

# Asbestos

## Raising the Bar in Asbestos Litigation

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November 2015 • Vol. 15, No. 11

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HarrisMartin's *COLUMNS-Asbestos* is published monthly by HarrisMartin Publishing LLC, 30 Washington Ave., Ste. D-3 Haddonfield, NJ 08033

*\$975 print & online annual subscription*  
*\$595 print & online 6-month subscription*

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# Take-Home Asbestos Claims: The Evolving Litigation Landscape

## 6<sup>th</sup> Annual Jurisdictional Update

*A Commentary by Carter E. Strang, Karen E. Ross, and Madeline B. Dennis*  
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Once a rarity, take-home asbestos claims are now commonplace. The result has been an increase in the number of multimillion-dollar awards, including – this past April to September alone – a \$20 million Ohio award,<sup>1</sup> a \$4.6 million Tennessee award,<sup>2</sup> and two \$3.5 million awards in Alabama and Washington.<sup>3</sup>

Take-home claims are those asserted on behalf of claimants that have never set foot on the premises or used the product at issue, but allegedly were exposed to asbestos through their spouses or others who brought it home on their work clothing. They are also commonly referred to as “household,” “bystander,” “secondary,” “second-hand,” or “para-occupational” exposure claims.<sup>4</sup> Such claims are brought against premises owners, product manufacturers and suppliers, and contractors.

A typical premises liability claim is based on negligence, and a central question is whether a duty is owed by the premise owner to the take-home plaintiff.<sup>5</sup> Courts generally apply one of two tests in making that determination: the “relationship” test or the “foreseeability” test.

The relationship test is focused on the relationship between the premises owner

and the take-home plaintiff. Absent the existence of a special relationship between those parties – such as “invitee” or “licensee” – courts using this test hold no duty is owed to take-home plaintiffs, such as spouses and other family members.

The foreseeability test focuses – as the name suggests – on the foreseeability of the harm to the take-home plaintiff. Taken into consideration are the time period of exposure, knowledge of asbestos hazards, relationship between the take-home plaintiff and person who tracked it home (spouse, uncle, etc.), and ability to warn about and protect against the hazard, among other factors. Court holdings applying this test are very case-specific, with some ruling that a duty was owed to the take-home plaintiff and others not.

And, there are two states – Kansas and Ohio – that have enacted statutes that bar take-home claims against premises owners.

In the context of premises liability claims, an “emerging majority” of courts in states where the issue has been addressed have held that no duty is owed.<sup>6</sup>

When take-home claims are asserted as products liability claims against manufacturers or others, the products law of that jurisdiction governs. Trends as to such claims are hard to discern, with rulings closely tied to the product, time period at issue, and other case-specific factors. In this article, the take home products liability cases 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.<sup>7</sup>

Few courts have addressed the liability of a contractor facing a take-home plaintiff claim; however, courts in several jurisdictions have – applying a negligence standard – permitted such claims holding that the contractor, as the party doing the work at the premises, is responsible for the alleged hazards related to that work.

In this – our sixth annual jurisdictional update of take-home asbestos claims – we address premises, products liability, and contractor claims state by state as of October 16, 2015, the date this article was submitted for publication.

It is important to note that the California Supreme Court is considering both premises and products liability take-home claims. The matter has been briefed but, as of this article, the dispute has not been scheduled for oral argument.

## Alabama

### *Premises Liability*

The United States District Court for the Northern District of Alabama recently extended a duty of care to take-home plaintiffs in the premises liability context. In *Bobo v. Tennessee Valley Auth.*, 2014 WL 4269128 (N.D. Ala. Aug. 25, 2014), the plaintiff alleged she was exposed to asbestos a minimum of twice a week while laundering her husband's clothes during the 22 years (1975-1997) he worked at his employer's worksite as a laborer, resulting in her diagnosis of pleural mesothelioma. Plaintiff argued that because Alabama considers foreseeability a primary factor, the court should find the existence of a duty. The defendant countered that the court should find no duty based on public policy, the nature of defendant's activities, the relationship between the parties, social considerations, and other factors. The court denied the defendant's motion for summary judgment, holding that policy considerations did not outweigh "the foreseeability of injury in a jurisdiction like Alabama that relies heavily on foreseeability in its duty analysis."

The case proceeded to a bench trial. After hearing the evidence presented by both sides, the court – on June 22, 2015 – certified the issue to the Alabama Supreme Court, noting "[t]here are no clear, controlling precedents in the decisions of the Alabama Supreme Court on these issues, and their significance extends beyond the present case." On August 24, 2015, the Alabama Supreme Court declined to accept the certified question.

On September 29, 2015, the trial court held that the premises owner owed a duty to the family members of its employees at risk of secondary asbestos exposure, and that it breached that duty to the decedent. It awarded \$3 million for pain and suffering and \$500,000 for costs. The court again emphasized that

**“When take-home claims are asserted as products liability claims against manufacturers or others, the products law of that jurisdiction governs. Trends as to such claims are hard to discern, with rulings closely tied to the product, time period at issue, and other case-specific factors.”**

the primary factor in the duty analysis under Alabama law is foreseeability, noting that the state's high court had not limited a finding of a legal duty to direct, contractual, or employment relationships in the past. The trial court stated that decedent's asbestos exposure was foreseeable in light of the existence of OSHA regulations and defendant's own workplace standards, especially those aimed at preventing asbestos fibers from clinging to employee's skin, hair, or clothing and being carried off defendant's property. Policy considerations further supported the court's decision, particularly in light of the low-cost methods of preventing secondary asbestos exposure.

## California

### *Premises Liability*

As noted, the California Supreme Court is hearing two major take-home cases: a premises case and a products liability case. The premises liability case presently before the California Supreme Court is *Haver v. BNSF Railway Co.*, 226 Cal. App. 4<sup>th</sup> 1104 (June 23, 2014), review granted Aug. 20, 2014, S219919, where the Second District Court of Appeals

District court – affirming the trial court award of summary judgment – held that the defendant premises owner owed no duty to the take-home plaintiff. The plaintiff's husband was employed by the predecessor to defendant BNSF Railroad Company during the 1970s and alleged exposure to asbestos-containing products and equipment on defendant's premises. The intermediate appellate court cited *Campbell v. Ford Motor* (see below) as applicable precedent, rejecting the argument that it applied only to family members of independent contractors and was incorrectly decided. And, it distinguished *Kesner v. Superior Court* (see below) as being a negligence manufacturer – not premises – case.

