

## CLEARING THE AIR: ORDINARY NEGLIGENCE IN TAKE-HOME ASBESTOS EXPOSURE LITIGATION

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*Abstract:* Since 2005, take-home asbestos exposure claims have constituted a new wave of asbestos litigation. In contrast to employees exposed to asbestos at a worksite, take-home exposure occurred among those affected by employees who inadvertently carried asbestos home on their clothing or their tools. While some jurisdictions have rejected these claims on the basis that the defendant did not owe a legal duty to the plaintiff, the Washington Court of Appeals recently recognized the potential validity of a household member's claim for relief for the harm he or she suffered as a result of asbestos exposure.<sup>1</sup> In doing so, the court applied an ordinary negligence test and examined the foreseeability of the harm to the plaintiff as the primary step in determining whether the defendant owed the plaintiff a legal duty. Although the Washington State Supreme Court has no precedent governing take-home asbestos exposure claims specifically, the courts of appeals' reasoning comports with Washington negligence law. Accordingly, Washington courts should apply this ordinary negligence test in future take-home asbestos exposure cases.

### INTRODUCTION

*"We bring more than a paycheck to our loved ones and family. We bring asbestosis, silicosis, brown lung, black lung disease. And radiation hits the children before they've even been conceived."*<sup>2</sup>

While the use of asbestos in the United States has declined significantly in recent decades,<sup>3</sup> asbestos litigation continues to burden the courts.<sup>4</sup> Asbestos litigation is the longest-running mass tort litigation in the United States.<sup>5</sup> In the past, most disputes were limited to the complaints of workers who were exposed to asbestos in the workplace.<sup>6</sup>

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1. *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at \*1 (Wash. Ct. App. Aug. 13, 2007).

2. Sweet Honey in the Rock, "More than a Paycheck," on *BREATHS* (Flying Fish 1988) (song).

3. NAT'L TOXICOLOGY PROGRAM, U.S. DEP'T OF HEALTH & HUMAN SERVS., *SUBSTANCE PROFILES: ASBESTOS*, in *REPORT ON CARCINOGENS* 21, 22 (11th ed., 2005).

4. STEPHEN J. CARROLL ET AL., *RAND INST. FOR CIV. JUST., ASBESTOS LITIGATION* at xvii (2005).

5. *Id.*

6. Lester Brickman, *An Analysis of the Financial Impact of S. 852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 *CARDOZO L. REV.* 991, 996-97 (2005).

Recently, however, plaintiffs include these workers' household members who encountered asbestos through "take-home exposure."<sup>7</sup> Take-home exposure occurs when workers exposed to asbestos in the workplace carry asbestos particles home on their work clothes, thereby exposing members of their households to the dangerous substance.<sup>8</sup> As household members develop adverse health outcomes related to their exposure, they have sought compensation for their injuries from the worker's employer through litigation.<sup>9</sup>

Jurisdictions are mixed in their treatment of take-home asbestos exposure claims. Currently, seven states permit such claims;<sup>10</sup> however, nine other states have rejected them.<sup>11</sup> The key factor that influences whether a court permits a take-home exposure claim is the methodology used to analyze negligence. Jurisdictions that tend to permit such claims begin their analyses by focusing on whether the harm to the plaintiff was

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7. Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 545–46 (2009). This Comment uses the term "take-home exposure," but other sources have identified this issue using alternative terms such as "bystander," "secondary," or "domestic" exposure. *See, e.g.*, Martin v. Cincinnati Gas & Electric Co., 561 F.3d 439, 444 (6th Cir. 2009) (using the term "bystander exposure"); Lunsford v. Saberhagen Holdings, Inc., 125 Wash. App. 784, 106 P.3d 808, 809 (2005) ("At issue in this case is Lunsford's secondary exposure to asbestos as a child."); Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 BRIT. J. INDUS. MED. 261, 261 (1965) (referring to "domestic" exposure).

8. Behrens, *supra* note 7.

9. *See* Williams v. Owens-Corning Fiberglas Corp., 405 F.3d 1291 (11th Cir. 2009); Catania v. Anco Insulations, Inc., No. 05-1418-JJB, 2009 WL 3855468, at \*1 (M.D. La. Nov. 17, 2009); Condon v. Union Oil Co. of Cal., No. A102069, 2004 WL 1932847, at \*1 (Cal. Ct. App. Aug. 31, 2004); Riedel v. ICI Ams. Inc., 968 A.2d 17 (Del. 2009); CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005); Simpkins v. CSX Corp., 929 N.E.2d 1257 (Ill. App. Ct. 2010); Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009); Chaisson v. Avondale Indus., Inc., 947 So.2d 171 (La. Ct. App. 2006); Adams v. Owen-Illinois, Inc., 705 A.2d 58 (Md. Ct. Spec. App. 1998); *In re* Certified Question from the Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206 (Mich. 2007); Olivo v. Owens-Illinois, Inc., 895 A.2d 1143 (N.J. 2006); *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115 (N.Y. 2005); *In re* Eighth Judicial Dist. Asbestos Litig., 815 N.Y.S.2d 815 (N.Y. Sup. Ct. 2006); Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448 (Ohio 2010); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347 (Tenn. 2008); Exxon Mobil Corp. v. Altimore, 256 S.W.3d 415 (Tex. Ct. App. 2008); Alcoa, Inc. v. Behringer, 235 S.W.3d 456 (Tex. Ct. App. 2007).

10. Catania, 2009 WL 3855468, at \*3; Condon, 2004 WL 1932847, at \*7; Chaisson, 947 So.2d at 184; Simpkins, 929 N.E.2d at 1266; Olivo, 895 A.2d at 1149; Satterfield, 266 S.W.3d at 375; Arnold v. Saberhagen Holdings, Inc., 157 Wash. App. 649, 240 P.3d 162, 174 (2010).

11. Williams, 405 F.3d at 1292; Riedel, 968 A.2d at 19; CSX Transp., 608 S.E.2d at 210; Van Fossen, 777 N.W.2d at 698; Adams, 705 A.2d at 66; *In re Certified Question from the Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d at 209-210; *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d at 116; *In re Eighth Judicial Dist. Asbestos Litig.*, 815 N.Y.S.2d at 821; Boley, 929 N.E.2d at 453; Exxon Mobil Corp., 256 S.W.3d at 425; Alcoa, 235 S.W.3d at 458.

a foreseeable consequence of the employer's actions.<sup>12</sup> In contrast, jurisdictions that tend not to uphold such claims focus on the relationship between the employer and the plaintiff.<sup>13</sup>

Washington courts use this foreseeability approach when analyzing negligence claims. The Washington State Supreme Court has held that for negligence claims, the foreseeability of harm defines the duty that an actor owes to another.<sup>14</sup> In *Rochon v. Saberhagen Holdings, Inc.*,<sup>15</sup> the Washington Court of Appeals ruled that a plaintiff could potentially recover on a take-home asbestos exposure claim under an ordinary negligence theory of liability.<sup>16</sup> The court declared that if the defendant affirmatively created a risk to Mrs. Rochon, the employee's at-home spouse, then it had a duty to protect her from harm arising out of that risk.<sup>17</sup> This unpublished opinion has no binding authority in Washington courts.<sup>18</sup> Nonetheless, applying a similar analysis to future cases would enable individuals exposed to asbestos to seek redress for their injuries from those who failed to provide adequate protection.

