LITIGATION

Premises Owner Liability for Secondhand Asbestos Exposure: The Next Wave?

*By Mark A. Behrens & Frank Cruz-Alvarez**

Asbestos litigation has evolved over the years as plaintiffs' lawyers have raised new theories of liability in the attempt to reach new types of defendants. In earlier years, asbestos litigation was focused mostly on the manufacturers of asbestos-containing products, often called "traditional defendants." Most of those companies have been forced to seek bankruptcy court protection. As a result, plaintiffs' lawyers began to sue "peripheral defendants," including premises owners for alleged harms to independent contractors exposed to asbestos. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs." These claims involve workers' family members who have been exposed to asbestos off-site, typically through contact with an employee or that person's soiled work clothes.

Since the beginning of 2005, several courts have decided whether premises owners owe a duty to "take home" exposure claimants. Recent decisions suggest that this well may prove to be dry in many states, but not all. Premises owner liability for secondhand asbestos exposures was rejected by the highest courts in Georgia and New York and a Tennessee trial court. On the other hand, the New Jersey Supreme Court and a Louisiana appellate court opened the door to such claims. At the time of this writing, the issue was pending before a Texas appellate court.

I. Cases Finding No Liability

In January 2005, the Georgia Supreme Court in *CSX Transportation, Inc. v. Williams,*[1] became the first state court of last resort to consider the liability of an employer for off-site, exposure-related injuries to nonemployees. The court unanimously held that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace."[2] The appeal involved a wrongful death action on behalf of a woman and negligence claims by three children who were exposed to asbestos emitted from the clothing of family members employed at the defendant's facilities. The claims were initially filed in federal court and reached the Georgia Supreme Court on a certified question from the United States Court of Appeals for the Eleventh Circuit.

The court held that the duty of employers to provide their employees with a reasonably safe work environment does not extend to individuals who were neither employees nor exposed to any danger in the workplace; there would have to be a basis for extending the employer's duty beyond the workplace. The court noted that "mere foreseeability" of harm had been rejected as a basis for creating third-party liability in previous cases.[3] The court also cited New York law for the proposition that duty rules must be based on policy considerations, including the need to limit the consequences of wrongs to a controllable degree. The court concluded, "we decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace."[4]

In October 2005, New York's highest court, with one justice abstaining, unanimously reached the same conclusion and reversed an appellate court in *In re New York City Asbestos Litigation* (*Holdampf v. A.C. & S., Inc.*).[5] The action was brought by a former Port Authority employee and his wife after the wife developed mesothelioma from washing her husband's asbestos-soiled work clothes.

The court said that, under New York law, a defendant cannot be held liable for injuries to a plaintiff unless a specific duty exists. That duty, the court said, is not defined by the foreseeability of harm. Rather, courts must balance a variety of factors, including the reasonable expectation of parties and society generally, the likelihood of unlimited or insurer-like liability, and public policy. "[O]therwise, a defendant would be subjected 'to limitless liability to an indeterminate class of persons conceivably injured' by its negligence acts."[6]

The court then explained that a duty could not be imposed on the defendant for failing to protect the decedent from harms resulting from off-site exposure to asbestos unless the defendant's relationship with the plaintiff or with a third-party under its control put the defendant in the best position to protect against the risk of harm. In these circumstances, the court explained, the "specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship."[7] Plaintiffs alleged that the defendant's status as an employer and as a landowner supported a duty running from the defendant to the decedent.

The court found that the duty of an employer to provide a safe workplace does not extend to individuals who are not employees.[8] The court added that the subject litigation did not involve the defendant's failure to control the conduct of a third-party tortfeasor, because there was no third-party tortfeasor in the case, nor was there a relationship between the defendant and the decedent that

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required the defendant to protect the decedent from contact with either her husband or his work clothes.

