

## Timing Is Everything In 'Take-Home' Asbestos Cases

*Law360, New York (September 29, 2014, 11:59 AM ET) --*

As ongoing asbestos litigation matures, the number of “take-home” or “secondary” exposure cases continues to grow. The plaintiff in such cases is typically a spouse or other family member who claims exposure from laundering a husband or father’s contaminated work clothes. The trend in these cases is to pursue liability against the employer or premise owner where the asbestos exposure originated. Often times, this is in addition to, or instead of, pursuing asbestos product manufacturer(s). In order to establish a claim against an employer/premise owner that did not manufacture the asbestos-containing products that were the source of exposure, the plaintiff cannot rely on a strict liability theory of recovery, but rather must establish liability under a theory of negligence.

An employer’s liability in a negligence claim brought by an employee’s family or household member is an unsettled question of law in many jurisdictions. Clearly, the threshold question is whether the employer owed a duty of care to the plaintiff-household member for where, no duty of care exists, there can be no liability as a matter of law. Thus, the plaintiff’s challenge in a take-home exposure claim is establishing that the employer/premise owner owed a duty of care directly to the household member.

The U.S. District Court for the Western District of Oklahoma recently decided a case that provides a framework for deciding this issue as a matter of first impression as these cases arise in other jurisdictions. By applying the basic principles of foreseeability present in the negligence analysis, courts will be well-equipped to determine whether the plaintiff has presented sufficient evidence to meet his or her prima facie burden.

### Comparison of Decisions from Other Jurisdictions

The causes of action available to a plaintiff in a take-home exposure case are far more limited than those available to plaintiffs who were directly exposed in the work space. Take-home (i.e., nonemployee) plaintiffs typically are excluded from coverage under fundamental workers' compensation laws. Additionally, a premises liability theory is unavailable since the plaintiff’s exposure did not occur on the employer’s premises. Moreover, a strict liability claim against a specific product manufacturer is excludable because the plaintiff’s exposure was not a reasonably foreseeable



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consequence of the product's uses. Therefore, when determining the issue of take-home liability under fundamental theories of negligence, which standard the court applies to decide whether a duty of care was owed, is determinative.

Those states that have ruled on the issue of take-home asbestos exposure liability are split. Compare *CSX Transportation Inc. v. Williams* (Georgia negligence law does not impose a duty on an employer to a third-party, nonemployee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace because there is no relationship between the parties) with *Satterfield v. Breeding Insulation Co.* (it was foreseeable that employee's child would come into contact with employee's asbestos-contaminated work clothes and employer had a duty to use reasonable care to prevent exposure to asbestos by not only its employees, but all individuals who came into contact with the employee's work clothing).

Generally, where an employer has been held liable for take-home asbestos exposure the focus has been on the foreseeability of the harm. In those that have not recognized liability the focus has been on the relationship between the employer and the plaintiff. See, for example, *Clearing The Air: Ordinary Negligence In Take-Home Asbestos Exposure Litigation*. However, even where the negligence analysis is based on the relationship of the parties, the existence of a duty centers on several factors, the first of which is the reasonable foreseeability of the injury. See *Simpkins v. CSX Transportation*. As these cases continue to develop, it will be important to determine the specific standard that is applied by the courts, with a particular emphasis on the foreseeability analysis. As shown below, the time period of exposure, along with evidence of the concomitant employer's knowledge of the potential hazards from exposure, will be critical to this determination.

### **Bootenhoff v. Hormel Foods Corp.**

The U.S. District Court for the Western District of Oklahoma's recently decided *Bootenhoff v. Hormel Foods Corp.* was one of first impression under Oklahoma law. The court's framework of analysis provides an example of what likely may be addressed in future cases on the same issue. In *Bootenhoff*, Eugene Bootenhoff worked at a Weyerhaeuser box manufacturing plant in Austin, Texas, from 1955 through 1966. Testimony was developed that, on two different occasions in 1959, Bootenhoff removed and installed asbestos-containing pipe insulation on a corrugating machine at the Weyerhaeuser warehouse. This work lasted only an hour or two each time. Those two jobs were the only evidence of Bootenhoff's direct exposure to asbestos.

The lawsuit alleged that Norma Bootenhoff was exposed to asbestos when she laundered her husband's clothes that had been contaminated with asbestos from the workplace. Norma Bootenhoff was diagnosed with mesothelioma in August 2009, and sought to hold International Paper Company liable as the successor to Eugene Bootenhoff's former employer, Weyerhaeuser.