This Comment argues that the Washington Court of Appeals was correct in applying an ordinary negligence test to assess whether a household member has stated a valid claim for take-home asbestos exposure. Part I provides an overview of asbestos exposure and the history of asbestos litigation in the United States. Part II addresses different legal theories that courts and legislatures use to compensate persons for injuries attributable to asbestos exposure. Part III discusses

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12. See, e.g., *Satterfield*, 266 S.W.3d at 361 (“The courts that ultimately recognize the existence of a duty when faced with facts similar to this case have focused on the foreseeability of harm resulting from the employer’s failure to warn of or to take precautions to prevent the exposure.”).

13. *Id.* (“The courts that ultimately recognize the existence of a duty when faced with facts similar to this case have focused on the foreseeability of harm resulting from the employer’s failure to warn of or to take precautions to prevent the exposure. On the other hand, the courts finding that no duty exists have focused on the relationship—or lack of a relationship—between the employer and the injured party.”); see also *Martin v. Gen. Electric Co.*, No. 02-201-DLB, 2007 WL 2682064, at \*5 (E.D. Ky. Sept. 5, 2007) (“Courts across the country have significantly disagreed on the extension of liability in household asbestos exposure cases and have frequently reached opposite conclusions based on each state’s law and how the law defines a legal duty.”).

14. *King v. City of Seattle*, 84 Wash. 2d 239, 525 P.2d 228 (1974) (reasoning that the type of damage suffered as a result of city’s wrongful act was foreseeable, and thus compensable, even though mechanism of injury was not); *Wells v. City of Vancouver*, 77 Wash. 2d 800, 467 P.2d 292 (1970) (holding that the city could properly be forced to compensate visitor to airplane hangar for injuries sustained by flying debris; city owed a duty based on foreseeability of injury).

15. No. 58579-7-1, 2007 WL 2325214 (Wash. Ct. App. Aug. 13, 2007).

16. *Id.* at \*1, \*2.

17. *Id.* at \*4.

18. WASH. R. APP. P. 10.4(h).

*Rochon v. Saberhagen Holdings, Inc.*, and Part IV argues that the court in *Rochon* applied the appropriate negligence test.

## I. THE USE OF ASBESTOS IN AMERICAN INDUSTRY HAS HAD PROFOUND MEDICAL AND LEGAL CONSEQUENCES

Asbestos has played a significant role in American industry.<sup>19</sup> Despite the fact that scientific data on the dangers associated with asbestos exposure began in the early twentieth century,<sup>20</sup> workers were continuously exposed to the substance in the workplace.<sup>21</sup> As they developed adverse health outcomes resulting from their exposure, they began to seek relief from their employers<sup>22</sup> and from manufacturers of asbestos products.<sup>23</sup> Now, as the courts face a new wave of asbestos litigation in take-home exposure claims,<sup>24</sup> Congress has been unsuccessful in crafting a legislative remedy that meets the needs of all the interested parties.<sup>25</sup>

### A. *Asbestos, a Naturally Occurring Mineral, Was Widely Used Commercially Throughout the Twentieth Century*

The Toxic Substances Control Act defines asbestos as the asbestiform<sup>26</sup> varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cumingtonite/grunerite), anthophyllite, tremolite, and actinolite.<sup>27</sup> Asbestos fibers are strong and flexible, so that they can be

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19. NAT'L CANCER INST., U.S. DEP'T OF HEALTH & HUMAN SERVS., ASBESTOS EXPOSURE AND CANCER RISK FACT SHEET (2009).

20. Lawrence Garfinkel, *Asbestos: Historical Perspective*, in 1 ENCYCLOPEDIA OF OCCUPATIONAL HEALTH AND SAFETY 28.36 (Janne Mager Stellman ed., Int'l Labour Org. 5th ed. 1998).

21. CARROLL ET AL., *supra* note 4, at 11.

22. *See, e.g.*, *Johns-Manville Prods. Corp. v. Contra Costa Super. Ct.*, 612 P.2d 948 (Cal. 1980) (holding that the employer was negligent for fraudulently and negligently concealing the nature and extent of an employee's workplace-related injuries when that action aggravated the worker's condition).

23. *See, e.g.*, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973); *see also infra* text accompanying note 89.

24. Behrens, *supra* note 7, at 546.

25. Christopher J. O'Malley, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1111.

26. "Asbestiform" means that the fibers are very flexible and have high tensile strength.

27. 15 U.S.C. § 2642(3) (2006).

woven together, and are also resistant to heat and to most chemicals, making them appealing for industrial use.<sup>28</sup>

In the United States, asbestos has been mined and used commercially since the nineteenth century, and its use increased significantly during World War II.<sup>29</sup> Since that time, it has been used widely in the building and construction industries to reinforce cement and plastic products, as well as for several other purposes.<sup>30</sup> While the demand for asbestos in the United States increased considerably from 1900 until 1973,<sup>31</sup> use of asbestos declined significantly as information on adverse health effects—and the resultant potential for liability—increased.<sup>32</sup> The last asbestos mine in the United States closed in 2002,<sup>33</sup> and asbestos is no longer widely used in manufacturing;<sup>34</sup> however, it is still used in the United States in construction and transportation products.<sup>35</sup> Because of the widespread past and present use of asbestos, low levels of asbestos are present in air, soil, and water, and each person is exposed to it at some point during his or her life.<sup>36</sup>

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28. *Asbestos: Basic Information*, U.S. ENVTL. PROT. AGENCY (June 7, 2010), <http://www.epa.gov/asbestos/pubs/help.html>. Chrysotile, amosite, anthophyllite, and crocidolite are the most commercially utilized forms of asbestos, but commercial use of anthophyllite was discontinued by the 1980s. NAT'L TOXICOLOGY PROGRAM, *supra* note 3, at 22.

29. NAT'L CANCER INST., *supra* note 19, at 1.

30. *Id.* Asbestos has also been used for purposes such as insulation, roofing, fireproofing, and sound absorption. In the shipbuilding industry, it was used to insulate boilers and pipes. In the automotive industry, it has been used in brake shoes and clutch pads. Additionally, asbestos has been used in ceiling and floor tiles, paints, coatings, and adhesives. *Id.*

31. NAT'L TOXICOLOGY PROGRAM, *supra* note 3, at 22.

32. *Id.*

33. BRADLEY S. VAN GOSSEN, U.S. GEOLOGICAL SURVEY, REPORTED HISTORIC ASBESTOS MINES, HISTORIC ASBESTOS PROSPECTS, AND ASBESTOS OCCURRENCES IN THE EASTERN UNITED STATES (2006).

34. Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Malignant Mesothelioma Mortality—United States, 1999–2005*, 58 MORBIDITY & MORTALITY WKLY. REP., Apr. 24, 2009, at 396 [hereinafter *Mesothelioma Mortality*].

35. *Id.*

36. NAT'L CANCER INST., *supra* note 19, at 2. Most people do not become ill from their exposure. People who become ill from asbestos are usually those who are exposed to it on a regular basis, most often through a job where they work directly with the material or through substantial environmental contact. *Id.*

B. *Knowledge of the Health Effects of Asbestos Exposure Developed Throughout the Twentieth Century and the Substance Is Now Universally Recognized as a Human Carcinogen*

In the early twentieth century, scientific research on asbestos exposure focused on occupational health inside the workplace, but expanded when data revealed that those who had never worked with asbestos firsthand were becoming ill.<sup>37</sup> The first reference to pulmonary fibrosis, or scarring in the lungs, was in 1906 in England,<sup>38</sup> and major recognition of asbestos-induced disease originated there in 1924.<sup>39</sup> In the United States, asbestosis<sup>40</sup> was first described in 1918.<sup>41</sup> In 1935, the first reference to carcinoma of the lung in a patient with “asbestos-silicosis” appeared in scientific literature, and reports of lung cancer in patients who died of asbestosis soon followed.<sup>42</sup> In 1955, British scientist Richard Doll found a high risk of lung cancer in those who had worked in an asbestos plant for twenty years, and a particularly high risk in those who had worked at the plant even longer.<sup>43</sup> In 1959, J.C. Wagner recognized the causal connection between asbestos and mesothelioma.<sup>44</sup>

Early studies were limited to workers exposed through the mining and production of asbestos. With the developing body of scientific knowledge, the New York Academy of Sciences held a conference in 1964 to discuss the adverse health consequences of asbestos exposure.<sup>45</sup> At that conference, scientists, including Dr. Irving Selikoff, revealed the association between workplace asbestos exposure and an increased risk of death from cancer.<sup>46</sup> This research also drew attention to the fact that others—including workers in asbestos production, workers indirectly

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37. James Edward Huff et al., *A Health View of Asbestos: An Annotated Literature Collection—1960–1974*, 9 ENVTL. HEALTH PERSP. 341, 341 (1974).

38. Garfinkel, *supra* note 20, at 28.36.

39. *Id.*

40. *See infra* notes 66–67 and accompanying text.

41. A. J. LANZA ET AL., SILICOSIS AND ASBESTOSIS 419 (A. J. Lanza ed., 1938).

42. Garfinkel, *supra* note 20, at 28.36.

43. Richard Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 BRIT. J. INDUS. MED. 81 (1955).

44. J.C. Wagner et al., *Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province*, 17 BRIT. J. INDUS. MED. 260 (1960). This study also established the risk of environmental exposure to asbestos from living near asbestos mines.

45. Huff et al., *supra* note 37, at 341.

46. Irving J. Selikoff et al., *Classics in Oncology: Asbestos Exposure and Neoplasia*, 34 CA: A CANCER JOURNAL FOR CLINICIANS 48, 54–55 (1984).

exposed to asbestos in the workplace, such as shipyard workers, and family members—may be exposed as well.<sup>47</sup> At the same conference, researchers Muriel Newhouse and Hilda Thompson presented findings that take-home asbestos exposure was causally linked to adverse health effects.<sup>48</sup> In their landmark study, they found “little doubt that the risk of mesothelioma may arise from both occupational and domestic exposure to asbestos.”<sup>49</sup> This study provided key information that the health risks associated with asbestos exposure are not limited to the workplace, but could reach those who lived in the worker’s home.<sup>50</sup>

After scientists highlighted the dangers of asbestos exposure during the conference, Dr. Selikoff lobbied to educate legislators about the need to protect Americans from such exposure.<sup>51</sup> Congress passed the Occupational Safety and Health Act in 1970 to “assure safe and healthful working conditions for working men and women.”<sup>52</sup> The new law applied to all persons “engaged in a business affecting commerce who has employees,” although it only included private sector workers.<sup>53</sup> The law established the U.S. Occupational Safety and Health Administration (OSHA) to promulgate safety and health standards and to enforce compliance by inspecting workplaces and issuing citations to employers.<sup>54</sup>

The increasing data on the hazards associated with asbestos exposure led OSHA to adopt workplace safety regulations in 1972 that specifically targeted asbestos exposure.<sup>55</sup> OSHA’s regulation of asbestos in 1972 was the agency’s first comprehensive standard.<sup>56</sup> Since 1972,

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47. Garfinkel, *supra* note 20, at 28.36–37.

48. 132 ANNALS OF THE N.Y. ACAD. OF SCI. (1965), available at <http://onlinelibrary.wiley.com/doi/10.1111/nyas.1965.132.issue-1/issuetoc>

49. Newhouse & Thompson, *supra* note 7.

50. *Id.*

51. Richard Lemen, Assistant Att’y General, U.S. Pub. Health Serv. (Ret.), PowerPoint Presentation at the American Public Health Association Annual Meeting: Case Study of Asbestos: History and Epidemiology (Nov. 9, 2010).

52. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, pmb1. tit., 84 Stat. 1590.

53. 29 U.S.C. § 652(5) (2006).

54. *Id.* § 655(b).

55. Standards for Exposure to Asbestos Dust, 37 Fed. Reg. 11,318, (June 7, 1972) (to be codified at 29 C.F.R. § 1910.93a).

56. *Workplace Safety and Asbestos Contamination: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 107th Cong. 48 (2001) [hereinafter *Hearing*] (statement of R. Davis Layne, Acting Assistant Sec’y of Labor for Occupational Safety and Health). The rule reduced the permissible exposure limit and included requirements for protective measures such as engineering controls, personal protective equipment, air or exposure monitoring, medical

OSHA has engaged in more rulemaking regarding asbestos than any other hazard it regulates.<sup>57</sup> In addition to setting a permissible exposure limit for asbestos in the workplace, these regulations required employers under OSHA's jurisdiction to provide convenient and sanitary washing facilities,<sup>58</sup> as well as separate changing rooms for employees<sup>59</sup> so that they could avoid removing the substance from the premises.<sup>60</sup> Previous federal and state measures also required employers to provide showering or changing facilities. However, the goal of those measures was to reduce the potential harm to the employee from the exposure to the substance.<sup>61</sup>

In 1986 and 1987, the U.S. Environmental Protection Agency (EPA) and the International Agency for Research on Cancer, respectively, identified asbestos as a human carcinogen. Asbestos exposure has been strongly associated with respiratory and other cancers.<sup>62</sup> Other adverse

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surveillance, work practices, labels, waste disposal, and recordkeeping. Standards for Exposure to Asbestos Dust, 37 Fed. Reg. at 11,320–22.