In *Campbell v. Ford Motor Co.*, 206 Cal. App. 4<sup>th</sup> 15, 34 (2012), as modified on denial of reh'g (June 19, 2012), the California Court of Appeals for the Second District held that a premises owner has no duty to protect family members of workers from secondary asbestos exposure. The take-home exposure was alleged to have occurred from laundering work clothing contaminated by asbestos at a Ford plant, where decedent's brother and father worked for an

## PERSPECTIVES

independent contractor. The court noted that the existence and scope of a duty is a legal question for the court. In determining the existence of a duty, the court considered the factors set forth in *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968), notably foreseeability of harm to the plaintiff, policy considerations, extent of the burden on the defendant, and consequences to the community from imposing a duty.

Relying on *Campbell*, the California Appellate Court for the Second District Court of Appeals – in *Beckerling v. Shell Oil Co.*, Case No. B256407, Cal. App

2nd (Nov. 21, 2014) – granted the premises owner’s motion for summary judgment in a take-home asbestos exposure case. Plaintiff alleged that she developed mesothelioma from laundering the work clothes of her husband, a machinist who worked at two defendant Shell’s facilities from 1954 – 1992. The court rejected plaintiff’s argument that *Campbell* applied only to family members of independent contractors and that *Campbell* was incorrectly decided.

In *Swanson v. Simpson Timber Co.*, 2013 WL 5469261 (Cal. Ct. App. Oct. 2, 2013), plaintiff alleged that he was ini-

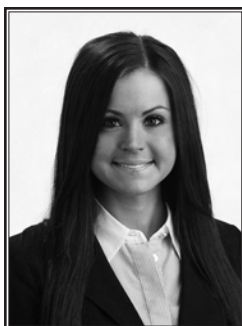
tially exposed to asbestos at work, and secondarily exposed off work premises to asbestos on his own work clothing as well as his son’s clothing, also brought home from that same workplace. The court extended *Campbell*’s holding to the case and entered an award of nonsuit. With regard to the claim based on exposure from plaintiff’s own work clothes, the court reasoned that the public policy factors weighing against extending such liability were even more compelling than under the facts in *Campbell*, and held that such claim was a derivative claim barred by exclusivity provisions of the Workers’ Compensation Act.

Conversely, in *Condon v. Union Oil Company*, Case No. A 102069, 2004 Ca. App. Unpub. LEXIS 7975 (Cal App., August, 2004), the court – applying a foreseeability standard – upheld a jury verdict in favor of the wife (ex-wife at the time of trial) where her husband allegedly brought asbestos home on his work clothing, which she washed from 1948 to 1963. The court found that there was substantial evidence, including expert testimony, to support a finding that during the relevant time period, it was known that worker clothing could be the source of contamination to others; thus, it was foreseeable that the husband’s contaminated clothing could lead to his wife’s exposure. In the face of such knowledge, the premises owner did not provide adequate protection against it, the court said. See also *Honer v. Ford Motor Co.*, Case No. B18916, 2007 WL 2985271 (Cal. App., October, 2007), where the court overruled the award of summary judgment where it was alleged the take-home exposure occurred during the 1940s; and *Bennett v. A.W. Chesterton, Inc.*, 2008 WL 8957253 (Cal. Super. Ct. Los Angeles County, June 10, 2008), where the court denied the premise owner’s motion for summary judgment which had alleged that the dangers of asbestos were not sufficiently known during the 1961-1964 period to be foreseeable, holding that the take-home plaintiff



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created an issue of fact through Dr. Barry Castleman, who testified that the dangers of asbestos were known as early as the 1930s. Similarly, in *Orona v. A.W. Chesterton Co.*, 2012 WL 10646823 (Cal. Super. Alameda Cty. Mar. 29, 2012), the trial court denied summary judgment to the defendant, holding that it did not meet its burden of showing that no duty was owed to the plaintiff, a son who alleged his father brought asbestos home on his work clothes. Compare *Corbett v. Agilent Technologies, Inc.*, 2012 WL 10677931 (Cal. Super.), where the court – addressing a take-home claim by a live-in boyfriend who alleged exposure from his girlfriend’s work place clothing during 1968 -1969 – denied the defendant’s motion for summary judgment, limiting *Campbell* to cases brought against premises owners, not employers.<sup>8</sup>

#### *Products Liability*

The products liability case presently before the California Supreme Court is *Kesner v. Super. Ct.*, 171 Cal. Rptr. 3d 811 (Cal. App. 1<sup>st</sup> Dist. 2014), review granted and opinion superseded sub nom. *Kesner v. S.C.* (Pneumo Abex LLC), 331 P. 3d 179 (Cal. 2014) S219534, where the California First District Court of Appeals held that take-home asbestos

exposure cases asserting negligence in the manufacture of a product should be treated differently from take-home cases in the premises liability context. The court explained: “While the same *Rowland* factors are pertinent to the analysis of a negligence claim, the balance that must be struck is not necessarily the same as under a claim of premises liability.”

Plaintiff – who developed mesothelioma – claimed asbestos exposure from the work clothes of his uncle, who worked for defendant, a manufacturer of brake linings, from 1973-2007, during which time plaintiff alleged he was a frequent guest at his uncle’s home.

The court examined the *Rowland* factors in the context of a negligence claim and emphasized that the most important of the factors – foreseeability – weighed in favor of holding an employer responsible for take-home asbestos exposure in some circumstances. With respect to the moral blame factor, the court explained that “[a]ssuming as we must the truth of [plaintiff’s] allegation that [defendant] was aware of the risks to those exposed . . . and took no steps to avoid those risks, certainly such indifference would be

morally blameworthy.” In addition, the court concluded that the imposition of a duty would advance the policy consideration factor of preventing future harm. Finally, the court explained that the remaining factors – extent of the burden to the defendant, possible consequences to the community, and the relative cost and availability of insurance covering the particular risk – did not weigh against extending a duty in the products liability context.

The court held that defendant owed a duty to the employee’s nephew in the particular case because the nephew’s contact with his uncle as a long-term guest in his uncle’s home was extensive. The court explained that “[a]s to such persons, the foreseeability of harm is substantial.” In concluding, the court noted that while a duty existed in the particular case, its finding was not a finding of negligence and it would not express an opinion regarding whether the defendant had been negligent, noting that left to be determined were the reasonableness of its efforts to prevent asbestos from being carried home on employee clothing, the extent of its knowledge of the dangers of asbestos at the time period in question, and the extent to which asbestos from its

**“Few courts have addressed the liability of a contractor facing a take-home plaintiff claim; however, courts in several jurisdictions have – applying a negligence standard – permitted such claims holding that the contractor, as the party doing the work at the premises, is responsible for the alleged hazards related to that work.”**

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plant played any role in causing the plaintiff's mesothelioma.

