



Featured Articles

“Take-Home” Premises Liability Asbestos Exposure Claims – 2013 Update®

by Carter E. Strang, Karen E. Ross, and Madeline Van Gunten

(Reprinted with the permission of DRI)



Introduction

"Take-home" liability claims are no longer a rarity, as plaintiff's counsel increasingly assert them and obtain some substantial verdicts, including a \$27M award this past June by a court in California.

Take-home claims are those asserted on behalf of claimants that have never set foot on the premises but allegedly were exposed to asbestos through their spouses or others who brought it home on their clothing. They are also commonly referenced as "household," "bystander," "secondary," or "second-hand" exposure claims. They are asserted against product manufacturers and premises owners. It is the latter claims that are the focus of this monograph, the fifth annual by the authors.

The evolving "majority rule" holds there is no duty owed by a premises owner to any take-home claimant. Courts applying the law of Delaware, Georgia, Iowa, Kansas, Kentucky, Maryland, Michigan, New York, Ohio, Pennsylvania, and Texas so hold. There are also a number of states where the issue has been addressed and courts have held that a duty may or may not exist depending on certain factors, such as the alleged date of exposure, employer knowledge about asbestos, etc. In this monograph, the decisions are grouped alphabetically by states.

California

In *Condon v. Union Oil Company*, Case No. A 102069, 2004 Ca. App. Unpub.LEXIS 7975 (Cal App., August, 2004), the court upheld a jury verdict in favor of the wife (ex-wife at the time of trial) of an employee who allegedly brought asbestos home on his work clothing, which the wife washed during the 1948-1963 time period. 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 contamination of his wife. In the face of such knowledge, the premises owner did not provide adequate protection against it. See, also *Honer v. Ford Motor Co.*, Case No. B18916, 2007 WL 298271 (Cal. App., October, 2007), where the court overruled the grant of summary judgment based on "take-home" exposure during the 1940s.

In a break from *Condon v. Union Oil Co. of California*, A102069, 2004 WL 1932847 (Cal. Ct. App. Aug. 31, 2004), the California Court of Appeals for the Second District recently held that a premises owner has no duty to protect family members of workers from secondary asbestos exposure. *Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15, 34 (2012), as modified on denial of reh'g (June 19, 2012). The court noted that the existence and scope of a duty is a legal question for the court. *Id.* at 26. 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.

The Plaintiff alleged she was exposed to asbestos from laundering her father and brother's work clothes during the time period they worked for Defendant at Defendant's plant installing asbestos insulation. *Id.* at 19. The court weighed the *Rowland* factors and concluded that Defendant owed no duty to the Plaintiff. The court reasoned that secondary exposure was not reasonably foreseeable, and that the burden to Defendant was of "uncertain but potentially very large scope," and could thus result in unreasonable costs imposed on the community. *Id.* at 31. In making its determination, the court stressed that "[t]he element of a legal duty of care generally acts to limit "the otherwise potentially infinite liability" that would otherwise flow from every negligent act." *Id.* at 31 (citations omitted). The court then applied the holding in *Campbell* to Plaintiff's take-home exposure claims in *Swanson v. Simpson Timber Co.*, 2013 WL5469261 (Cal. Ct. App. Oct. 2, 2013). In an interesting twist, Plaintiff, an employee of Defendant, alleged that he was initially 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 an employee for Defendant. The court extended *Campbell's* holding to the case and entered a 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, further, such claim was a derivative claim barred by exclusivity provisions of the Workers' Compensation Act. *Id.*

Interestingly, despite the holdings in *Campbell* and *Swanson*, in June of 2013, the California Superior Court for Alameda County entered a jury verdict in favor of Plaintiff in a take-home asbestos case, in the amount of just over \$27,000,000. *Grigg vs. Allied Packing & Supply Co.*, No. RG12629580 2013 WL 3972725 (Cal. Super. June 14, 2013). Plaintiff, like the plaintiff in *Campbell*, alleged exposure to asbestos via the person and clothing of her husband who worked as pipe coverer and insulator for Defendant. Defendant Owens-Illinois filed a motion for summary judgment contending that in line with holdings by a majority of jurisdictions nationwide, including California, Defendant did not owe a duty of care to Plaintiff. Defendant noted further that the product alleged to have caused the injuries was manufactured only from the 1940s until 1958, and that courts unanimously recognize that take-home exposure was not foreseeable prior to the mid-1960s. *Id.* While *Campbell* indicates that Defendant should succeed on appeal, it will be interesting to see how the case plays out.