57. *Hearing*, *supra* note 56, at 48.

58. 29 C.F.R. § 1910.141(d) (2010).

59. *Id.* § 1910.141(e).

60. Although OSHA regulates the employer-employee relationship, in a hearing in the U.S. Senate Committee on Health, Education, Labor, and Pensions in 2001, R. Davis Layne, the Acting Assistant Secretary of Labor for Occupational Safety and Health, testified that the intent of these regulations was to prevent spreading asbestos outside the workplace. *Hearing*, *supra* note 56, at 49.

61. *See, e.g.*, Act of Aug. 2, 1946, ch. 744, § 13, 60 Stat. 806, 809 (1946) (now codified at 5 U.S.C. § 7903 (2006)) (“Appropriations available for the procurement of supplies and material or equipment shall be available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks”). The State of Washington had a law in place prior to 1973 that was similar to the federal statute providing generally for a safe workplace. Act of Mar. 15, 1919, ch. 130, § 4, 1919 Wash. Sess. Laws 309, 310. This law was replaced in 1973 with the state version of OSHA. Washington Industrial Safety and Health Act, ch. 80, 1973 Wash. Sess. Laws 212 (codified as amended at WASH. REV. CODE §§ 49.17.010–910 (2010)). In 1937, the Washington State Department of Labor and Industries passed *Safety Standards for Protection Against Occupationally Acquired Diseases*, pursuant to the state's Workmen's Compensation Act. These standards applied to “every place of employment where a work or process is carried on by which dust, fumes, vapors, or gases of a harmful nature are produced or generated . . . which may be inhaled in quantities, or concentrations . . . injurious to health.” WASH. DEP'T OF LABOR & INDUS., SAFETY STANDARDS FOR PROTECTION AGAINST OCCUPATIONALLY ACQUIRED DISEASES 9 (1938) (repealed 1970). Employers were required to provide washing and changing facilities where employees are subject to contamination. However, the stated purpose of these rules was to protect employees from contamination, and there is no indication that the goal was to prevent the removal of harmful substances from the premises. *Id.* at 15–16.

62. *Asbestos: Health Effects*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, [http://www.atsdr.cdc.gov/asbestos/asbestos/health\\_effects/index.html](http://www.atsdr.cdc.gov/asbestos/asbestos/health_effects/index.html) (last updated Apr. 1, 2008). Some epidemiological data have indicated an association between asbestos exposure and gastrointestinal and colorectal cancers, and a few have indicated an increased risk of kidney, brain, larynx, and bladder cancers. *Id.*

effects include pleural thickening, pleural plaques, and pleural effusions.<sup>63</sup> Although some forms of asbestos are more hazardous to human health than others, all forms are hazardous and can cause cancer.<sup>64</sup> Asbestosis, mesothelioma, and lung cancer are the most prominent adverse health effects of asbestos exposure.<sup>65</sup>

Asbestosis is a respiratory disease that results from inhaling asbestos fibers. It causes scar tissue inside the lungs so that the lungs cannot properly expand and contract. The latency period for asbestosis is about ten to twenty years following exposure.<sup>66</sup> There is no known cure for asbestosis, and the disease can range from asymptomatic to fatal.<sup>67</sup>

Malignant mesothelioma is an uncommon cancer tumor of the lining of the lung and chest cavity, or lining of the abdomen, that is caused almost exclusively by asbestos exposure.<sup>68</sup> This disease may develop twenty to forty years following initial exposure,<sup>69</sup> and the average age of diagnosis is sixty years old.<sup>70</sup> The average patient diagnosed with malignant mesothelioma lives about nine months.<sup>71</sup>

For both asbestosis and mesothelioma, there is no defined level of exposure that leads to adverse health conditions, as each individual reacts differently to different levels of exposure.<sup>72</sup> However, risk factors such as exposure duration, exposure frequency, exposure concentration, the size, shape, and chemical makeup of the asbestos fibers, and a person's individual risk factors—such as smoking or history of tobacco use—affect the risk of developing both asbestosis and mesothelioma.<sup>73</sup>

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63. *Id.* The pleura is the lining of the chest cavity, outside the lung.

64. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, PUBLIC HEALTH STATEMENT: ASBESTOS I (2001).

65. *Id.*

66. *Asbestos*, *supra* note 62.

67. *Id.*

68. Nat'l Insts. of Health, *Mesothelioma—malignant*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/000115.htm> (last updated June 2, 2010). Mesothelioma occurs in the mesothelium, which lines the lung, while lung cancer occurs inside the lung. *Id.*

69. *Mesothelioma Mortality*, *supra* note 34, at 393.

70. Nat'l Insts. of Health, *supra* note 68.

71. *Id.*

72. *Asbestos: Health Effects*, *supra* note 62.

73. *Id.* Long and thin asbestos fibers generally reach the lower airways and alveolar regions of the lung, remaining in the lungs for longer periods of time. They also tend to be more toxic than short and wide fibers or particles. Wide particles are generally deposited in the upper respiratory tract and do not reach the lung and pleura, the sites of asbestos-induced toxicity. Short, thin fibers, however, may also play a role in asbestos pathogenesis. Fibers of amphibole asbestos such as tremolite asbestos, actinolite asbestos, and crocidolite asbestos remain in the lower respiratory tract longer than chrysotile fibers of similar dimension. *Id.*

Since 1979, an estimated 43,073 people have died of mesothelioma or asbestosis, including at least 1730 people in Washington.<sup>74</sup> Between 1999 and 2005, the most recent years when data are available, it is estimated that there were 18,068 deaths due to malignant mesothelioma in the United States. The death rate in Washington State was higher than the national average.<sup>75</sup> The lack of data on the number of injuries that asbestos exposure has already caused makes it difficult to project the number of asbestos-related injuries that may manifest in the future.<sup>76</sup>

C. *Victims of Asbestos Exposure Have Relied upon Administrative Systems and Litigation to Remedy Their Injuries*

As more workers in the United States were exposed to asbestos, they sought relief for the harm they suffered. In the early twentieth century, workers sought compensation for their injuries through administrative systems such as workers' compensation.<sup>77</sup> Initially, workers' compensation laws covered accidental injuries that took place at definite times and places and due to sudden and unexpected events, such as a piece of equipment falling on a worker.<sup>78</sup> However, those laws did not cover occupational diseases, such as asbestosis.<sup>79</sup> At that time, employers fought expansive workers' compensation laws. They argued that the employee was at fault for causing the injury, the worker assumed the risk in taking the job, or that fellow employees were to blame.<sup>80</sup> Unfortunately for employers, the failure to include occupational

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74. *Government Statistics on Deaths Due to Asbestos Related Diseases*, ENVTL. WORKING GRP., [http://www.ewg.org/sites/asbestos/tables/deathdetails\\_state.php](http://www.ewg.org/sites/asbestos/tables/deathdetails_state.php) (last visited Apr. 1, 2011). It is challenging to estimate the incidence of asbestos-related health conditions because the data are not extensive. The National Institute for Occupational Safety and Health publishes limited data on deaths from asbestosis, and there is insufficient information available on nonfatal cases. CARROLL, *supra* note 4, at xix.