In *Grigg v. Allied Packing and Supply, Inc.*, 2013 WL 8103803 (Cal. Super. 2013), the Superior Court of Alameda County denied the motion for summary judgment of defendant Owens-Illinois (O-I) in a products liability take-home asbestos case. The plaintiffs claimed Mrs. Grigg was exposed to asbestos on the work clothes of her husband while he was working as an insulator and field supervisor for the contracting division of Owens Corning Fiberglas from 1950 until 1965.

product was defective." The court stated that the relevant focus in assessing whether a product is defective is consumer expectations, not the knowledge of the scientific community: "In this case the court cannot say it was unreasonable for [plaintiff] to expect that her husband could work with or near O-I's products without getting cancer." In addition, the court explained that the public policy considerations behind strict liability supported an extension of a duty in the case, as strict liability was developed to protect consumers. Defendant could not establish the absence of any duty of care to

but – as discussed more fully below – the court focused its discussion on defendant's liability as a contractor; and *Bennett v. A.W. Chesterton, Inc.*, 2008 WL 8957253 (Cal. Super. Ct. Los Angeles County, June 10, 2008), where defendant Goodyear was sued as the manufacturer of the brakes at issue and the court denied summary judgment on plaintiff's failure to warn claims, based on the earlier cited testimony of Dr. Barry Castleman that the dangers of asbestos were known as early as the 1930s.

### *Contractor Liability*

In *Sendle v. Pacific Gas and Elec. Co.*, *supra.*, the court denied defendant contractor's motion for summary judgment, rejecting defendant's argument that *Campbell* applied to it as a non-premises owning employer. The plaintiff's parents worked at a shipyard where defendant generated asbestos dust while installing brick, insulation, and other products containing asbestos into ships being built from 1942 to 1945.

In a case of first impression, the court considered "whether a contractor hired by a premises owner has a duty to protect family members of other contractors on the premises from take-home exposure to asbestos." The court concluded it could not award summary judgment to the defendant contractor because there was no justification for departing from Civil Code 1714 subd.(a), which states that "everyone is responsible for an injury occasioned to another by his or her want of ordinary care. . . ." The court emphasized that *Campbell* was applicable to premise owners, not contractor defendants. See also *Valenzuela v. Allied Packing & Supply*, 2014 WL 1246373 (Cal. Super.), where the court denied summary judgment on the grounds defendant was a contractor, not a premises owner.

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**“The court found that there was substantial evidence, including expert testimony, to support a finding that during the relevant time period, it was known that worker clothing could be the source of contamination to others; thus, it was foreseeable that the husband's contaminated clothing could lead to his wife's exposure.”**

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Plaintiffs argued that he removed asbestos-containing pipe and block insulation manufactured by defendant O-I during that time. O-I argued that the case was controlled by *Campbell*, but the court stated that "*Campbell* is distinguishable because this case – in contrast to *Campbell* – involves strict products liability claims against the manufacturer and distributor of the asbestos-containing product and the public policy considerations in such a case differ from that involved in an action for premises liability." The court explained that strict liability is focused on the product, not the manufacturer's conduct, and that "the law holds the manufacturer liable if the

plaintiff "because under the strict products liability cause of action asserted in this case O-I owed a general duty to produce defect-free products." In 2013, a jury awarded Ms. Grigg \$12 million for pain and suffering damages, \$342,500 for future medical expenses and loss of earnings, \$11 million in punitive damages, and \$4 million to her current husband for loss of companionship against O-I. See also *Sendle*, 2014 WL 1246400 (Cal. Super. Feb. 25, 2014), where the court stated that the defendant could be held liable as a products liability defendant where there was some evidence defendant maintained an inventory of products and supplied them to projects,

## Connecticut

### *Premises Liability*

In *Reed et al. v. 3M Co.*, No. CV-126034053S, 2015 WL 4380102 (Conn. Super. Ct., Fairfield Jud. Dist. June 12, 2015), the court denied a premises owner's motion for summary judgment finding that the premises liability claims raised genuine fact questions that should not be decided at the summary judgment stage. The plaintiff's father was a mechanic at Stamford Motors, Inc. until 1966, during which time plaintiff lived in the family home. Plaintiffs alleged that the father's work resulted in asbestos dust coming into the family home via the father's work clothes. Stamford moved for summary judgment, arguing the premises claim failed because plaintiff's injury was not foreseeable till after 1966. The court disagreed, finding that conflicting evidence existed regarding when auto mechanic work became associated with asbestos exposure.

## Delaware

### *Premises Liability*

In *Price v. E.I. DuPont Nemours & Company*, 26 A. 3d 162 (Del. Supr. 2011), the Delaware Supreme Court rejected plaintiff's take-home asbestos claim because it found there was no special relationship between the worker's spouse and the defendant.

In *Price*, the plaintiff's wife allegedly developed asbestos-related disease after years of washing her spouse's asbestos-laden clothing, and plaintiffs alleged nonfeasance. Under Delaware law, the court noted, nonfeasance requires evidence demonstrating that the defendant has a "special relationship" to the plaintiff and that the defendant fails to protect her from an unreasonable risk.

Plaintiff moved to amend the complaint to include a misfeasance claim, but her motion was denied because the court

found the amendment was "predicated on exactly the same underlying facts earlier claimed to be nonfeasance." The court determined that a legal characterization couldn't change the underlying conduct alleged.

The court found that there was no special relationship shown between the parties, rejecting plaintiff's claims that the company's health benefits and her husband's long-term relationship with the company created a special relationship. In the absence of such a special relationship, plaintiff's take-home claim must fail. Further, based on the court's denial of plaintiff's claim to amend her complaint to include malfeasance, the court implicitly indicated that a malfeasance take-home premises claim would likely suffer the same fate because the conduct alleged would actually be nonfeasance.

See also *Riedel v. ICI Americas Inc.*, 968 A. 2d 17, (Del. Supr. 2009), cited with approval in *Price*, where summary judgment in favor of the defendant was upheld and the Delaware Supreme Court declined to adopt the Restatement (Third) of Torts, because it "redefined the concept of duty in a way that is inconsistent with [Delaware's] precedents and traditions."

