

Asbestos

A Potential New Frontier In Asbestos Litigation: Premises Owner Liability For “Take Home” Exposure Claims

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Commentary

A Potential New Frontier In Asbestos Litigation: Premises Owner Liability For 'Take Home' Exposure Claims

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[Editor's Note: Mark Behrens is a partner in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. Frank Cruz-Alvarez is an associate in the firm's Miami office. Mr. Behrens filed amicus curiae briefs on behalf of defendant and insurer groups in the Holdampf case decided by the New York Court of Appeals and the Olivo case decided by the New Jersey Supreme Court. Copyright 2006 by the authors. Replies to this commentary are welcome.]

The history of asbestos litigation has been marked by evolution. In its infancy, the litigation primarily involved sick plaintiffs suing companies that made or sold asbestos-containing products, often called "traditional defendants." When these companies began to file for bankruptcy court protection, plaintiffs' lawyers responded by targeting premises owners and other "peripheral defendants." Now, the litigation threatens to evolve once again as plaintiffs' lawyers seek to name premises owners in actions brought by secondarily exposed "peripheral plaintiffs."

Since the beginning of 2005, several courts have decided whether premises owners owe a duty to persons exposed to asbestos off-site, typically through contact with an employee or that person's soiled work clothes. The holdings have been mixed. The highest courts in Georgia and New York, a subsequent New York trial court, and a Tennessee trial court have declined to impose liability against premises owners for injuries allegedly caused by secondhand exposure to asbestos. The New Jersey Supreme Court and a Louisiana appellate court applied a different analysis, opening the

door to such claims. The issue is now before a Texas appellate court.

This commentary briefly summarizes these cases and suggests that courts would be wise to draw the line now and prevent the litigation from entering another problematic phase.

I. Cases Finding No Liability

The Georgia Case: In January 2005, the Georgia Supreme Court 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 in *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005), 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." 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 Georgia Supreme Court explained that under Georgia statutory and common law, employers are required to maintain a reasonably safe workplace. The plaintiffs, however, were neither employees of the defendant nor were they exposed to any danger in the workplace, "so that duty was not owed to them."

Id. at 209. To impose liability against the defendant, 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 Georgia cases. *Id.* 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." *Id.* at 210. The court also distinguished cases where landowners were found liable for creating a dangerous situation in the community by explaining that the subject litigation did "not involve [the defendant] spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." *Id.*

The New York Cases: In October 2005, New York's highest court, with one justice abstaining, unanimously reached the same conclusion in *In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115 (N.Y. 2005) (reversing appellate court). 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 began its opinion by stating the black letter rule that a defendant cannot be held liable for injuries to a plaintiff unless a specific duty exists. Like the Georgia Supreme Court, the New York Court of Appeals said that "foreseeability, alone, does not define duty — it merely determines the scope of the duty once it is determined to exist." *Id.* at 119. "[O]therwise, a defendant would be subjected 'to limitless liability to an indeterminate class of persons conceivably injured' by its negligence acts." *Id.* (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). "Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs." *Id.* The court added that *Hamilton* emphasized a "judicial resistance" to extending liability to a defendant for failure to control the conduct of

others, because of "practical concerns both about the potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.*

Based on *Hamilton*, the court said a duty could not be imposed on the defendant for failing to protect the decedent from harms resulting from exposure to asbestos on her husband's work clothes 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." *Id.* 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 common law of employer liability, now codified in New York, requires an employer to provide a safe workplace, but this duty "does not extend to individuals who are not employees." *Id.* at 120. The court cited with approval an appellate court ruling, *Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306, 611 N.Y.S.2d 569 (N.Y. App. Div. 2d Dept. 1994), where the court "properly refused" to recognize a cause of action for negligence against an employer for injuries suffered by its employee's family member as a result of exposure to toxins brought home from the workplace on the employee's work clothes. *Holdampf*, 840 N.E.2d at 120. The *Widera* court had concluded that the recognition of a cause of action under the circumstances would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." *Widera*, 204 A.D.2d at 307, 611 N.Y.S.2d at 571.

The *Holdampf* 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 required the defendant to protect the decedent from contact with either her husband or his work clothes. "Specifically," the court said, there was "no relationship between [the defendant] and [decedent] — much less that of master and servant (employer and employee), parent and child or common carrier

and passenger” — situations where third-party liability had been imposed in other cases. *Holdampf*, 840 N.E.2d at 120. The court also noted that the defendant was not in the best position to protect against the risk of harm to the decedent because it was dependent on the willingness of its employee to comply with and carry out risk-reduction measures.