75. *Mesothelioma Mortality*, *supra* note 34, at 394. From 1999 to 2005, the total number of malignant mesothelioma deaths increased 8.9%, from 2482 in 1999 to 2704 in 2005, but the annual death rate was stable. The national death rate was 13.8 people per million per year, whereas the death rate in Washington was 20.1 people per million per year. *Id.*

76. CARROLL, *supra* note 4, at xix.

77. Kevin Leahy, *Asbestos Exposure and the Law in the United States*, in *ASBESTOS AND ITS DISEASES* 346, 349 (John E. Craighead & Allen R. Gibbs eds., 2008).

78. *Id.*

79. *Id.*

80. BARRY I. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 125–26 (2d ed. 1986); *see also* JACK McCULLOUGH & GEOFFREY TWEEDALE, *DEFENDING THE INDEFENSIBLE: THE GLOBAL ASBESTOS INDUSTRY AND ITS FIGHT FOR SURVIVAL* 52–53 (2008) (discussing correspondence between Johns-Manville and Raybestos-Manhattan corporations indicating their interest in limiting data available to the public on the dangers of asbestos exposure). Beginning in the 1930s, the

diseases in such laws meant that employees could bring civil suits.<sup>81</sup> As workers' compensation statutes began to cover dust diseases by the early 1940s, litigation essentially ceased until the 1960s.<sup>82</sup> This statutory compensation, however, was inadequate to meet the employees' actual needs<sup>83</sup> and provided little incentive for employers to reduce exposure to dust in the workplace.<sup>84</sup>

The 1964 New York Academy of Sciences conference renewed the social and scientific interests in the dangers of asbestos exposure.<sup>85</sup> Prior to this time, lawsuits against non-employers (e.g. asbestos manufacturers) were rare due to the unavailability of compensation remedies,<sup>86</sup> employers' efforts to shield claims from the public,<sup>87</sup> and employers' efforts to deny culpability.<sup>88</sup> However, in 1969, Clarence Borel, an insulation worker from 1936 to 1939, filed suit against eleven companies that manufactured insulation materials containing asbestos,<sup>89</sup> alleging that the manufacturers had failed to warn of the dangers of handling asbestos and that as a result he had contracted asbestosis and mesothelioma.<sup>90</sup> In *Borel v. Fibreboard Paper Products Corp.*,<sup>91</sup> the

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companies also invested in scientific research to generate favorable results and defend existing working conditions. *Id.*

81. CASTLEMAN, *supra* note 80, at 125–26.

82. Leahy, *supra* note 77, at 351; *see* *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076 (5th Cir. 1973); *see also infra* note 89 and accompanying text.

83. Leahy, *supra* note 77, at 350. Workers' compensation laws only provided for half to two-thirds of lost wages and did not include compensation for pain and suffering. Additionally, claims were often challenged based upon issues such as diagnosis and causation. *Id.* Statutes of limitations also effectively barred many claims. CASTLEMAN, *supra* note 80, at 129.

84. Leahy, *supra* note 77, at 350–51. Workers' compensation laws mandated that these laws serve as the exclusive remedy for dust diseases. Consequently, such diseases became accepted hazards in occupations like mining and manufacturing. Without the threat of lawsuits, employers had less incentive to provide safe working environments. *Id.*

85. Huff et al., *supra* note 37, at 341.

86. Leahy, *supra* note 77, at 353 (“[N]egligence law . . . did not receive widespread application as a recovery theory against asbestos product manufacturers during the early part of the previous century. Product liability . . . developed decades after asbestos illness first appeared and did not offer tangible returns for claimants as a distinct basis for recovery until the 1960s.”).

87. *Id.* Discovery during an asbestos case in the 1970s revealed that Johns-Manville settled two lawsuits in 1957 and 1961 that insulators filed against the company for negligence and breach of warranty. *Id.*

88. McCULLOUGH & TWEEDALE, *supra* note 80, at 49. In 1929, Pauline Lasin sued her husband's employer, Johns-Manville, after her husband died from asbestosis. The company did not deny that asbestos caused John Lasin's death, but argued that he assumed the risk of employment, that he knew or should have known the dangers of asbestos exposure, and that he was negligent in failing to wear a face mask. Johns-Manville's attorneys persuaded Pauline Lasin to drop the case. *Id.*

89. *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076, 1086 (5th Cir. 1973).

90. *Id.* at 1081.

Fifth Circuit held the manufacturers, including the Johns-Manville Corporation, strictly liable for their failure to warn the plaintiff.<sup>92</sup> As compensation, Borel was awarded \$68,000.<sup>93</sup> In this way, *Borel* expanded the scope of liability from employers to companies that supplied or installed building materials that contained asbestos.<sup>94</sup>

In 1980, in another suit against the Johns-Manville Corporation, the California Supreme Court held that workers' compensation laws did not bar the plaintiff's action for his original injury.<sup>95</sup> Johns-Manville, which mined most of the asbestos in the United States, was the leading manufacturer of asbestos products.<sup>96</sup> After *Borel*, the company faced an overwhelming number of new claims from former employees suffering health consequences from asbestos exposure in the workplace.<sup>97</sup> The case also led injured workers to look outside of the employer–employee relationship to seek compensation.<sup>98</sup> Since *Borel*, most asbestos lawsuits have been third-party product liability cases.<sup>99</sup> The opportunity to sue for relief instead of seeking workers' compensation allows claimants to pursue significantly higher awards for their injuries.<sup>100</sup> There were 10,000 cases filed in federal courts from 1980 to 1984.<sup>101</sup> In 1982, Johns-Manville filed for bankruptcy as it faced thousands of pending claims.<sup>102</sup>

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91. 493 F.2d 1076 (5th Cir. 1973)

92. *Id.* at 1103. Four firms settled before trial. The trial court instructed a verdict in favor of a fifth defendant because the plaintiff had failed to show that he had ever been exposed to any of that company's product. *Id.* at 1086; see also Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 589 (2007).

93. *Borel*, 493 F.2d at 1102.