Next, the court considered the defendant's status as a landowner and, again, found no duty ran to the decedent. The court said that the facts before it were "far different" from cases that have recognized a landowner's duty to prevent the negligent release of toxins into the ambient air.[9] The decedent's exposure came from handling her husband's work clothes; none of the defendant's activities released "asbestos into the community generally."[10]

Finally, the court concluded that the duty rule sought by plaintiffs would be unworkable in practice and unsound as a matter of policy. The court expressed skepticism that a new duty rule could be crafted to avoid potentially open-ended liability for premises owners. For example, the new duty rule could potentially cover anyone who might come into contact with a dusty employee or that person's dirty clothes, such as a babysitter or employee of a local laundry. The court also rejected plaintiffs' contention that the incidence of asbestos-related disease caused by secondhand exposures is rather low, candidly observing that "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality."[11]

Earlier this year, a Tennessee trial court reached the same conclusion in *Satterfield v. Breeding Insulation Co.*,[12] arising from the death of a child from secondhand asbestos exposure. The court held that Tennessee law "does not stand for the broad extension of the duty of an employer to third parties as argued by the Plaintiffs in this case." Accordingly, the court granted the defendant's motion for summary judgment, "leaving it to consideration by the Tennessee legislature as to whether it is wise to establish the duty sought by Plaintiffs in the case at bar."

II. A Foreseeability Analysis May Invite Claims

In April 2006, the New Jersey Supreme Court reached a different conclusion in *Olivo v. Owens-Illinois, Inc.*,[13] involving an independent contractor who worked as a union welder at a refinery owned by Exxon Mobil. During the course of his employment, the plaintiff was exposed to asbestos, and his late wife developed mesothelioma as a result of handling his work clothes. The court held that "to the extent that Exxon Mobil owed a duty to workers on its premises for the foreseeable risk of exposure to [asbestos], similarly, Exxon Mobil owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos brought home on contaminated clothing."[14] The court emphasized that, unlike other states such as New York, New Jersey law attaches "significance" to the foreseeability of risk in deciding duty questions.[15] The court even referred to forseeability as "determinant" in establishing the defendant's duty of care.[16] The court then remanded the case for further consideration, concluding that there were "genuine issues of material fact about the extent of the duty that Exxon Mobil owed to [the plaintiff], and whether Exxon Mobil satisfied that duty."[17]

The Louisiana case, *Zimko v. American Cyanamid*,[18] involved a plaintiff who claimed he developed mesothelioma from household exposure to asbestos fibers that clung to his father and his father's work clothes. Plaintiff also attributed his disease to exposures at his own place of employment. The court, without engaging in an independent analysis, concluded that the father's employer owed a duty of care to the son. In recognizing this duty, the court said it found the New York intermediate appellate court's decision in *Holdampf* to be "instructive."[19] As explained, the New York Court of Appeals overturned the intermediate appellate court's ruling in *Holdampf* after *Zimko* was decided.

Recently, the validity of *Zimko* was called into question in a concurring opinion from a Louisiana appellate court in *Thomas v. A.P. Green Indus., Inc.*[20] The case did not involve secondhand asbestos exposure, but was a typical premises owner liability case brought by an exposed worker. Judge Tobias explained in his concurring opinion:

> *One must clearly understand the factual and legal basis upon which Zimko was premised and its history.*
>
> *Zimko* was a 3 to 2 decision of this court. [The father's employer] was found liable to the plaintiff and [plaintiff's' employer] was found not liable to the plaintiff. Neither [company] sought supervisory review from the Louisiana Supreme Court, but the plaintiff did on the issue of the liability of [his employer]. . . . Thus, the Supreme Court was not reviewing the correctness of the majority opinion respecting [the liability of the father's employer]. . . . *Any person citing Zimko in the future should be wary of the majority's opinion in Zimko in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.*
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> The Court of Appeals of New York (that state's highest court) briefly alluded to the problem in *Zimko* in the case of *In re New York City Asbestos Litigation* . . . and chose not to follow *Zimko*.[21]

III. The Texas Case

The Fourteenth Court of Appeals in Houston is considering an appeal in *Exxon Mobil Corp. v. Altimore*,[22] involving plaintiff's claim that she developed mesothelioma from exposure to asbestos at home through handling the clothes of her husband, who worked at defendant's facility. The case was tried to a jury, and resulted in a verdict for the plaintiff. The Texas Supreme Court has not yet ruled on the question whether an employer owes a duty of care to an employee's spouse who claims an asbestos injury.