Connecticut

In a secondary exposure case in the Superior Court of Connecticut, Judicial District of Fairfield, the court denied summary judgment to Defendant on grounds that there were genuine issues of material fact regarding Plaintiff's exposure to Defendant's alleged asbestos containing products. *Russo v. A.O. Smith Corp.*, 2013 WL 3306707 (Sup. Ct. Ct. June 5, 2013). Neither Defendant nor the court raised the issue of whether there was even a duty in the first place, suggesting that in Connecticut, defendants may be liable for take-home asbestos exposure. *Id.*

Delaware

Like its 2009 decision in *Riedel v. ICI America's Inc.*, 968 A.2d 17 (Del. Super. 2009), in *Price v. E.I. DuPont DeNemorus & Company*, the Delaware Supreme Court rejected a "take-home" asbestos claim because it found there was no special relationship between the worker's spouse and the worker's employer. *Price v. E.I. DuPont DeNemorus & Company*, 26 A.3d 162 (Del. Super. 2011). The *Price* facts mirrored *Riedel's*: wife allegedly developed asbestos-related disease after years of washing her spouse's asbestos-laden clothing. Plaintiff alleged nonfeasance. Under Delaware law, 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 her 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." *Price*, 26 A.3d at 169. The court determined that a legal characterization cannot change the underlying conduct alleged. The court found Plaintiff's claims of wrongful failure to prevent Mr. Price from taking asbestos home or to warn the Prices of the dangers associated with wearing the work clothes home to be nonfeasance claims. *Id.* at 169-170.

The court recognized the similarity to *Riedel* and held that failure to prevent harm and failure to warn claimed by Mrs. Price typified nonfeasance. Like *Riedel*, the court found that there was no special relationship shown between the parties. *Id.* As such, the court rejected Mrs. Price's claims that the company's health benefits and her husband's long-term relationship with the company created a special relationship. Thus, the Delaware Supreme Court upheld Delaware's prohibition of "take-home" claims. 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. Super 2009), in which the Delaware Supreme Court affirmed the trial court's decision granting summary judgment to an employer in an employee's wife's negligence action based on her asbestosis diagnosis allegedly caused by laundering her husband's asbestos contaminated work clothes during his employment from 1962-1990; declining to adopt any sections of the Restatement (Third) of Torts, because it "redefined the concept of duty in a way that is inconsistent with [Delaware's] precedents and traditions." *Riedel*, at *2.

Georgia

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 the initial inquiry in such claims is whether a duty exists, which question is a matter of public policy, not mere foreseeability. 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

Appellate courts in Illinois have reached different conclusions on the viability of "take-home" claims. The difference, it appears, stems from whether the court considered the claim a premises-liability claim or a negligence claim; based on the similarity of the facts at issue, however, such a distinction seems to be one without a difference. 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 a premises owner had no duty to its employees' wife/mother in an asbestos premises liability case. 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. But, the court also implicitly indicated that a different result may have been reached had the matter been pled differently.

Similarly, in *Holmes v. Pneumo Abex, L.L.C.*, an Illinois appellate court reversed liability for a "take-home" exposure claim finding that the manufacturers of asbestos-containing products owed no duty of care to the wife of a factory worker exposed to asbestos fibers carried home on her husband's clothes. *In Re Estate of Holmes, et al. v. Pneumo Abex, L.L.C., et al.*, 955 N.E.2d 1173 (Ill. App.Ct., 4th Dist. 2011). The Fourth Circuit found that the imposition of a duty depends on the relationship of the parties to each other and that Honeywell and Abex owed no duty to Mrs. Holmes because there was a lack of foreseeability of harm. *Id.* at ¶27. The court's foreseeability decision was based on the fact that the studies and evidence presented by the plaintiff did not show a connection between asbestos fibers and "take-home" exposure until 1974 and Mrs. Holmes' claims were based on laundry she did in 1962 and 1963. *Id.* at ¶¶25-26.

