there was no evidence that its product was defective as designed.

Daniel J. Kelly is a partner in the San Francisco office of **Tucker Ellis LLP**, where he focuses on environmental, mass tort, and product liability litigation. He is a member of DRI, the San Francisco Bar Association, and the Federal Bar Association. **Carter E. Strang** is a partner in the Cleveland office of **Tucker Ellis LLP**, where his focus is mass tort, product liability, and environmental litigation. Mr. Strang is the past president of the Cleveland Metropolitan Bar Association and the Federal Bar Association, Northern District of Ohio Chapter. A member of the DRI Toxic Torts and Environmental Law Committee, he is a recipient of the 2013 DRI Lifetime Community Service Award. **Karen E. Ross** is counsel in the Cleveland office of **Tucker Ellis LLP**, where she serves as local and national counsel in premises, asbestos, silica, coal mine dust, and other toxic exposure litigation in Ohio and across the United States.

Supreme Court Update: Patent Act—Venue

On December 14, the Supreme Court granted certiorari in *TC Heartland LLC v. Kraft Food Brands Group LLC,* No. 16-341, to resolve a dispute regarding venue in patent cases.

The patent venue statute, 28 U.S.C. § 1400(b), provides that a patent infringement action "may be brought in the judicial district where the defendant resides." In *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), the Supreme Court held that a corporate defendant "resides" only where it is incorporated, for purposes of § 1400(b), and that the general venue statute, 28 U.S.C. § 1391, was inapplicable. The Federal Circuit subsequently found that *Fourco* had been abrogated by amendments to § 1391 and that patent infringement actions could be brought where permitted by § 1391. Section 1400(b) separately permits venue "where the defendant has committed acts of infringement and has a regular and established place of business," but a recent study estimated that 86% of patent cases are filed in judicial districts that would be permitted by § 1391 but not by § 1400(b). Accordingly, the Court's resolution of this dispute could meaningfully limit where a plaintiff is entitled to file an action for patent infringement.

BACK

SHARE AND FOLLOW US




DRI The Voice of the Defense Bar
55 West Monroe St. Suite 2000, Chicago Illinois, 60603