Legal Opinion Letter

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HIGH COURTS REJECT PREMISES LIABILITY FOR SECONDHAND ASBESTOS EXPOSURE

by
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In late October 2005, New York's highest court, with one Justice abstaining, unanimously held that an employer does not owe a duty of care to the spouse of an employee who is harmed as a result of exposure to asbestos carried home on the employee's work clothes. The court's decision, *In re New York City Asbestos Litigation* (*Holdampf v. Port Authority of New York and New Jersey*), No. 07863, 2005 WL 2777559 (N.Y. Oct. 27, 2005), marks the second time this year that a state high court has rejected an invitation to impose liability on premises owners in secondhand asbestos exposure suits. In January, the Georgia Supreme 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." Decided within the year, these cases represent a novel new issue in asbestos litigation and the proper judicial response.

By declining to impose liability, the New York and Georgia courts were unwilling to extend traditional employer and landowner duties and exacerbate what the United States Supreme Court has described as an "asbestos-litigation crisis" confronting this country. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). A 2005 report by the RAND Institute for Civil Justice describes the magnitude of the litigation: Through 2002, almost three-quarters of a million people filed claims; at least 73 employers had been forced into bankruptcy; over 8,400 defendants had been dragged into the litigation; and about $70 billion had been spent. As more companies have been forced into bankruptcy, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing," noted a *Wall Street Journal* editorial.

Facts of the Cases. The New York plaintiff's husband was a 36-year Port Authority employee who handled asbestos-containing products in various Port Authority sites, including the World Trade Center. For convenience, he frequently opted to bring his dirty work clothes home to wash rather than leave them at work to be sent offsite for cleaning by a laundry service. As a result, his wife often handled his asbestos-soiled clothing; she was later diagnosed with mesothelioma. The Georgia litigation 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 CSX Transportation facilities. The claims were initially filed in federal court and reached the Georgia Supreme Court on a certified question from the U.S. Court of Appeals for the Eleventh Circuit.

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Courts' Analyses. The New York Court of Appeals, reversing an appellate court, said that under New York law, a defendant cannot be held liable for injuries to a plaintiff unless a "specific duty" exists. That duty, the court said, is not defined solely by the foreseeability of harm. Rather, courts must balance a variety of factors, including the reasonable expectation of parties and society generally, the likelihood of unlimited or insurer-like liability, and public policy. The "key consideration" in deciding third-party liability, the court said, is "that 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; and that 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."

The court then concluded that long-standing common law notions of employer liability did not support a duty of care on the part of the Port Authority because there was no relationship between the Port Authority and Ms. Holdampf that required the defendant to protect her from exposure to asbestos on her husband's clothes. In fact, the court said, the Port Authority was dependent on Mr. Holdampf's willingness to comply with and carry out risk-reduction measures. The court also rejected the extension of liability that has been found when landowners negligently release toxins into the general community. In addition, the court declined to follow a recent New Jersey appellate court decision, *Olivo v. Exxon Mobil Corp*., 872 A.2d 814 (N.J. Super. Ct. App. Div. 2005), *cert. granted*, 878 A.2d 855 (N.J. 2005), which found that a duty existed in a secondhand asbestos exposure action brought against a premises owner by an independent contractor for his spouse's asbestos-related disease. Finally, the New York court was skeptical that a new duty rule could be crafted to avoid potentially limitless liability for employers. Even though the appellate court below tried to limit the duty of care to members of the employee's household, the Court of Appeals said that the "line is not so easy to draw." The court cited examples of a babysitter or the employee of a local laundry who washes the employee's clothing. (Other potentially exposed persons might include co-workers, extended family members, renters, houseguests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes).

Similarly, the Georgia Supreme Court held that Georgia statutory and common law rules that require employers to provide their employees with a reasonably safe work environment do not encompass individuals who were neither employees nor exposed to any danger in the workplace. The court noted that "mere foreseeability" of harm was rejected as a basis for extending a duty of care in previous cases. Instead, the court cited New York law for the proposition that the creation of a duty is based on policy considerations – considerations that weighed against the extension of a new duty rule. The court also dismissed analogies to cases where landowners were found liable for creating a dangerous situation in the community. The court explained that the subject litigation did "not involve [the defendant] itself spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace."

The New York and Georgia cases involved highly sympathetic plaintiffs. Yet, both courts appreciated that imposing a broad new duty on premises owners would exacerbate the current asbestos litigation "crisis" and allow plaintiffs' attorneys to begin to name countless employers directly in asbestos and other mass tort actions. Furthermore, adoption of a new duty rule for employers could bring about a perverse result: non-employees with secondary exposures would have greater rights to sue and potentially reap far greater recoveries than employees. Namely, secondarily exposed non-employees 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.

Conclusion. As more asbestos manufacturers are driven into bankruptcy, plaintiffs' lawyers are looking for more potentially responsible parties to sue in an attempt to shift liability to solvent defendants. According to plaintiffs' lawyer Dick Scruggs, the litigation has become an "endless search for a solvent bystander." The issue of premises owner liability for secondhand exposure to asbestos stands as a potential "next wave" in the litigation. As more courts confront this issue, they 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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