Next, the court considered the defendant's status as a landowner and, again, found no duty to run 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. *Id.* at 121. The decedent's exposure came from handling her husband's work clothes; none of the defendant's activities released “asbestos into the community generally.” *Id.*

Finally, the court concluded that the duty rule sought by plaintiffs would not only upset traditional tort law rules, but 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. The appellate court had tried to avoid this problem by limiting its holding to members of the employee's household, but the New York Court of Appeals said “this line is not so easy to draw.” *Id.* at 122. 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.” *Id.*

Recently, a trial court in New York's Erie County considered a similar case, *In re Eighth Judicial District Asbestos Litigation (Rindfleisch v. Allied Signal, Inc.)*, 2006 WL 1374504 (N.Y. Sup. Ct., Erie County May 16, 2006), brought by a plaintiff who allegedly contracted mesothelioma from handling her husband's work clothes. Plaintiff contended that defendant's failure to provide work clothes and other protective measures to her husband should alter the duty analysis in New York. The court, however, found her argument to be unpersuasive: “Although not couched as such, plaintiffs are essentially arguing foreseeability

of injury, in contrast to the *Holdampf* court's clear mandate that a relationship between the plaintiff and the defendant should be the key consideration, not foreseeability, when performing a duty analysis.” *Id.* at *4. The court said that the New York courts “have repeatedly refused to extend liability to proposed tortfeasors where plaintiffs have suffered grave consequences in the absence of a duty.” *Id.* The court explained that, while such decisions may seem harsh in a particular case, the courts “must be cautious of creating an indeterminate class of potential plaintiffs. . . .” *Id.* Accordingly, the court declined plaintiff's invitation to expand the common law, holding that no duty was owed to the plaintiff.

The Tennessee Case: A Tennessee trial court reached the same conclusion in *Satterfield v. Breeding Insulation Co.*, No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006), arising from the tragic death of a child from secondhand asbestos exposure. The court noted that while its “heart goes out to the Satterfield family and to the friends, relatives, and acquaintances of [the decedent], . . . the legal issues are the only issues to be considered by the Court.” 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

The New Jersey Case: In April 2006, the New Jersey Supreme Court distinguished the Georgia and New York high court decisions and opened the door to the imposition of liability against premises owners for secondhand exposure injuries in *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006). The case involved an independent contractor who worked as a union welder at numerous sites, including 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 her alleged secondhand exposure to asbestos from washing her husband's work clothes. The New Jersey Supreme 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." *Id.* at 1149. The court emphasized that, unlike other states such as New York, New Jersey law places "significance" on the foreseeability of risk in deciding duty questions. *Id.* at 1148. The court even referred to foreseeability as "determinant" in establishing the defendant's duty of care. *Id.* 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." *Id.* at 1151.

The Louisiana Case: In *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006), a wrongful death and survival action, plaintiff sued his father's employer, American Cyanamid, after plaintiff developed mesothelioma that he attributed to household exposure to asbestos fibers that clung to his father and his father's work clothes. Plaintiff also attributed the disease to bystander exposures at his own place of employment, a Domino factory owned by Tate & Lyle North American Sugars, Inc. 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 appellate court's decision in *Holdampf* to be "instructive." *Id.* at 483. As explained, that decision was overturned by the New York Court of Appeals 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 Industries, Inc.*, No. 2005-CA-1064 (La. App. Ct. May 31, 2006). 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. American Cyanamid was found liable to the plaintiff and Tate & Lyle was found not liable to the plaintiff. Neither American

Cyanamid nor Tate & Lyle sought supervisory review from the Louisiana Supreme Court, but the plaintiff did on the issue of the liability of Tate & Lyle. By implication, American Cyanamid had settled with the plaintiff or agreed not to pursue their appeal further. Thus, the Supreme Court was not reviewing the correctness of the majority opinion respecting American Cyanamid's liability. . . . *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.*

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* [citation omitted] and chose not to follow *Zimko*.

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

III. The Case Pending In Texas

The Fourteenth Court of Appeals in Houston is considering an appeal in *Exxon Mobil Corp. v. Altimore*. No. 14-04-01133-CV, 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

The United States Supreme Court has said that this country is experiencing an "asbestos-litigation crisis" as a result of the "elephantine mass" of claims that have been filed. Former United States Attorney General Griffin Bell has said, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections." Nationally, asbestos claims continue to pour in at an extraordinary rate, scores of employers have been forced into bankruptcy, and payments to the sick are threatened.

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." The number of asbestos defendants now includes over 8,500 companies, affecting many small and medium size companies in industries that cover eighty-five percent of the economy. Plaintiffs' attorney Richard Scruggs has called the litigation an "endless search for a solvent bystander." Before it ends, the litigation may cost up to \$195 billion — on top of the \$70 billion spent through 2002.

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 asbes-

tos 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.

V. 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. The courts 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. ■

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