## Georgia

### *Premises Liability*

The Georgia Supreme Court, in *CSX Transp., Inc. v. Williams*, 608 S.E. 2d 208 (Ga. January, 2005), refused to extend a duty to a wife and children of a worker who alleged off-site contact with asbestos-contaminated work clothing. The court held that the initial inquiry in such claims is whether a duty exists, which is a matter of public policy. As a matter of public policy, the court held, no duty is owed to such claimants because they did not work at, and were not exposed at, the workplace.

## Illinois

### *Premises Liability*

Appellate courts in Illinois have reached different conclusions on the viability of take-home claims, with the Illinois Supreme Court suggesting a duty may exist if properly plead.

In *Nelson v. Aurora Equipment Company*, 391 Ill. App. 3d 1036, 909 N.E. 2d 931 (2009), appeal denied 233 Ill. 2d 564, 919 N.E. 2d 355 (Sept. 30, 2009), an Illinois appellate court affirmed that premises owners owe no duty to take-home plaintiffs. The court found that the threshold question in a premises liability case is duty, which requires an analysis of the nature of the relationship between the parties. There was no relationship between the take-home plaintiff – wife and mother of two men who allegedly tracked asbestos home on their clothing – and defendant, the premises owner. Absent a special relationship (such as an invitee), no duty is owed and a foreseeability analysis is inappropriate, the court held.

In *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, 965 N.E. 2d 1092 (2012), the Illinois Supreme Court hinted that a premises owner may, with the proper factual allegations, owe a duty to take-home asbestos plaintiffs. The trial court granted defendant's motion to dismiss, but the appellate court reversed and remanded, holding that the complaint "sufficiently states a cause of action to establish a duty of care." The court granted defendant's petition for leave to appeal. The court affirmed the reversal of the trial court but held that the allegations in the complaint as it stood were insufficient to establish that defendant owed a duty to plaintiff. The court noted that the existence of a relationship is the "touchstone" of duty analysis and that the existence of a relationship depended 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. Plaintiff



alleged her asbestos exposure from her husband's work clothes was foreseeable, but the court explained that foreseeability turns on the specific facts regarding what defendant knew or should have known regarding the nature and potential harms from asbestos between 1958 and 1964, which were the years the husband worked at CSX. And, the court held that plaintiff's "conclusory allegation that [defendant] knew or should have known" failed to allege any specific facts supportive of that claim, rendering the complaint insufficient. However, because defendant had not raised the issue before the circuit court, the court remanded the case and gave plaintiff leave to amend the complaint. The dissent found the case was ready for ruling on whether a general duty was owed and stated that the court should have ruled no duty was owed.

### *Products Liability*

In *Estate of Holmes v. Pneumo Abex, L.L.C.*, 2011 IL App (4<sup>th</sup>) 100462, 955 N.E. 2d 1173 (2011), appeal denied 968 N.E. 2d 1066 (May 30, 2012), a take-home plaintiff's failure to warn claims were dismissed where the court held that two manufacturers of asbestos-containing products – Bendix and Abex – owed no duty to the wife of an asbestos plant worker, based on a lack of foreseeability.<sup>9</sup> In determining the existence of a duty, the court considered the following factors: foreseeability, likelihood of injury, magnitude of the burden of guarding against the injury, and consequences of placing the burden on the defendant. Plaintiff failed to establish that the danger of take-home asbestos was foreseeable in 1962 or 1963 when the decedent's husband's work clothing was allegedly contaminated. Here, the court explained, plaintiff's expert Dr. Barry Castleman testified that the first epidemiological study establishing the danger of take-home exposure was not published until October 1964. As a result, the court held that no duty was owed to plaintiff and granted the motion for judgment notwithstanding the verdict.

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## Indiana

### *Products Liability*

In *Stegemoller v. A.C. & S., Inc.*, 767 N.E. 2d 974 (Ind. 2002), 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." Defendant argued that plaintiff did not qualify as a consumer under the Act because she was not at the worksite when defendant's insulation products were used. The court disagreed: "This is too narrow a view. The normal, expected use of asbestos products entails contact with its migrating and potentially harmful residue." The court reasoned further that clean up was encompassed in product use, including cleaning asbestos off clothing after work. Thus, plaintiff had standing to sue defendant manufacturer under the Act. See also *Martin v. A.C. & S., Inc.*, 768 N.E. 2d 426 (Ind. 2002), where the court held that the take-home asbestos plaintiff decedent had standing to bring claims under the Act.

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## Iowa

### *Premises Liability*

In *Van Fossen v. MidAmerican Energy Co.*, 777 N.W. 2d 689 (Nov. 13, 2009), the Iowa Supreme Court affirmed an award of summary judgment in favor of two companies who were being sued by the wife of an employee of an independent contractor. The court held that the owners of the power plant owed no legal duty to give warnings of the health hazards posed by asbestos to the spouse of an independent contractor's employee.

Specifically, the Court declined to impose a duty under: 1) Restatement (Second) Sections 413 and 416; 2) Restatement (Second) Section 427 – inherently dangerous activity exception to no duty; or 3) the general duty to exercise reasonable care (holding that "[o]ne 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."). The court recognized and chose to follow the other jurisdictions that hold there is no duty owed a third-party by a premises owner, rejecting those states that impose such a liability because "[s]uch a dramatic expansion of liability would be incompatible with public policy."

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## Kansas

### *Premises Liability*

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."

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## Kentucky

### *Premises Liability*

In *Martin v. Cincinnati Gas and Electric Co.*, et al., 561 F. 3d 439 (6<sup>th</sup> Cir. 2009), the Sixth Circuit Court of Appeals affirmed the United States District Court for the Eastern District of Kentucky's decision, construing Kentucky law, that a premises owner owed no duty to the take-home plaintiff where it was alleged his father brought asbestos particles home on his clothes during his employment at the defendant's premises during 1951-1963. The Sixth Circuit focused on the foreseeability of harm at the time of injury. The court explained that the plaintiff must show that the employer knew, or should have known, the danger of take-home asbestos exposure during the time his father was employed there,

and the court found that there was no evidence that the employer had actual knowledge of the danger of take-home exposure. Similarly, the court agreed with the trial court's conclusion that the plaintiff failed to show that the risk of take-home asbestos exposure was foreseeable at the relevant times in light of the fact that the first studies regarding the dangers of take-home exposure were published in 1965.