In considering IPC's motion for summary judgment and determining the threshold question of whether IPC owed a duty of care to Norma Bootenhoff, the court found guidance in a prior Tenth Circuit decision applying Oklahoma products liability law. See *Rohrbaugh v. Owens-Corning Fiberglass Corp.*

In *Rohrbaugh*, the court found that the wife of an insulator who worked with asbestos was not a foreseeable user of the products and, therefore, no duty to warn was owed to her. The Tenth Circuit's decision rested on the issue of foreseeability. The evidence presented at trial in *Rohrbaugh* established that it was unknown at the time of the wife's exposure — the last alleged exposure occurring in 1969 — that the type of asbestos associated with products at issue could cause mesothelioma.

The Tenth Circuit further relied on its decision in Rohrbaugh to uphold summary judgment in a subsequent wrongful death case where the plaintiff alleged she was exposed to asbestos while laundering her husband's work clothes. See *Carel v. Fibreboard Corp.*

In *Carel*, the court reaffirmed its holding that "an Oklahoma manufacturer has no duty to warn when the injured party 'was never exposed to asbestos as a user or present where the product was used'" and rejected the plaintiff's argument that the defendant's failure to warn of the dangers of asbestos was a foreseeable cause of the plaintiff's death.

While IPC contended that the Tenth Circuit decisions were dispositive in *Bootenhoff*, the plaintiff argued they were inapplicable because they were not pursuing a product liability claim against IPC. The plaintiffs also maintained that the prior decisions should not apply because they were based on the evidence presented in those cases, and the evidence submitted in their case demonstrated that the danger from exposure to asbestos was foreseeable in the time frame when Norma Bootenhoff was exposed. In finding that IPC owed no duty of care to Norma Bootenhoff, the court held that the issue turned on whether the risk of developing mesothelioma from secondary exposure was foreseeable during the time period when she had direct exposure to asbestos.

The evidence relied on by the plaintiff was typical of what is produced in take-home exposure cases to establish that the risk of harm was foreseeable: medical literature they contended should have put IPC on notice of the harm; discovery responses they alleged showed IPC had actual knowledge of the risk of harm to family members; and historical legislation (e.g., the Walsh-Healy Public Contract Act and U.S. Occupational Safety and Health Administration regulations). The court ultimately determined that none of the evidence presented by plaintiffs was sufficient to establish that IPC owed a duty of care to Norma Bootenhoff because none of the evidence demonstrated that it was foreseeable that she could develop mesothelioma as a result of her husband's direct exposure to asbestos in 1959.

In further support of Norma Bootenhoff's claim, medical literature was produced that formed the basis for an affidavit from Dr. Barry Castleman, who opined generally that the hazard of asbestos exposure to families of the workers was scientifically knowable since the 1950s. However, the court found that the fact these reports in the medical field began to link the possibility of asbestos-related diseases to household members of workers does not demonstrate that the risk of disease should have been known in the industry to manufacturing companies like IPC. The court found that the discovery responses relied upon by the plaintiffs were taken out of context, and in fact only established that IPC acknowledged it was not until the mid to late 1970s that the medical and scientific literature indicated that jobsite "bystanders" were at risk. Finally, the court determined that the legislation was insufficient to put the employer on notice because it was focused on protecting workers from occupational exposure in the workplace and did not specifically address bystander exposure.

### **Application of Bootenhoff Rationale to Future Cases**

As the number of take-home exposure cases against employers increases, it will be important for defendants to understand the theories of liability available and the court's varying treatment of each. The negligence analysis will be focused on whether the defendant owed a duty of care to the plaintiff, and as discussed above, whether or not such a duty exists may well turn on a state's preferred test. The analysis will also be highly fact-specific, with the precise time period of the employee's exposure being critical. Absent evidence of knowledge regarding the risk of harm to household members at the time of exposure in the workspace, an employer cannot be held liable for breaching a duty of care to the "take

home" exposed plaintiff.

Regardless of the specific intricacies of a state's application of negligence concepts, foreseeability continues to be the most important consideration in these cases. Although the general allegations as to the nature of exposure are often the same, the specific timing of the alleged exposure history may well make or break the viability of a take-home asbestos exposure case based on negligence. The *Bootenhoff* decision demonstrates the importance of the time frame of the employee's alleged exposure. If the plaintiff cannot establish that the last exposure occurred at a time when the employer was, or should have been, aware of the hazard, the employer cannot be held to have owed a duty of care to protect household members from a hazard of which it was not aware.

Each individual case will, of course, be decided on its own facts. The decisions of various courts over the last several years should provide guidance in determining whether a duty of care existed in the take-home exposure incidence. In sum, for the plaintiff to establish foreseeability he or she must demonstrate that the employer/premise owner was or should have been aware of the dangers of asbestos exposure to the employee's household members, at the time of the alleged exposure. As in *Bootenhoff*, if the plaintiff is unable to present evidence that the employer/premise owner knew or should have known of the dangers of take-home exposure when its employee was exposed to asbestos, summary judgment should be granted since the potential for harm was not foreseeable, regardless of the specific negligence standard applied by the court.

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