PIERCE DAVIS & PERRITANO LLP

Toxic Torts Alert: Duty to "Take Home" Exposure Plaintiffs

Trending Topic: Duty to "Take Home" Exposure Plaintiffs

A number of courts have recently addressed the issue of whether a duty is owed to a plaintiff secondarily exposed to a toxic substance from the clothes or belongings of an individual who worked directly with that substance. Some of the cases addressed an employer/premises owner's duty, while others addressed the duty of a manufacturer or supplier. The resulting decisions were varied:

***Schwartz v. Accuratus Corp.*, No. 12-6189, 2017 WL 1177171 (E.D. Pa. Mar. 30, 2017), remanded by 655 Fed.Appx. 111 (3d Cir. 2016), following certification to 139 A.3d 84 (N.J. 2016)**: on remand from the U.S. Court of Appeals for the Third Circuit, which vacated the federal district court's original dismissal order, the District Court for the Eastern District of Pennsylvania ultimately held that a defendant could owe a negligence-based duty of care to a plaintiff alleging exposure to beryllium brought home on the clothing of her boyfriend and his roommate from the defendant employer's facility.

In its original 2014 order granting dismissal, the federal judge had relied, in part, upon the New Jersey Supreme Court's 2006 *Olivo v. Owens-Illinois, Inc.* decision and held that, "[w]hile an employer working with beryllium might foresee potential danger to mere roommates and visitors, the considerations of policy and fairness noted by the *Olivo* court demand that take-home liability be reasonably limited." On appeal by Plaintiff, the Third Circuit certified a question to the New Jersey Supreme Court to determine whether *Olivo's* holding, that a premises owner owed a duty of care to the spouse of a person exposed to toxic substances, could be extended to non-spouses. In its response, the Supreme Court declined to "create an abstract bright-line rule at this time as to 'who's in and who's out' on a negligence-based take-home toxic-tort cause of action." The Court noted that it was not the *Olivo* plaintiff's "role as the lawfully wedded spouse" of the asbestos worker that formed the basis for finding a duty of care, but rather "that it was foreseeable that she would be handling and laundering the [worker's] soiled, asbestos-exposed clothes." Because the duty analysis is "very fact-specific and principled," the Court stated that its response to the certified question "will have to be limited to clarifying that the duty of care . . . may extend, in appropriate circumstances, to a plaintiff who is not a spouse" and that several enumerated factors should be weighed "to determine whether . . . foreseeability, fairness, and predictability concerns . . . should lead to the conclusion that a duty of care should be recognized under common law."

On remand, the Eastern District applied the facts to those factors and found that: (1) "[beryllium is] a toxin that was known to travel on clothes to workers' homes, can remain dangerous in the home for some time, and importantly, can cause serious damage with only minimal exposure;" and (2) it "may be reasonably foreseeable to a Defendant employer working with a particularly insidious toxic substance that material carried home on an employee's clothes may harm someone at that home who is a frequent overnight guest and romantic partner or a roommate sharing living space and housework."

***Ramsey v. Atlas Turner Ltd.*, C.A. No. N14C-01-287 ASB, 2017 WL 465301 (Del. Super. Ct. Feb. 2, 2017)**: granting a defendant's motion for summary judgment, a Delaware trial court held that the manufacturer-defendant did not owe a duty of care to a plaintiff who alleged that her lung cancer was caused by exposure to asbestos debris "caked" onto her husband's clothing when he returned home from work, where he had encountered asbestos paper manufactured and sold by the defendant. Plaintiff argued that, under general negligence tort principles, an automatic duty of reasonable care is owed to all foreseeable plaintiffs by manufacturers who place an asbestos-containing product into the stream of commerce, but Defendant argued that the misfeasance/nonfeasance framework set forth in cases involving claims against employers should also be applied to manufacturers. The court ultimately agreed with Defendant that the Delaware Supreme Court's analysis in two employer liability cases—*Price v. E.I. DuPont de Nemours & Co.* and *Riedel v. ICI Americas Inc.*–is applicable to

manufacturers. The court concluded that, because Plaintiff's claims that the manufacturer failed to warn, test or take other protective measures constitutes a claim of nonfeasance, Plaintiff must—but failed to—show a special relationship between herself and the manufacturer. The court noted that applying a different analysis for manufacturers than for employers would have resulted in a "paradoxical result." [Plaintiff has filed a motion for re-argument, which remains pending at the time of this publication.]