### *Products Liability*

Also in *Martin*, the court affirmed a summary judgment award in favor of a manufacturer defendant. Evidence indicated that defendant General Electric provided asbestos products to decedent's father's place of employment between 1937-1955. Decedent often played in the basement while his mother laundered his father's work clothes. The court held that defendant did not owe a duty to decedent because there was no showing that the risk was foreseeable at the relevant times. The court stated that the evidence submitted by plaintiffs did not provide "evidence of a general awareness of the dangers of bystander exposure – even inside the specialized fields of asbestos manufacture or utility companies." Indeed, the court affirmed that "[p]laintiff's expert report concedes that the first studies of bystander exposure were not published until 1965." With respect to plaintiffs' strict liability bystander claim, the court conceded that Kentucky recognized bystander products liability claims under Restatement 402A, but "limited to bystanders whose injury from the defect is reasonably foreseeable," which the court restated was not the case with decedent's injuries.

## Louisiana

### *Premises Liability*

In *Catania v. Anco Insulations, Inc.*, U.S. Dist. Ct. M.D. LA No. 05-1418-JJB, 2009 WL 3855468, a Louisiana federal court found that a duty of care was owed to the niece of several men who worked at the premises, then allegedly exposed the niece to asbestos through their work clothing. Defendant contended it owed no duty to the take-home plaintiff because the risk of a family member contracting mesothelioma was not foreseeable at the time of the alleged exposures and because plaintiff was not a member of an employee's household. While declining to define "household member," the court held the niece was owed a duty of care.

And a Louisiana appellate court – in *Chaisson v. Avondale Industries, Inc.*, 947 So. 2d 171 (La. App. 4 Cir. 2006) – upheld a jury's award of over \$3.8 million to plaintiffs, where the alleged exposure through her husband's work clothing occurred from 1976-1978. The court noted that the exposure occurred after the 1972 issuance of regulations and warnings by OSHA about the dangers of take-home exposure as a result of work place clothing. It cited *Olivo* with approval, noting that Louisiana, like New Jersey, relies heavily on foreseeability in determining the scope of duty owed take-home plaintiffs.

In *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005), the court rejected defendant's contention that it owed no duty to the take-home plaintiff, who alleged exposure through his father's work at defendant's plant from 1945-1966. The premise owner was appealing a \$3.5 million verdict. The court rejected the "no duty" test in favor of the foreseeability test. See also *Bello v. Anco Insulations, Inc.*, 2010 WL 4340019 (La. Dist. Ct. 19<sup>th</sup> Judicial Dist. Oct. 19, 2010), applying *Zimko* regarding the

existence of a duty to take-home plaintiffs, but finding insufficient evidence presented at trial to support causation.

## Maryland

### *Premises Liability*

In *Adams v. Owens-Illinois, Inc.*, 705 A. 2d 58, 66 (1998), the court held that the premises owner defendant owed no duty to the wife of an employee but a "stranger" to it. The court raised the "slippery slope" argument, suggesting that if a duty were extended to the wife, "presumably [defendant] would owe a duty to others who came in close contact with [husband], including other family members, automobile passengers, and co-workers."

### *Products Liability*

In line with the holding in *Adams v. Owens-Illinois, Inc.*, 705 A. 2d 58 (Md. Ct. App. 1998), a Maryland appellate court in *Georgia Pacific v. Farrar*, 69 A. 3d 1028, 1030-31 (Md. Ct. App. 2013), held that the product manufacturer at issue owed no duty to the take-home asbestos plaintiff. Plaintiff alleged that she laundered her grandfather's asbestos laden clothing as a teenager in the 1960s. The court explained that the connection between asbestos-related disease and take-home exposure from workers' clothing was not generally recognized as far back as 1958-1962. Rather, the earliest clear and widely broadcast indication of such a danger came with the 1972 OSHA regulations on the issue of asbestos clothing entering the home. The court noted that arguments have been made that even then, the 1972 regulations "provided minimal written justification [for the standards]" and did not cite a single study. The court went on to explain that if in fact take-home dangers should have been foreseen as far back as plaintiff alleged, there was still no practical way for manufacturers to warn such individuals at that time, given the absence of computers and social media. The court reasoned "to impose a duty that either

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## PERSPECTIVES

cannot easily be implemented or even if implemented would have no practical effect would be poor public policy.” See also *Sherin v. Crane-Houdaille, Inc.*, WDQ-11-3698, 2014 WL 4678302 (D. Md. Sept. 16, 2014), where the court granted summary judgment to Union Carbide on a duty to warn claim because plaintiff failed to provide evidence that better warnings would have prevented plaintiff’s exposure.

However, in *Dixon v. Ford Motor Co.*, 70 A. 3d 328 (Md. 2013), the court held against manufacturer Ford Motor Co. in a products liability take-home exposure case. Plaintiffs sued Ford as well as Georgia-Pacific Corp. for negligence in failing to warn Ms. Dixon regarding asbestos in their products that Mr. Dixon handled and brought home on his clothing.

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## Michigan

### *Premises Liability*

In *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller et al. v. Ford Motor Company)*, 479 Mich. 498, 740 N.W. 2d 206 (July 2007), reh’g denied, 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 1954-1965. 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 in contact with someone who has simply been on the premises owner’s property would expand traditional tort principals beyond manageable bounds.

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## New Jersey

### *Premises Liability*

In *Anderson v. A.J. Friedman Supply Co., Inc.*, et al., 416 N.J. Super. 46, 3 A.3d 545 (2010), a New Jersey appellate court held that a duty was owed to a plaintiff who laundered her husband’s asbestos-laden work clothes from 1969-2003. Anderson relied heavily on *Olivo v. Owens-Illinois, Inc.*, 895 A. 2d 1143 (N.J. April, 2006), the most-oft cited case supportive of the existence of a duty owing by a premises owner to a take-home plaintiff asserting premises liability claims.

In *Olivo*, the New Jersey Supreme Court upheld the appellate court’s reversal of the summary judgment granted in favor of a premises owner, holding that it was foreseeable that asbestos might be brought home on the clothing of one working in its vicinity.

The *Olivo* court held that the proper standard to apply to determine whether any duty extends from the premises owner to the take-home plaintiff “devolves to a question of foreseeability of the risk of harm to that individual or identifiable class of individuals,” as the “risk reasonably to be perceived defines the duty to be obeyed.” Once it is determined that the risk is foreseeable, the court should consider whether imposition of a duty is fair by weighing and balancing factors, including the relationship of the parties, nature of the risk, opportunity and ability to exercise care, and the public interest. The court found that notice of the dangers of asbestos dust were known as early as 1937 and that defendant Exxon Mobil did not provide precautions to prevent the dust from being carried home on work clothing.

