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## Product Liability & Toxic Torts

### Across the Hudson, a Different View of 'Take-Home' Liability

States differ on landowner liability for asbestos-related injuries of worker's spouse

By Timothy Corrison and Andrew McNally

Recently, in *Olivo v. Owens-Corning, Inc.*, the New Jersey Supreme Court held that a landowner may be held liable for asbestos-related injuries by the spouse of a worker even where the spouse never entered the landowner's premises at any time. In *Holdampf v. A.C. & S., Inc.*, the New York Court of Appeals reached an opposite conclusion on similar facts. The holdings are rooted in the manner in which the respective courts have considered foreseeability in determining whether a duty exists. Given the proximity of these jurisdictions, counsel for both plaintiffs and defendants must be mindful that when a take-home asbestos case may be brought in either New Jersey or New York, the forum selected can make all the difference.

In the context of a negligence cause

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of action, New Jersey separates the discussion of foreseeability into two distinct considerations: foreseeability as to duty owed and foreseeability as to proximate cause of alleged harm. It is not enough to ground liability in the fact that the defendant did not act with reasonable care and that his carelessness caused injury — the plaintiff must demonstrate that the defendant owes him a duty of care. An analysis of duty ultimately requires a consideration of foreseeability in determining what the reasonable man should recognize as involving an unreasonable risk of harm. Foreseeability, as it impacts on duty determinations, is based on "the knowledge of the risk of injury to be apprehended." As stated by one New Jersey court, "the crucial element in determining whether or not to impose a duty rests on whether the defendant was reasonably able to comprehend that his tortious conduct could injure as it did." In other words, foreseeability, as related to a duty determination, depends on knowledge of the risk. It follows that if the danger is not known, no duty exists.

Foreseeability as it relates to proximate cause is fact-intensive and depends on the events leading up to the alleged injury. Once various causes are identified, the analysis to determine foreseeability will proceed in the same manner as with a duty/foreseeability determination, as discussed above. New

Jersey makes the distinction between these foreseeabilities, because while the presence or absence of a duty might be foreseeable, a different foreseeability determination should be made regarding proximate cause.

New York does not include a foreseeability component as part of its determination of the presence or absence of a duty. Instead, New York courts make duty determinations based on logic, science and policy considerations. In this regard, "duty" is a legal term that expresses the conclusion that there can be liability when the risk to which one person exposes another is within the protection of the law. "Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty." Rather than being determinative of the existence of a duty, New York courts hold that foreseeability is only relevant in establishing the scope of a pre-existing duty. In effect, "foreseeability is a limitation on duty."

In *Olivo*, a plaintiff who had been exposed to asbestos brought a wrongful death and survival action in New Jersey against Exxon Mobil, the owner of the site where the plaintiff worked, asserting that his wife's mesothelioma (and resulting death) was caused by her handling of the plaintiff's asbestos-laden work clothes (sometimes referred to as a "take-home" case). Before trial, Exxon Mobil moved for summary judgment, arguing that it owed no duty to persons harmed by off-site asbestos exposure. After a reversal by the Appellate Division and subsequent

appeal, the New Jersey Supreme Court held that a landowner owes such a duty to a worker's spouse, as the spouse's asbestos-related injuries are foreseeable.

The Supreme Court observed that Exxon Mobil was aware of the dangers of asbestos exposure for decades, and referred to industrial hygiene texts from the early 20th century that recommended plant owners "provide workers with the opportunity to change in and out of work clothes to avoid bringing contaminants home on their clothes." The Court pointed out that Exxon Mobil did not take such precautions, and stated that employees and/or their spouses would be expected to handle their soiled work clothes at home for purposes of cleaning them. As such, the Court held that Exxon Mobil "owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing." In analyzing the fairness of imposing a duty upon a landowner for off-site injuries to employees' spouses, the Court opined that Exxon Mobil's fears of "limitless exposure" were overstated, in that the Court noted that the duty it recognized was "focused on the particularized foreseeability of harm to [a] plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband."

*Holdampf* was another take-home case, involving a claim brought in New York by a worker and his wife against the Port Authority of New York and New Jersey, his employer, seeking damages for his wife's mesothelioma, alleged to have been sustained as a result of her handling of his work clothing while cleaning it. The Port Authority moved for summary judgment, alleging that it owed no duty to its employee's spouse

for off-site asbestos exposure. While the trial court granted the Port Authority's motion, the Appellate Division reversed, and certified the question of whether a duty existed for the Court of Appeals.

While the Court of Appeals observed that foreseeability of injury is a consideration, the court noted that "foreseeability alone does not define duty — it merely determines the scope of the duty once it is determined to exist." The "key" consideration, according to the Court of Appeals, as to whether a duty exists is whether "the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm." This relationship, the Court held, is critical as it avoids the potential of a defendant's "limitless liability" and restricts the duty to a limited class of persons. Distinguishing the case before it from cases involving third persons over whom a defendant could exert actual control, or where the defendant was obligated to protect a plaintiff from the actions of third parties, the Court of Appeals held that the Port Authority shared no relationship with its employee's spouse, and therefore owed no duty to her.

The *Holdampf* plaintiffs argued alternatively that the Port Authority owed a duty to its employees' spouses for asbestos-related injuries based upon the Port Authority's status as a landowner. In this way, the *Holdampf* plaintiffs sought to hold the Port Authority liable on the exact same theory advanced against Exxon Mobil in *Olivo*. The Court of Appeals, while recognizing that *Olivo* held that a landowner owes a duty to a worker's spouse for asbestos-related injuries, distinguished *Olivo* on the basis that New York law, unlike New Jersey law, does not premise its duty analysis

on foreseeability. Factually, the Court of Appeals noted that the Port Authority in *Holdampf*, unlike Exxon Mobil in *Olivo*, provided laundry services for its worker's clothes, such that the plaintiff-employee could have avoided bringing his work clothes home to his spouse altogether.

The Court of Appeals concluded by opining that extending a landowner's or employer's duty to include the spouses of workers would require courts, in many cases, to draw an arbitrary line between duty and no duty. The Court stated that if it were to recognize a duty to workers' spouses, it would inevitably have to recognize a duty owed to other members of the workers' household, and any in-house help who could be expected to do laundry, or even persons working at an outside laundry service. The Court rejected the *Holdampf* plaintiffs' contention that the infrequency of off-site, "secondhand" asbestos-related disease would permit courts to avoid making such determination, and instead cautioned that "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality."

The contrasting holdings in take-home cases by the courts in New Jersey and New York can present complex issues for litigants and the courts. Due to the close proximity of New York and New Jersey, one could be presented with a matter wherein a New Jersey resident plaintiff's alleged exposure to a toxic substance via a spouse's employment in New York or conversely, a New York resident plaintiff's alleged exposure to a toxic substance via a spouse's employment in New Jersey. In such cases, the law applied will be dispositive as to whether there is a duty owed by the premises owner. As such, venue and choice of law issues become paramount. ■