94. O'Malley, *supra* note 25, at 1107.

95. Johns-Manville Corp. v. Contra Costa Super. Ct., 612 P.2d 948 (Cal. 1980).

96. O'Malley, *supra* note 25, at 1107.

97. Carrington, *supra* note 92, at 589.

98. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 54 (2003).

99. O'Malley, *supra* note 25, at 1123; see also Debra Cassens Moss, *Toxic Tort Cases Mounting*, 73 A.B.A. J., Oct. 1987, at 30, 30. In such cases, workers that were exposed to asbestos products sued manufacturers that provided the products to the employers without adequate warning. *Id.*

100. EDWARD B. RAPPAPORT, CONG. RESEARCH SERV., RL 32286, ASBESTOS LITIGATION: PROSPECTS FOR LEGISLATIVE RESOLUTION, at CRS-2 (2004). While many cases are resolved through private settlements, for cases in which plaintiffs have succeeded at trial, the average award has been approximately \$1.8 million. Approximately two-thirds of plaintiffs go to trial and receive monetary awards. *Id.*

101. Carrington, *supra* note 92 at 589. There is no documentation of the number of suits in state courts. *Id.*

102. Brickman, *supra* note 6, at 997.

Just before the Johns-Manville bankruptcy, the Court of Appeals for the D.C. Circuit opened up a new opportunity for asbestos litigants by extending liability to asbestos defendants' insurance companies. In *Keene Corp. v. Insurance Co. of North America*,<sup>103</sup> the court held that those companies that issued policies at any time between workers' initial exposure to asbestos and the actual disease manifestation were liable up to policy limits for each policy issued each year during that time frame.<sup>104</sup> This ruling provided an incentive for manufacturers to pass the cases to their insurance companies to compensate employees for their suffering.<sup>105</sup>

Beginning in 1972, in order to reduce transaction costs associated with asbestos litigation, parties began to consolidate cases to encourage settlements and avoid trials on the merits.<sup>106</sup> This increased consolidation led to an onslaught of new cases facing federal courts.<sup>107</sup> Ultimately in 1991, to increase efficiency and avoid trying each case on the merits, all the asbestos cases pending in the federal courts—comprised of 26,639 claims in eighty-seven federal districts<sup>108</sup>—were consolidated into a single claim.<sup>109</sup> As federal courts resisted trying individual asbestos cases, lawyers sought to encourage settlements by keeping cases in state courts.<sup>110</sup> Additionally, beginning in the late 1990s,<sup>111</sup> lawyers actively recruited plaintiffs who were not sick to add to their consolidated claims,<sup>112</sup> encouraging settlements and reducing transaction costs.<sup>113</sup>

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103. 667 F.2d 1034 (D.C. Cir. 1981).

104. *Id.* at 1041.

105. O'Malley, *supra* note 25, at 1108.

106. Carrington, *supra* note 92, at 592.

107. Edward Frost, *Asbestos Suits Consolidated*, 77 A.B.A. J., Oct. 1991, at 16, 16.

108. *Id.* The claims shared issues of punitive damages and “state of the art” medical knowledge at the time the asbestos was used. The Panel on Multidistrict Litigation noted that at the time of its first decision regarding consolidating asbestos cases in 1977, only 103 actions were pending in nineteen federal districts. *Id.*

109. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422–24 (J.P.M.L. 1991).

110. Carrington, *supra* note 92, at 593.

111. Behrens, *supra* note 7, at 502.

112. *Id.* at 504.

113. *Id.* at 509. In the 1994 *Georgine* Settlement, plaintiff's attorneys agreed to settle 77,000 asbestos claims against twenty defendants. In exchange, future unimpaired claimants, such as those with pleural plaques, would not be able to receive compensation until they met certain objective medical criteria. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994). In 1997, the U.S. Supreme Court struck down this settlement on the basis that “the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 595 (1997). The

More recently, a number of judicial and legislative reforms have returned the focus to sick claimants.<sup>114</sup> Some jurisdictions have implemented inactive dockets that allow plaintiffs who are not sick, but who were exposed to asbestos, to file suit to comply with the statute of limitations.<sup>115</sup> The court delays resolving the dispute until the plaintiff provides medical evidence of impairment.<sup>116</sup> A number of other jurisdictions maintain inactive dockets for this purpose, while others have established expedited dockets to give priority to plaintiffs who have developed cancer.<sup>117</sup> Medical criteria laws<sup>118</sup> and judicial and legislative efforts to limit consolidations have also effectively reduced the caseload.<sup>119</sup>

Recently, statutes of limitations have not been significant barriers for asbestos complainants. Most jurisdictions now hold that the statute of limitations for long-latency asbestos disease claims begins to run when plaintiffs discover that they have been injured, rather than from the time they were first exposed.<sup>120</sup> However, jurisdictions vary on whether nonmalignant diseases, such as pleural thickening, are compensable,<sup>121</sup>

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Court noted that a nationwide administrative claims regime would provide the best means for relief. *Id.*

114. Behrens, *supra* note 7, at 507.

115. *Id.* In Washington State in 2002, King County Superior Court Judge Sharon Armstrong established an inactive docket to allow asbestos plaintiffs “who are asymptomatic, who suffer from only mild reduction in lung function, or whose reduced lung function is not attributed by competent medical opinion to asbestos-related disease” to file suit to comply with the statute of limitations, but delay resolving the dispute until the plaintiff experiences significant functional impairment. Memorandum of the Coalition for Litigation Justice, Inc. in Support of Defendants’ Motion to Establish an Unimpaired Docket 27, *In re Asbestos Litig.*, No. 2004-03964 (Tex. May 3, 2004).

116. Behrens, *supra* note 7, at 507.

117. CARROLL, *supra* note 21, at 26.

118. Behrens, *supra* note 7, at 505. Beginning in 2004, a number of states enacted statutes requiring claimants to meet particular medical criteria in order to proceed with a claim. Such states include Ohio, Texas, Florida, Kansas, South Carolina, and Georgia. *Id.* at 506.