### *Products Liability*

In *Kaenzig v. Charles B. Chrystal Co. Inc.*, 2015 WL 1365589 (Superior Ct. NJ, Appellate Div. Mar. 27, 2015), a talc manufacturer/distributor was found liable

for take-home claims. Plaintiffs argued that the son’s mesothelioma was caused by take-home exposure 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, which included talc from the defendant. Evidence presented at trial included tests of the talc products at issue in 1972 and 1973 showing asbestos contamination in it. Likely with this evidence in mind, the jury rejected the defendant’s lack of causation defense and awarded damages of \$1.6 million.

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## New York

### *Premises Liability*

In *In re New York City Asbestos Litigation (Holdampf, et al. v. A.C. & S. Inc., et al. and the Port Authority of New York and New Jersey)*, 5 N.Y. 3d 486, 806 N.Y.S. 2d 146 (October 2005), the Court of Appeals for New York (New York’s highest court) denied the take-home asbestos exposure claim of a wife asserted against the owner of the premises where her husband worked. The court held that the initial analysis required a determination of whether any duty was owed by the premises owner to the wife, not whether the 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, 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 premises owner. To hold otherwise, the court further noted, would be unworkable in practice and unsound as a matter of public policy. See also *In re Eighth Judicial District Asbestos Litigation (Rinsfleisch v. AlliedSignal, Inc.)*, 12 Misc. 3d 936, 815 N.Y.S 2d 815 (N.Y. Sup. Ct. 2006), where a wife’s take-home premises liability asbestos exposure claim based on exposure during the 1984-1990

period was denied, despite the fact that the premises owner did not provide protective work clothing, laundry service, changing rooms, or advice as to how to avoid exposure to asbestos.

## Ohio

### *Premises Liability*

In *Boley, et al. v. Goodyear Tire & Rubber Company, et al.*, 125 Ohio St. 3d 510, 929 N.E. 2d 448, 2010-Ohio-2550, the Ohio Supreme Court affirmed the Eighth District Court of Appeals' decision in *Adams v. Goodyear Tire and Rubber Co.*, 8<sup>th</sup> Dist. No. 91404, 2009-Ohio-491, declining to find that an employer owed a duty to its employee's wife who was exposed to asbestos brought home by her husband on his work clothes from 1973 to 1983. The court held that O.R.C. 2307.941 barred the claim because under the statute "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." The court was not persuaded by plaintiff's claims that O.R.C. 2307.941 did not apply because the employee's wife was never exposed to asbestos on the defendant's property. Instead, the court held that "R.C. 2307.941(A) applies to all tort actions for asbestos claims brought against premises owners relating to exposure originating from asbestos on the premises owner's property, and R.C. 2307.941(A)(1) applies to preclude a premises owner's liability for any asbestos exposure that does not occur at the owner's property."

## Oklahoma

### *Premises Liability*

In *Bootenhoff v. Hormel Foods Corp.*, 2014 WL 3744011 (W.D. Okla. 2014 July 30, 2014), the Western District of Oklahoma held that no duty was owed to a take-home plaintiff where the workplace contact with asbestos was so spo-

radic as to be unforeseeable. The court also stated that while no Oklahoma court had directly considered the issue, Tenth Circuit cases applying Oklahoma law held that no duty existed due to lack of foreseeability, citing *Rohrbaugh v. Owens-Corning Fiberglass Corp.*, 53 F. 3d 1181 (10<sup>th</sup> Cir. 1995) and *Carel v. Fibreboard Corp.*, No. 94-5222, 1996 WL 3917 (10<sup>th</sup> Cir. Jan. 4, 1996). See also *Bootenhoff v. Hormel Foods Corp.*, No. CIV-11-1368-D, 2014 WL 3810383 (W.D. Okla. Aug. 1, 2014), where the court awarded summary judgment to another defendant – where plaintiff's husband worked between 1966-1972 – based on a lack of foreseeability.

### *Products Liability*

In *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181 (10<sup>th</sup> Cir. 1995), the trial court affirmed an award of summary judgment to defendant manufacturer Owens-Corning Fiberglass (OCF). Plaintiffs filed negligence and strict liability claims against the manufacturer alleging that their mother died after being exposed to asbestos dust from OCF products as a result of washing her husband's work clothes. A jury ruled in favor of plaintiffs.

However, the 10<sup>th</sup> Circuit – in *Rohrbaugh v. Owens-Corning Fiberglass Corp.*, 965 F. 2d 844, 846 (10<sup>th</sup> Cir. 1992) (applying Oklahoma law) – vacated and remanded the case because the wife was not exposed to asbestos as a user or present where it was used; thus, the court reasoned, her exposure was not foreseeable. In addition, the court held that defendant could not have known the danger associated with its asbestos-containing products prior to 1969. Plaintiffs presented no evidence that defendant knew or should have known of the dangers and the "evidence to the contrary . . . was overwhelming." On remand, plaintiffs did not submit additional evidence to create a fact issue regarding foreseeability, so the trial court granted summary judgment to OCF. The trial court explained that the "threshold question in a negligence action is whether the defendant owed a duty to

the plaintiff allegedly harmed," and the "most important consideration in this determination is whether the plaintiff is foreseeably endangered by the defendant's conduct." Because plaintiffs submitted no additional evidence lending to a finding of foreseeability, the court affirmed summary judgment in OCF's favor.

Similarly, in *Carel v. Fibreboard Corp.*, 74 F. 3d 1248 (10<sup>th</sup> Cir. 1995), the court affirmed an award of summary judgment on defendant's failure to warn claims, relying on the *Rohrbaugh* holding that manufacturers owe no duty to warn take-home asbestos exposure plaintiffs because they are not foreseeable users of the products.

## Pennsylvania

### *Premises Liability*

In *Gillen v. Boeing Co.*, 2:13-CV-03118-ER, 2014 WL 4211354 (E.D. Pa. Aug. 26, 2014), the U.S. District Court for the Eastern District of Pennsylvania over-seeing the national Asbestos Products Liability Multidistrict Litigation docket declined to extend a duty in the premises liability context under Pennsylvania law based in large part on the slippery slope that such liability would create. The court explained that while no Pennsylvania appellate court had directly considered the issue, its holding was consistent with lower court decisions applying Pennsylvania law.