Following *Holmes*, the Fourth Circuit also found no duty in *Rodarmel v. Pneumo Abex, L.L.C.*, 2011 IL App (4th) 100, 463, 2011 WL 4336923. *Rodarmel* involved the standard facts for a "take-home" claim (wife washed husband's asbestos-laden clothes), but the only defendants remaining for trial were not employers of wife's husband or suppliers of asbestos at issue. Rather, the defendants were named as conspirators with the employer and suppliers in a scheme to falsely assert that it was safe for people to be exposed to asbestos and to withhold information about the harmful effects of asbestos. Finding that the employer owed no duty because, like in *Holmes*, the risk was not foreseeable, the court found that there was no basis of liability for the alleged co-conspirators. *Id.* at ¶90.

Conversely, in *Simpkins v. CSX Corp. and CSX Transportation, Inc.*, 5th Appellate Dist. Ill. No. 5-07-0346, 2010 WL 2337778 (June 10, 2010), the Fifth District Illinois Appellate Court found that a duty did exist when it reviewed a circuit court's decision granting a motion to dismiss a wife's "take-home" negligence-based claims stemming from exposure to asbestos from her husband's work clothes. In their ruling, the court explained that "[u]nder Illinois law, the existence of a duty depends on whether the parties stand in such a relationship to each other that the law imposes upon the defendant an obligation to act in a reasonable manner for the benefit of the plaintiff." In considering the duty factors, the court was persuaded by *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. April, 2006) and *Satterfield v. Breeding Insulation Co., et al.*, 266 S.W.3d 347 (Supreme Tenn. 2008).

Despite the Fifth Appellate District's decision above, *Nelson, supra*, remains good law. As such, it is unclear if the cases were distinguished based on the claims presented (*Nelson* was premises liability, not employer negligence and strict liability), if *Nelson* was overlooked, or if the *Simpkins'* court declined to find *Nelson* authoritative. What is

clear, however, is that Illinois law currently has contradictory holdings depending on the claims presented, not the facts of the underlying claims. Likely recognizing this issue, during oral argument to the Illinois Supreme Court, Simpkins' attorney made clear that his case was based on negligence, not premises liability. Unfortunately, the Illinois Supreme Court has yet to clarify the law in Illinois.

In *Simpkins v. CSX Transportation Inc.*, 965 N.E.2d 1092, 1099 (2012), the Illinois Supreme Court held that while the allegations in Plaintiff's complaint were insufficient to establish the existence of a duty, the case should be remanded to allow Plaintiff to amend the complaint because Defendant failed to raise the issue before the trial court. The court outlined duty analysis under Illinois law, noting that the question boiled down to whether a plaintiff and a defendant "stood in such a *relationship* to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Id.* 1097. The existence of such a relationship depends on four factors: reasonable foreseeability of injury, likelihood of injury, magnitude of the burden on the defendant, and the consequences of putting the burden on the defendant. *Id.* Here, the court reasoned that as to the foreseeability question, Plaintiff's complaint was insufficient as it relied on the "conclusory allegation" that Defendant "knew or should have known of dangers of secondary asbestos exposure." *Id.* at 1099. Accordingly, the court held it was unable to assess the duty question without additional facts and, because Defendant was raising the issue for the first time, Plaintiff was entitled to amend the complaint to include specific facts. Thus, the existence of a duty to take-home asbestos plaintiffs remains unresolved in Illinois.

Iowa

In *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Nov. 13, 2009), the Iowa Supreme Court affirmed the granting 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." *2. 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." *12.) The court recognized, and chose to follow, the no duty precedent of the Sixth Circuit, and courts in Delaware, Georgia, Illinois, Michigan, and Ohio. Conversely, the court distinguished the Louisiana, New Jersey, Tennessee, and Washington courts imposing a "take-home" duty because "[s]uch a dramatic expansion of liability would be incompatible with public policy." *16.

Kansas

Under K.S.A. 60-4905, Kansas plaintiffs cannot maintain a silica or asbestos claim against a premises owner based on exposure to silica or asbestos on the premises owner's property if the exposure did not occur while the "individual was at or near the premises owner's property."

Kentucky

In *Martin v. Cincinnati Gas and Electric Co., et al.*, 561 F.3d 439 (6th 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 an employer/premises owner owed no duty to the son of an employee who brought asbestos particles home on his clothes during his employment from 1951-1963. The Sixth Circuit focused on the foreseeability of harm at the time of injury. *Id.* at *4. 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. *Id.* Similarly, the court agreed with the District court's conclusion that the plaintiff failed to show that the risk of "take-home" asbestos exposure was foreseeable at the relevant times – the first studies regarding the dangers of "take-home" exposure were published in 1965. *Id.* at *5.