119. *Id.* at 510–12. Consolidating cases was a successful approach to force defendants to settle with low transaction costs to plaintiffs. State legislatures have enacted laws requiring individual trials in asbestos cases, while state courts have adopted measures such as amending the state’s rules of civil procedure, implementing administrative orders to prohibit the joinder of asbestos cases with different claims, and severing multi-plaintiff asbestos-related cases. These actions have reduced the number of claims by removing economic incentives for plaintiffs to file less serious claims that have had little value unless joined with more serious ones. *Id.*

120. CARROLL, *supra* note 21, at 25. In the past, state statutes of limitations placed greater restrictions on asbestos claims. *Id.*

121. *Id.*

and some courts allow compensation for fear of developing a disease related to asbestos exposure or for medical monitoring.<sup>122</sup>

Because take-home asbestos exposure cases are rooted in state tort law, forum shopping is an occurring phenomenon. For example, in *Sales v. Weyerhaeuser*,<sup>123</sup> an Arkansas resident sued a Washington corporation alleging that take-home exposure caused him to develop mesothelioma.<sup>124</sup> The Washington State Supreme Court held that the doctrine of *forum non conveniens* allowed it to consider the effect of removal to another jurisdiction.<sup>125</sup> Limiting removal allows victims to pursue litigation at a faster pace, which positively affects plaintiffs because conditions such as mesothelioma can lead to death a short time after symptoms manifest.<sup>126</sup>

In the past, most asbestos litigation concerned adverse health effects that employees experienced following occupational exposure to asbestos in the workplace. Since 2005, there has been an increase in the number of cases that have concerned employees' household members who have experienced adverse health effects after the employees carried asbestos home on their work clothes or tools.<sup>127</sup> Because these individuals

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122. Plaintiffs exposed to asbestos have made claims for mental distress based on their fear of developing cancer in the future. *See, e.g.*, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 427 (1997); *In re Asbestos Litig. Leary Trial*, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763, at \*3-5 (Del. Super. Ct. June 14, 1994); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 233 (Pa. 1996); *Temple-Inland Forest Prod. Corp. v. Carter*, 993 S.W.2d 88, 89 (Tex. 1999). Claimants have also sought medical monitoring. *See, e.g.*, *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987); *Simmons*, 674 A.2d at 239; *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 818 (2002). Such cases are premised on the tort of negligent infliction of emotional distress and draw on that theory for recovery; however, the cases rarely explain whether the underlying theory of recovery is strict liability or negligence. *See* Henderson & Twerski, *supra*.

123. 163 Wash. 2d 14, 177 P.3d 1122 (2008).

124. *Id.* at 15, 177 P.3d at 1122.

125. *Id.* at 24, 177 P.3d at 1127. The Court concluded that the trial court abused its discretion in failing to consider the effect of trying the case in federal court, rather than state court, on the ease, speed and expense of litigation.

126. Nat'l Insts. of Health, *supra* note 68.

127. *Williams v. Owens-Corning Fiberglas Corp.*, 405 F.3d 1291 (11th Cir. 2005); *Catania v. Anco Insulations*, No. 05-1418-JJB, 2009 WL 3855468, at \*1 (M.D. La. Nov. 17, 2009); *Riedel v. ICI Ams.*, 968 A.2d 17 (Del. 2009); *CSX Transp. v. Williams*, 608 S.E.2d 208 (Ga. 2005); *Simpkins v. CSX Corp.*, 929 N.E.2d 1257 (Ill. App. Ct. 2010); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009); *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171 (La. App. 2006); *In re Certified Question from the Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d 206 (Mich. 2007); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006); *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005); *In re Eighth Judicial Dist. Asbestos Litig.*, 815 N.Y.S.2d 815 (N.Y. Sup. Ct. 2006); *Boley v. Goodyear*, 929 N.E.2d 448 (Ohio 2010); *Satterfield v. Breeding*

developed adverse health outcomes as a consequence of their exposure to asbestos and a number of courts have begun to recognize the potential validity of their claims,<sup>128</sup> these cases represent an increasing proportion of asbestos litigation.

*D. Congress Has Tried Unsuccessfully to Reduce the Burden on the Courts from Asbestos Claims*

In 1990, U.S. Supreme Court Chief Justice William Rehnquist appointed the Ad Hoc Committee on Asbestos Litigation “to address the substantial number of asbestos personal injury cases and the complex issues they present.”<sup>129</sup> Noting the problem in both state and federal courts, the Committee concluded: “[T]he resulting delays and costs have resulted in a denial of justice and fundamental unfairness to litigants.”<sup>130</sup> In order to better serve litigants and the judiciary, the Committee called upon Congress to develop a legislative remedy to resolve asbestos disputes.<sup>131</sup> Additionally, the Judicial Conference called upon its Standing Committee on Rules of Practice and Procedure to direct the Advisory Committee on Civil Rules to study whether to amend Rule 23 of the Federal Rules of Civil Procedure<sup>132</sup> to accommodate the demands of mass tort litigation.<sup>133</sup>

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Insulation, 266 S.W.3d 347 (Tenn. 2008); Exxon Mobil v. Altimore, 256 S.W.3d 415 (Tex. Ct. App. 2008); Alcoa v. Behringer, 235 S.W.3d 456 (Tex. Ct. App. 2007).

128. *Catania*, 2009 WL 3855468, at \*1; *Condon v. Union Oil Co. of Cal.*, No. A102069, 2004 WL 1932847, at \*1 (Cal. Ct. App. Aug. 31, 2004); *Simpkins*, 929 N.E.2d 1257; *Chaisson*, 947 So.2d 171; *Olivo*, 895 A.2d 1143; *Satterfield*, 266 S.W.3d 347; see also NAT'L INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, PUB. NO. 95-123, REPORT TO CONGRESS ON WORKERS' HOME CONTAMINATION STUDY CONDUCTED UNDER THE WORKERS' FAMILY PROTECTION ACT (29 U.S.C. 671A), at 6 (1995) (“Although many past uses of asbestos have been abandoned, and asbestos uses and occupational exposures are now subject to regulation, potential exposures of family members in the United States may still exist . . .”).

129. JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIGATION, REPORT OF THE AD HOC COMMITTEE 33 (1991) [hereinafter REPORT].

130. *Id.*

131. *Id.* (“Accordingly, the Committee recommended . . . that Congress consider a national legislative scheme . . . with the objectives of achieving timely appropriate compensation of present and future asbestos victims and of maximizing the prospects for the economic survival and viability of the defendants. As a back-up position, the Committee recommended, and the Conference agreed, that Congress consider legislation expressly to authorize consolidation and collective trial of asbestos cases in order to expedite disposition of cases in federal courts with heavy asbestos personal injury caseloads.”).

132. *Id.* Rule 23 governs the procedure and conduct of class action suits brought in Federal courts. The rule permits three categories of actions. Rule 23(b)(1) permits a class action if individual actions by members of the class (1) would create a risk of inconsistent decisions, or (2) would impair the interests of other class members who are not actually part of the individual cases. Rule

Congress has acknowledged the problem that asbestos litigation has caused for the courts, taxpayers, and victims of exposure. In considering asbestos legislation in 2005, the Senate Judiciary Committee noted that:

[a]sbestos litigation has overwhelmed both federal and state court systems; 77 companies have gone into bankruptcy, with more on the brink, due to the rising tide of asbestos claims; and thousands of impaired asbestos victims have received pennies on the dollar since many of the companies liable for their exposure have gone into bankruptcy.<sup>134</sup>

Despite these concerns, Congress has yet to pass legislation to manage the asbestos caseload.<sup>135</sup> Some of the most significant barriers include determining who would fund any compensation scheme that the legislation established, establishing medical criteria for individuals to qualify for compensation, forecasting the future caseload, and resolving statute of limitation issues.<sup>136</sup> Legislation that has been considered in Congress has involved a number of different approaches to easing the burden of asbestos litigation on the courts and expediting the compensation process for claimants. While both chambers of Congress have considered asbestos litigation measures—and a number of measures were advanced through committees of jurisdiction and floor votes—none have successfully passed in both chambers of Congress.<sup>137</sup>

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23(b)(2) permits a class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive or declarative relief appropriate to the entire class. Rule 23(b)(3) permits a class action when the court finds that questions of law or fact common to the class members predominate, and that a class action is superior to all other alternatives for dealing with the issue or issues. Fed. R. Civ. P. 23.