First, the court examined the relationship between the parties, concluding that "[plaintiff's] relationship with [defendant] as it relates to her take-home exposure claim is essentially that of "legal strangers" under the law of negligence." Second, the court considered the social utility of defendant's conduct and found its activities to be lawful and useful. It noted also that defendant's use of asbestos had been "substantially regulated and replaced by other products since the early 1970s." Third, the court looked at the nature of the risk imposed and fore-

seeability of the harm incurred. The court stated that plaintiff failed to show that defendant knew, or should have known, that the plaintiff could be exposed to asbestos while washing workplace clothing. Interestingly, the court emphasized that foreseeability was not a prioritized factor under Pennsylvania law. The fourth factor the court considered was the consequence of imposing a duty on defendant, which the court believed weighed heavily against imposition of a duty in the case. The court reasoned that “liability for take-home exposure would essentially be infinite.” Finally, the court examined lower court cases applying Pennsylvania law and decisions by courts in other jurisdictions, noting that the majority decline to recognize a duty. See also *In re Asbestos Litig. (McCoy v. PolyVision Corp.)*, 2012 WL 1413887 (Del. Super Ct. Feb. 21, 2012), where the court applied Pennsylvania law in granting summary judgment to a premises owner, holding defendant did not owe a duty to the take-home spouse.

### *Products Liability*

In *Hudson v. Bethlehem Steel Corp.*, 1991-C-2078, 1995 WL 17778064 (Pa. Com. Pl. Dec. 12, 1995), plaintiff brought strict liability and negligence claims against defendant Bethlehem Steel based on his late wife’s exposure to asbestos via the work clothes of her father, who worked at Bethlehem Steel from 1930 until the mid-1960s. Plaintiff alleged his late wife laundered her father’s work clothes for a period of 20 years ending around 1960, and that her father was exposed to asbestos-containing products at work. The court granted defendant’s motion for summary judgment. The court held strict liability could not be applied where a defendant was not the seller or supplier of the asbestos product at issue. With respect to the negligence claim, the court concluded that foreseeability could not be established in light of the time periods of exposure.

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## Tennessee

### *Premises Liability*

In *Millsaps v. Aluminum Co. of Am.*, MDL 875, 2013 WL 5544053 (E.D. Pa. Aug. 8, 2013), the U.S. District Court for the Eastern District of Pennsylvania, applying Tennessee law, held that take-home asbestos exposure plaintiffs need not be residents of the same household to establish a duty of care. Citing *Satterfield v. Breeding Insulation Co.*, 266 S.W. 2d 347, 367 (Tenn. 2008), the court held that the “class of foreseeable people . . . includes ‘persons who regularly and for extended periods of time came into close contact with the asbestos-contaminated work clothes of [defendant’s] employees.’” The court denied the defendants’ motion for summary judgment because evidence was 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. Thus, the existence of a duty under Tennessee law does not depend on whether a person is a household resident of a defendant’s employee, but rather on how much contact a person has with the employee and the employee’s asbestos-contaminated clothing.

In *Satterfield v. Breeding Insulation Co.*, *supra.*, the Tennessee Supreme Court held that a duty extended to the take-home plaintiff, who was the daughter of a man that brought asbestos home on his 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, defendant failed to warn or follow the applicable regulations. See also *Stockton v. Ford Motor Co.*, et al., No. 57CC1-2013-CV-5 (Tenn. Cir. Ct., Madison Cty. August 21, 2015), where the jury returned a verdict for the take-home plaintiff and against a premises owner in the amount of \$4.6 million.

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## Texas

### *Premises Liability*

A Texas appellate court, in *Exxon Mobile Corp. v. Altimore*, No. 14-04-0113-CV, 2007 WL 1174447 (April 19, 2007), applied a “foreseeability” test to plaintiff’s take-home claim and held it was not foreseeable during the time period at issue (1942-1972). In so ruling, the court noted that OSHA’s first regulations regarding the dangers of carrying home asbestos fibers to household members were not released until 1972. See also *Alcoa Inc. v. Bebringer*, 235 S.W. 3d 456 (Tex. Ct. App. 2007), where the court held there was no duty owed to the take-home plaintiff for take-home exposure during the 1950s.

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## Washington

### *Premises Liability*

In *Rochon v. Saberhagen Holdings Inc.*, 140 Wash. App. 1008 (Wash. Ct. App., Div. 1 2007), a Washington appellate court upheld the trial court’s dismissal of the take-home premises liability asbestos exposure claim of a wife against her husband’s former employer that arose from alleged exposure during 1956-1966. However, the court reversed the trial court’s holding that no duty of care was owed under ordinary negligence theory. The court held that there was a genuine issue of material fact regarding whether the company operated and maintained its plant in an unreasonably unsafe manner that caused foreseeable and proximate harm to the wife, and it remanded the case to determine those issues.

Conversely, in *Hoyt v. Lockheed Shipbuilding Co.*, 2013 WL 3270371 (W.D. Wash. 2013), *aff’d sub nom. Hoyt v. Lockheed Martin Corp.*, 13-35573, 2013 WL 4804408 (9<sup>th</sup> Cir. Sept. 10, 2013), the District Court for the Western District of Washington awarded summary judgment to defendant in a take-home asbestos exposure case, based on the time

period of the allegations. The court noted that “no reasonable fact finder could conclude that harm from take-home exposure to asbestos should have been foreseeable to defendant by 1958.” While the court rejected the existence of a duty under the facts of the case, it explained that Washington courts do recognize a duty to prevent take-home exposure if the harm is reasonably foreseeable.

The court, in *Hoyt*, discussed Washington cases including *Arnold v. Saberhagen Holdings, Inc.*, 240 P.3d 162 (Wash. Ct. App., Div. 2 2010), review denied by 171 Wash.2d 1012 (Wash. Mar. 30, 2011), *Rochon v. Saberhagen Holdings, Inc.*, 2007 WL 2325214 (Wash. Ct. App., Div. 1 2007), and *Lunsford v. Saberhagen Holdings, Inc.*, 106 P. 3d 808 (Wash. Ct. App., Div. 1 2005), in which Washington appellate courts reasoned that employers and manufacturers may be liable to family members for take-home asbestos exposure – depending on foreseeability factors, including the time period of exposure.