Louisiana

In *Francis v. Union Carbide Corp.*, 116 So.3d 858 (La. App. 4 Cir. 2013), the Fourth Circuit Court of Appeals for Louisiana followed Louisiana precedent recognizing a "take home" duty (*Chaisson v. Avondale Industries, Inc.*, 947 So.2d 171 (La. App. 4 Cir. December, 2006)), in reversing the trial court's grant of summary judgment to

Defendant. The court considered whether Plaintiff presented sufficient evidence to create genuine issues of material fact. The court compared the facts alleged with those in *Grant v. Am. Sugar Ref., Inc.*, 952 So.2d 746, 749 (La. App. 4 Cir. 2007), where the court found genuine issues of material fact in a take-home asbestos exposure case based on evidence that the defendant performed insulation work while the plaintiff's father worked at the defendant's work site and the presence of asbestos was never denied. As a result, the court reasoned in *Francis* that summary judgment was inappropriate because it was undisputed that Plaintiff's father worked for Defendant, work with asbestos was performed while Plaintiff's father worked there, and Plaintiff alleged being "around his father's "dusty" work clothing" in his deposition. *Id.* at 863. See, also *Zimko v. American Cyanamid*, 905 So.2d 465 (La. Ct. App. 2005) (finding that a duty existed, though it relied on a New York decision since reversed).

Similarly, 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 employees. The court was not persuaded by the defendants' arguments that it did not owe a duty because the risk of an employee's family member contracting mesothelioma was not foreseeable at the time of the alleged exposures and, regardless of foreseeability, the plaintiff was not a member of an employee's household. While declining to define "household member", the court found that the plaintiff – who predictably came into routine contact with the employer's workers – was owed a duty of care. *Id.* at *3, relying in part on *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005).

Maryland

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 a product manufacturer had no duty to a take-home asbestos plaintiff. Plaintiff alleged that she laundered her grandfather's "asbestos laden" clothing as a teenager in the 1960s. *Id.* at 1030. 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." *Id.* at 1035. Rather, the earliest clear "widely broadcast" indication of such a danger came with the June 1972 OSHA regulations on the issue of asbestos clothing entering the home. *Id.* at 1037. The court noted that arguments have been made that even the 1972 regulations "provided minimal written justification [for the standards]" and did not cite a single study. *Id.* (internal citations omitted). The court went on to explain that even if take-home dangers should have been foreseen as far back as Plaintiff's allegations, there was 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 cannot easily be implemented or even if implemented would have no practical effect would be poor public policy." *Id.* at 1039.

Michigan

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.

New Jersey

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 followed New Jersey precedent and held that an employer owed a duty to an employee's wife with regard to asbestos exposure from laundering her husband's asbestos-laden work clothes from 1969-2003. *Anderson* relied heavily on the most oft cited case for the existence of a duty owing to one asserting a "take-home" premises liability claimant — *Olivo v. Owens-Illinois, Inc.*, 895 A. 2d 1143 (N.J. April, 2006). 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 the vicinity of it.

The *Olivo* Court held that the proper standard to apply to determine whether any duty extends from the premises owner to the wife "devolves to a question of foreseeability of the risk of harm to that individual [the wife] 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.

New York

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 the 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 exposure/injury was 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 (Rinfleisch 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

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.*, 8th 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 Ohio Supreme 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." *Boley*, at ¶ 2. The Ohio Supreme 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 Ohio Supreme 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." *Id.* at ¶ 25.

Pennsylvania

In re Asbestos Litig., CIV.A. N10C-04203ASB, 2012 WL 1413887 (Del. Super. 2012), the Superior Court of Delaware, New Castle County, applying Pennsylvania law, granted summary judgment to the defendant in a take-home asbestos exposure case, explaining that "the court predicts that the Pennsylvania Supreme Court would not find that a premises owner/employer owes a duty to its employee's spouse for take home asbestos exposure." In making this prediction, the court examined Pennsylvania cases regarding duty and the Restatement (Second) of Torts. The court also noted that four out of five states adjacent to Pennsylvania have rejected take-home liability. It concluded that "under Pennsylvania law an employer/premises owner does not owe a duty to the spouse of an employee in the take home asbestos exposure context."

