

## New Trend Emerging From Pending California Take-Home Exposure Decision?

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California has become a hub for asbestos litigation. Its plaintiff-friendly law and juries have attracted plaintiffs from both California and across the country. A case currently pending in the Supreme Court of California concerning whether a duty is owed to a plaintiff who alleges “take-home” asbestos exposure could have a major impact on whether California becomes an even greater hotbed for asbestos litigation. Should the Court impose a duty on an employer for “take home” exposures, this expansion of an employer’s duty is likely to lead to increased asbestos filings as plaintiffs seek out attractive jurisdictions based on substantive legal doctrine.

Recently, the Supreme Court of California heard oral arguments in coordinated “take-home” asbestos cases. In both cases, at issue is whether an employer owes a duty of care to members of an employee’s household who could be affected by asbestos brought home on the employee’s clothing.

In *Kesner v. Superior Court*, 226 Cal.App.4th 251 (2014), plaintiff, the nephew of a brake manufacturer’s employee, alleged that he developed mesothelioma as a result of exposure to asbestos from his uncle’s dirty and dusty clothing during frequent visits to his uncle’s home. In finding that the brake manufacturing company employer owed plaintiff a duty of care, the court found that “[a]s a general matter, harm to others from secondary exposure to asbestos dust is not unpredictable.” *Kesner* 226 Cal.App.4th at 259. Further, the harm “from a lack of precautions to control friable asbestos that may accumulate on employees’ work clothing is generally foreseeable.” *Id.* As for employers, the court found that “extending the duty of care to [an employee’s household members or long term occupants of a residence] does not threaten employers with potential liability for an intangible injury that can be claimed by an unlimited number of persons.” *Id.* at 261. Thus, the court not only imposed a duty on an employer for “take home” exposures, it extended a duty to any guest that frequents an employee’s home. It is important to note, however, that despite the fact that plaintiff claimed that he was exposed to asbestos through his uncle’s clothing, plaintiff’s claim was premised on a theory of products, not premises, liability.

That distinction is important, as a month later a different appellate court ruled against extending a duty of care based on “take home” exposure in the context of a case alleging premises liability. In *Haver v. BNSF Railway Co.*, 226 Cal.App.4th 1104 (2014), the heirs of an employee’s deceased wife claimed that she developed mesothelioma as a result of exposure to asbestos from the clothing her husband wore home while employed by the defendant company. Deciding not to follow the earlier *Kesner* decision, the *Haver* court distinguished the two cases by pointing out that *Kesner* was a products case while *Haver* involved allegations of premises liability. Importantly, though, the court noted that courts should be wary of the consequences of extending employers’ liability too far. *Id.* at 1110.

A decision by the California Supreme Court which extends a duty to the family and/or guests of an employee is likely to result in a huge uptick in asbestos claims filed in California, as plaintiffs look for favorable jurisdictions in which to bring their cases. That is what has occurred in Illinois, where the Illinois Supreme Court upheld the appellate court’s reversal of an order granting an employer’s dismissal based on the lack of a duty to an employee’s spouse, and allowed plaintiff to re-plead foreseeability. See *Simpkins v. CSX Transp., Inc.*, 2012 Ill. 110662. Conversely, multiple jurisdictions, such as Georgia, have shut the forum shopping door by holding that employers and premises owners owe no duty to a member of a household injured by take home exposure to asbestos. *CSX Transp., Inc. v. Williams*, (2005) 278 Ga. 888.

Should the Supreme Court of California expand the scope of an employer’s duty to include “take home” exposure,

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venue selection flexibility and favorable new legal doctrine may very well cause a seismic shift in asbestos filing activity, leaving California at the epicenter.