### *Products Liability*

In *Lunsford v. Saberhagen Holdings, Inc.*, 106 P. 3d 808 (Wash. App. Div. 1 2005), the court reversed summary judgment in favor of a defendant manufacturer on a strict liability claim in a take-home asbestos products liability case. Exposure was based on asbestos dust brought home on plaintiff’s father’s work clothing and that defendant provided asbestos-containing insulation to the father’s workplace. Defendant argued that plaintiff was not a “user” under Restatement (Second) of Torts § 402A. The court explained that no Washington cases had addressed whether a person in plaintiff’s position was a user for purposes of 402A; however, based on cases discussing strict liability in the context of injured bystanders, the court reasoned “there is at least an assumption that a person in [plaintiff’s] position may bring suit under a theory of strict liability in Washington.” In addition, the court noted that other states extended strict liability coverage to bystanders in asbestos cases. The court

then considered the policy considerations for imposing strict liability, including consumers’ forced reliance on sellers, placing the burden of accidental injuries caused by products on those who market them as a cost of production, and consumer protection generally. The court held that those “policy rationales 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,” and it was a question for the jury to determine whether it was reasonable for defendant to foresee that plaintiff could have been exposed via his father’s work clothes.

On remand, the trial court granted defendant’s motion for partial summary judgment as to the strict products liability claims because the claim arose from asbestos exposure prior to Washington’s adoption of strict liability. The appellate court, however, reversed and remanded, on grounds that strict liability retroactively applied to the action. *Lunsford v. Saberhagen Holdings, Inc.*, 208 P.3d 1092, 1095 (2009). The Washington Supreme Court affirmed the appellate court holding that strict liability applied retroactively to the action.

### *Contractor Liability*

In *Brandes v. Kaiser Gypsum Company, Inc.*, et al., No. 14-2-21662-9 SEA King County (April 21, 2015), a Washington jury awarded the largest take-home verdict in state history: \$3.5 million in damages for decedent’s exposure to her husband’s asbestos-laden clothes arising from work place exposure to pipe insulation by Brand Insulations. Brand was a contractor that fabricated, installed, and removed pipe insulation at the husband’s workplace during 1971-1972. The case was tried under a negligence standard. Plaintiff’s experts, including Dr. Barry Castleman, opined that the hazards of asbestos were sufficiently known by the early 1970s such that the defendant insulating company should have taken pre-

cautions to avoid exposure to those in the vicinity of Brand’s workers. Apparently the decedent, who attended the trial, died the day before the closing arguments.

## Wisconsin

### *Premises Liability*

In *Heuwel Sr. v. Albany Intern. Corp.*, 2014 WL 4654947 (Mo. Cir.) (applying Wisconsin law), decedent’s husband worked as a laborer for a coatings company, and starting in 1973 worked directly with various fibrous talc. The decedent laundered his work clothing. The court denied summary judgment to defendant, holding it had a duty to act reasonably in view of the foreseeable risks of danger to household members from workplace clothing. The risk, the court held, was known for decades before decedent’s alleged exposure.

### *Products Liability*

In *Heuwel*, the court also denied summary judgment to a products liability defendant regarding take-home asbestos plaintiff’s strict liability and negligence claims based on the same facts as above. The defendant supplied asbestos-contaminated talc to the take-home plaintiff’s decedent’s husband’s workplace that was allegedly tracked home on his clothing. The court discussed Wisconsin’s “consumer contemplation” test for strict liability and concluded there seemed to be “no dispute that asbestos-containing products are unreasonably dangerous to the user or consumer,” and thus the take-home asbestos plaintiff could maintain a strict liability claim. With respect to the negligence claim, the court also denied summary judgment to defendant based on the foreseeability of the secondary asbestos exposure, as discussed earlier.

### Conclusion

Take-home claims against premises owners, product manufacturers, and contractors will likely continue to grow as plaintiff's counsel look for new paths to deep pockets as the population of first-hand exposed workers dwindles and the possibility for first-hand exposure similarly decreases. As a result, take-home cases will be an increasing focus in courtrooms nationally, as they are in California where, in *Haver* and *Kesner*, its Supreme Court will be ruling on the issue.

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**“Take-home claims against premises owners, product manufacturers, and contractors will likely continue to grow as plaintiff's counsel look for new paths to deep pockets as the population of first-hand exposed workers dwindles and the possibility for first-hand exposure similarly decreases.”**

### Footnotes

<sup>1</sup> *Mark Schwartz, Individually and as Executor of the Estate of Kathleen Schwartz, deceased, et al. v. Honeywell International, Inc., et al.*, Cuyahoga County Court of Common Pleas, Case No. 819582 (June 23, 2015).

<sup>2</sup> *Stockton v. Ford Motor Co., et al.*, Tennessee Circuit Court, Madison County, No. 57CC1-2013-CV-5 (August 21, 2015).

<sup>3</sup> *Bobo v. Tennessee Valley Auth.*, CV 12-S-1930-NE (N.D. Ala. Sep. 29, 2015); *Brandes v. Kaiser Gypsum Company, Inc., et al.*, King County, Washington, No. 14-2-21662-9 SEA (April 21, 2015).

<sup>4</sup> “Bystander” and “secondary” claims more accurately describe cases in which the injured person was near/around the product or on the premises at issue, but we include them here because those terms are also used to describe take-home plaintiffs.

<sup>5</sup> Courts have – in many of the cases discussed below – stated that the determination of whether any general duty extends as a matter of public policy to a take-home plaintiff is a matter for the court, and if it finds such duty exists, it is the role of the jury to determine whether the duty was breached.

<sup>6</sup> States with courts that have held no duty is owed – whether under the relationship test, the foreseeability test, pursuant to statute, or other otherwise – are California, Delaware, Georgia, Illinois, Iowa, Kentucky, Maryland, Michigan, New York, Ohio, Oklahoma, Pennsylvania, Texas, and Washington. In some of these states – such as Illinois and Washington – there are contrary rulings as well, as can be seen from a review of the cases cited in the article.

<sup>7</sup> Excluded are the numerous take-home products liability cases focused on product identification, the substantial factor test, or other aspects that add little or nothing unique to an analysis of take-home claims.

<sup>8</sup> The girlfriend was employed with the defendant, which is where the take-home plaintiff had worked prior to his lay off.

<sup>9</sup> Although the case is an atypical products liability claim, it is placed in this section because the defendants were manufacturers. It is atypical because there was no exposure from either of defendants' products and because plaintiff's failure to warn claims were asserted in the context of an alleged “conspiracy” claim against both defendants. The court reversed a jury award against the defendants in excess of \$2 million.