Tennessee

In *Millsaps v. Aluminum Co. of Am.*, MDL 875, 2013 WL 5544053 (E.D. Pa. Aug. 8, 2013), the 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 as defendants' employees to establish a duty of care. Rather, citing to *Satterfield v. Breeding Insulation Co.*, 266 S.W.2d 347, 367 (Tenn. 2008), the court reasoned 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 summary judgment

to the defendant 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. *Id.* 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 how much contact a person has with the employee and the employee's asbestos-contaminated clothing. See, *Satterfield v. Breeding Insulation Co., et al.*, 266 S.W.3d 347 (Supreme Tenn. 2008) (Tennessee Supreme Court affirming that a duty existed to the daughter of a worker who wore asbestos-contaminated work clothes home from work when the employer knew of the danger at the relevant time (1970s – 1980s) and failed to abide by OSHA regulations regarding the danger and/or warn the employee of the danger).

Texas

A Texas appellate court, in *Exxon Mobile Corp. v. Altimore*, No. 14-04-0113-CV, 2007 WL 1174447 (April 19, 2007), also held no duty was owed by the premises owner to the "take-home" exposure plaintiff, who claimed asbestos exposure from washing her husband's work clothing during the 1942-1972 period. A duty was denied because the wife's exposure was not foreseeable during the time it occurred. While the court reversed the trial court, it agreed with the trial court's holding that, generally, a duty may be owed by a premises owner to a "take-home" claimant. However, the exposure would have to be after 1972. See, also *Alcoa Inc. v. Behringer*, 235 S.W.3d 456 (Tex. Ct. App. 2007) (holding no legal duty based on 1950s "take-home" exposure), Texas Supreme Court declined review November 21, 2008.

Washington

In *Rochon v. Saberhagen Holdings Inc.*, 140 Wash. App. 1008 (Wash. Ct. App., Div. 1 2007), a Washington state 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 (9th Cir. Sept. 10, 2013), the District Court for the Western District of Washington granted 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 factfinder could conclude that harm from take home exposure to asbestos should have been foreseeable to Defendant by 1958." *Id.* 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 discussed Washington cases including *Arnold v. Saberhagen Holdings, Inc.*, 240 P.3d 162 (Wash. Ct. App., Div. 2 2010), *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) (child alleged that manufacturer supplied asbestos-containing products to his father's worksite resulting in take-home exposure), in which Washington appellate courts reasoned that employers and manufacturers may be liable to family members for take-home asbestos exposure where such injuries were reasonably foreseeable. For example, in *Arnold*, involving work for the defendant during the 1960s, the court reasoned that the defendant had a duty to protect both the plaintiff and the plaintiff's family at home from the dangers of asbestos at the workplace. Thus, Washington courts recognize a duty to prevent take-home exposure in some circumstances, but not based on allegations prior to the 1960s.

Conclusion

Take-home claims against premises owners will likely rise as plaintiff's counsel look for new paths to deep pockets due to the dwindling 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 of the legal battle ground nationally.

Fortunately for defense counsel, the evolving majority rule holds there is no duty owned by a premises owner to

any take-home claimant. Nevertheless, many jurisdictions permit such claims, exposing premises defendants to potential multimillion dollar verdicts.

Carter E. Strang is a partner in the Cleveland offices of Tucker Ellis LLP. He is a member of the DRI Toxic Tort & Environmental Law Section and is listed in the Top Rated Lawyers Guide to Energy, Environmental and Natural Resources Law. He is Immediate Past President of the Cleveland Metropolitan Bar Association, recipient of the 2013 DRI Lifetime Community Service Award, and serves as coordinator of his firm's award-winning pipeline diversity program.

Karen E. Ross is Counsel in the Cleveland office of Tucker Ellis LLP. She is a member of the Trial Department and practices in the areas of mass tort and product liability. Karen is also dedicated to the students of the Cleveland Metropolitan School District where she coaches Cleveland Early College's Mock Trial Teams and mentors students during their transition from high school to college.

Madeline Van Gunten, is a third year at Case Western Reserve University School of Law, a legal intern at Tucker Ellis, and will join Tucker Ellis as an Associate in the litigation department in the fall of 2014.