***Kesner v. Pneumo Abex, LLC/Haver v. Pneumo Abex, LLC*, 384 P.3d 283 (Cal. 2016)**: in a consolidated appeal, reversing/vacating the Court of Appeal's decisions stemming from trial court orders dismissing claims against the employer defendants, the California Supreme Court rejected the defendants' contention that an employer does not owe a duty to members of an employee's household to prevent take home asbestos exposure. The Court explained that, under California law, "'the general duty to take ordinary care in the conduct of one's activities' applies to the use of asbestos on an owner's premises or in an employer's manufacturing processes." Analyzing foreseeability from a *general* tort perspective (not specific to these plaintiffs and these defendants), the Court found, in part, that "[i]t is a matter of common experience and knowledge that dust or other substances may be carried from place to place on one's clothing or person, as anyone who has cleaned an attic or spent time in a smoky room can attest." In weighing public policy considerations, the Court analyzed California's factors, including availability of insurance and prevention of future harm, from the perspective of the time period of the alleged exposures, rather than the current time period. The Court declined to adopt a categorical no-duty rule merely because, as the employer defendants argued, imposing a duty would open the door to an "'enormous pool of potential plaintiffs'" who may have contact with an employee (such as babysitters, neighbors and public transportation commuters). Instead, the Court held that "[b]y drawing the line at members of a household, [it] limit[s] the potential plaintiffs to an identifiable category of person who, as a class, are most likely to have suffered a legitimate, compensable harm."

***Certainteed Corp. v. Fletcher*, 794 S.E. 2d 641 (Ga. 2016)**: in pertinent part, reversing the Court of Appeals' decision which reversed the trial court's order granting summary judgment to the asbestos-containing pipe manufacturer defendant on duty grounds, the George Supreme Court agreed that the defendant did not owe a duty to warn the daughter of a pipefitter who worked with the defendant's pipes. The Court rejected the intermediate court's conclusion that, although Plaintiff would not have seen any warning the defendant placed on its pipes (since she did not encountered the pipes herself), a warning could have permitted Plaintiff's father to take steps to mitigate the potential danger. The Court deemed such a conclusion to be "problematic" because it is a duty that is "specifically crafted based on the unique facts present [in this specific case], without consideration for its broader proposition." The Court noted that the duty imposed by the intermediate court would actually be putting the onus on the worker to take the necessary steps to keep the third parties safe. Citing to its 2005 decision in *CSX Transp. v. Williams*, wherein the Court similarly declined to extend an employer's duty to take home plaintiffs for public policy reasons, the Court concluded that "it [would be] unreasonable to impose a duty on [the pipe manufacturer defendant] to warn all individuals in [the plaintiff's] position, whether those individuals be family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless."

***Quiroz v. ALCOA, Inc.*, 382 P.3d 75 (Ariz. Ct. App. 2016), review granted, Ariz. S. Ct., 16-0248 (Feb. 14, 2017)**: affirming a trial court's order granting summary judgment in favor of a defendant, the Arizona intermediate appellate court held that the employer-defendant did not owe a duty of care to the son of an employee who alleged that his mesothelioma was caused by asbestos brought home on his father's clothes. The Court explained that in Arizona, unlike in jurisdictions that have imposed a duty in take home exposure cases, "[w]hether a defendant owes a plaintiff a duty of care does not turn on the foreseeability of injury" and that the court "do[es] not undertake a fact-specific analysis, nor do[es] [it] look at the parties' specific actions." Instead, the Court explained, a duty arises only from a special/categorical relationship between the parties or from public policy considerations. With respect to relationship, the Court rejected—as inconsistent with existing Arizona law—the application of section 54 of the Restatement (Third) of Torts or section 371 of the Restatement (Second) of Torts, both of which Plaintiff argued would impose a duty on Defendant. Because the claimant was not an invitee or licensee, the Court also rejected Plaintiff's argument that Defendant's status as a landowner imposed a duty in this case. With respect to public policy considerations, the Court analyzed the relevant factors and found that they weighed against imposing a duty

of care. [The Arizona Supreme Court granted Plaintiff's Petition for Review and has scheduled oral argument for April 25, 2017.]

***Palmer v. 999 Quebec, Inc.*, 874 N.W.2d 303 (N.D. 2016)**: affirming a trial court's order granting summary judgment for the defendant supplier/installer of asbestos-containing insulation products, the North Dakota Supreme Court agreed with the defendant that it did not owe the son of a man who used its asbestos products a negligence-based duty to warn. In addressing Plaintiff's contention that the focus should be on the foreseeability of the injury and the defendant's opposing contention that the focus should be on whether a special relationship existed between Plaintiff and Defendant, the Court noted that its prior negligence cases have focused on both when determining whether a duty exists. The Court went on to hold that, "regardless of whether the focus is on foreseeability of injury, relationship of the parties or a combination of both," Plaintiff had failed to raise any genuine issues of material fact regarding either issue. In an attempt to prove foreseeability by showing the defendant's knowledge of the dangers of asbestos, Plaintiff had introduced evidence of a 1973 local statute that banned the use of powered asbestos. However, the Court held that Plaintiff had failed to provide evidence that the defendant continued to use asbestos products after the statute was enacted.

Past Trending Topics:

- Each and Every Exposure Theory
- Liability for Products Manufactured and Sold by Others (the "Bare Metal" Defense)

Contact Us

For more information regarding the duty to "take home" exposure plaintiffs generally and strategies for defending against the theory in individual cases, please contact:

Judith A. Perritano

617.350.0950

jperritano@piercedavis.com


Melissa M. Malloy

617.350.0950

mmalloy@piercedavis.com

This Toxic Torts Alert is solely intended to convey information to our clients about recent legal developments, and is not intended to create an attorney-client relationship or to convey legal advice with respect to any particular set of facts or circumstances.