IV. Policy Implications of Potentially Unlimited Liability

In 1997, the United States Supreme Court in *Amchem Prods. Inc. v. Windsor*,[23] said that this country was experiencing an "asbestos-litigation crisis." As claims poured in at an extraordinary rate, scores of employers were

forced into bankruptcy and payments to the sick became threatened.[24]

Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today are not sick. Those who are sick face a depleted pool of assets as asbestos lawsuits have bankrupted at least seventy-eight companies. Plaintiffs' lawyers have responded to these bankruptcies by dragging more defendants into the litigation. The *Wall Street Journal* has reported that "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."[25] The number of asbestos defendants now includes over 8,500 companies, affecting many small and medium size companies in industries that cover 85% of the economy. Plaintiffs' attorney Richard Scruggs has called the litigation an "endless search for a solvent bystander."[26]

Premises owner liability for "take home" exposure injuries represents the latest frontier in asbestos litigation. These actions clearly involve highly sympathetic plaintiffs. Yet, as several leading courts have appreciated, the law should not be driven by emotion or mere foreseeability. Broader public policy impacts must be considered, including the very real possibility that imposition of an expansive new duty on premises owners for off-site exposures would exacerbate the current "asbestos-litigation crisis." Plaintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes. Current filing trends indicate that the vast majority of these plaintiffs would have no present asbestos-related physical impairment.

Furthermore, adoption of a new duty rule for employers could bring about a perverse result: nonemployees with secondary exposures could have greater rights to sue and potentially reap far greater recoveries than employees. Namely, secondarily exposed nonemployees could obtain noneconomic damages, such as pain and suffering, and possibly even punitive damages; these awards are not generally available to injured employees under workers' compensation.

CONCLUSION

The level of recent activity in litigation brought by peripheral plaintiffs against premises owners suggests that more courts will be asked to decide cases involving secondhand asbestos exposures. As more courts confront this issue, they would be wise to follow the sound reasoning of the New York and Georgia high courts and rule that premises owners do not owe a duty of care to remote plaintiffs injured off-site through secondhand exposure to asbestos or other hazards on the property.

Footnotes

1 608 S.E.2d 208 (Ga. 2005).

2 *Id.* at 210.

3 *Id.* at 209.

4 *Id.* at 210.

5 840 N.E.2d 115 (N.Y. 2005).

6 *Id.* at 119 (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001) (declining to impose liability on handgun manufacturers for harms caused by criminal misuse of firearms)).

7 *Id.*

8 *See also* Widera v. Ettco Wire & Cable Corp., 204 A.D.2d 306 (N.Y. App. Div. 2d Dep't 1994) (refusing to recognize a cause of action against an employer for injuries suffered by its employee's family member as a result of exposure to toxins brought home on the employee's work clothes).

9 *Id.* at 121.

10 *Id.*

11 *Id.*

12 No. L-14000 (Tenn. Cir. Ct. Blount County Mar. 21, 2006).

13 895 A.2d 1143 (N.J. 2006).

14 *Id.* at 1149.

15 *Id.* at 1148.

16 *Id.*

17 *Id.* at 1151.

18 905 So. 2d 465 (La. Ct. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006).

19 *Id.* at 483.

20 No. 2005-CA-1064 (La. App. Ct. May 31, 2006).

21 *Thomas*, slip op. at 2 (Tobias, J., concurring) (emphasis added).

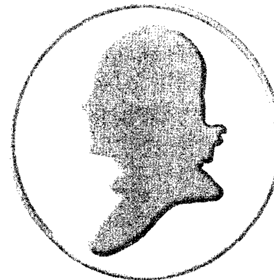
22 No. 14-04-01133-CV.

23 521 U.S. 591, 597 (1997).

24 *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

25 Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.

26 *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).



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