133. REPORT, *supra* note 129, at 33. The Federal Judicial Center conducted the study from 1994 to 1995 at the advisory committee's request. THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3 (1996). The purpose of the study was to provide systematic, empirical information about how Rule 23 operates. *Id.* The Center concluded that there was not substantial litigation over the appropriate Rule 23 category to apply, that judges tend to rule promptly on the merits of claims before ruling on class certification, and that there were limited opportunities for appeal of certification rulings before final judgment. *Id.* at 90. Accordingly, there was not enough systematic data at the time to determine whether to amend Rule 23. *Id.* at 91.

134. 151 CONG. REC. 13105, 14053 (2005).

135. On May 26, 2005, after six Judiciary Committee markup sessions, the Committee approved the Fairness in Asbestos Injury Resolution Act (FAIR Act), S. 852, 109th Cong. (2005). O'Malley, *supra* note 25, at 1121 (discussing the Committee's passage of the Act). However, in 2006, the Senate adjourned without passing the bill. *Id.* at 1123.

136. Carrington, *supra* note 92, at 596–97.

137. See Fairness in Asbestos Injury Resolution Act (FAIR Act), S. 3274, 109th Cong. (2006); Fairness in Asbestos Injury Resolution Act (FAIR Act), S. 852, 109th Cong. (2005); Fairness in Asbestos Injury Resolution Act (FAIR Act), H.R. 1360, 109th Cong. (2005); Asbestos Compensation Fairness Act of 2005, H.R. 1957, 109th Cong. (2005); Fairness in Asbestos Injury

Given the publicity and political tension surrounding asbestos litigation,<sup>138</sup> Congress has yet to reach a compromise.

## II. TAKE-HOME EXPOSURE CLAIMANTS ARE SEEKING RELIEF THROUGH LITIGATION AND JURISDICTIONS ARE SPLIT ON RECOGNIZING CLAIMS

Take-home exposure cases<sup>139</sup> represent a new trend in asbestos litigation as a growing number of jurisdictions are ruling on these claims.<sup>140</sup> These jurisdictions are generally split into two categories: those that focus on the foreseeability of the harm to the plaintiff resulting from the employer's failure to take protective measures, and those that focus on the relationship between the employer and the plaintiff.<sup>141</sup> Jurisdictions in the first category are more plaintiff-friendly and generally uphold take-home exposure claims.<sup>142</sup> Conversely, jurisdictions that place more emphasis on the relationship between the parties largely favor defendants.<sup>143</sup> In addition, some jurisdictions place

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Resolution Act (FAIR Act), S. 2290, 108th Cong. (2004); Asbestos Claims Criteria and Compensation Act, S. 413, 108th Cong. (2003); Fairness in Asbestos Injury Resolution Act (FAIR Act), S. 1125, 108th Cong. (2003); Fairness in Asbestos Injury Resolution Act (FAIR Act), H.R. 1586, 108th Cong. (2003); Asbestos Compensation Act, H.R. 1283, 106th Cong. (as reported by H. Comm. on the Judiciary, July 24, 2000); Fairness in Asbestos Compensation Act, S. 758, 106th Cong. (1999); Fairness in Asbestos Compensation Act, H.R. 1283, 106th Cong. (1999).

138. Susan Kostal, *Asbestos They Can?*, 91 A.B.A. J., June 2005, at 20, 20.

139. Although this Comment distinguishes between litigation regarding primary and secondary exposure, in some instances, both an employee and a household member together seek compensation for the harm they suffered from the employee's primary exposure to asbestos. *See, e.g., Arnold v. Saberhagen Holdings, Inc.*, 157 Wash. App 649, 240 P.3d 162 (2010).

140. Behrens, *supra* note 7, at 545–46.

141. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 361 (Tenn. 2008) (“The courts that ultimately recognize the existence of a duty when faced with facts similar to this case have focused on the foreseeability of harm resulting from the employer’s failure to warn of or to take precautions to prevent the exposure. On the other hand, the courts finding that no duty exists have focused on the relationship-or lack of a relationship-between the employer and the injured party.”); *see also Martin v. Gen. Electric Co.*, No. 02-201-DLB, 2007 WL 2682064, at \*5 (E.D.Ky. Sept. 5, 2007) (“Courts across the country have significantly disagreed on the extension of liability in household asbestos exposure cases and have frequently reached opposite conclusions based on each state’s law and how the law defines a legal duty.”).

142. *See, e.g., Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (“[T]o the extent Exxon Mobil owed a duty to workers on its premises for the foreseeable risk of exposure to friable asbestos and asbestos dust, similarly, 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.”).

143. *See, e.g., Riedel v. ICI Ams.*, 968 A.2d 17, 26 (Del. 2009) (holding that defendant’s newsletters regarding off-the-job safety did not establish a legal duty; plaintiff and defendant are “legal strangers in the context of negligence”).

limitations on the scope of eligible claims based upon the year that the plaintiff was exposed to asbestos.<sup>144</sup>

A. *Jurisdictions Focusing on the Foreseeability of the Harm to the Household Member Tend to Uphold Take-Home Exposure Claims*

Victims of take-home asbestos exposure cannot utilize the same legal remedies as employees exposed to asbestos at the worksite. Because they are not employees, they may not file workers' compensation claims<sup>145</sup> or sue on an employer liability negligence theory.<sup>146</sup> Likewise, household members who have never been present on the employer's premises cannot sue for negligence based on premises liability.<sup>147</sup>

Six states, including Washington, have upheld take-home asbestos exposure claims, all under a negligence theory of liability.<sup>148</sup> Those

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144. See *Catania v. Anco Insulations*, No. 05-1418-JJB, 2009 WL 3855468, at \*1 (M.D. La. Nov. 17, 2009) (holding that the risk of employees carrying asbestos home on their clothing was foreseeable). The Walsh–Healey Act required employers to provide a change of clothing to employees to prevent them from carrying asbestos home. Even though the Act only applied to federal contractors, it demonstrated an awareness of the dangers of asbestos exposure. Additionally, the Louisiana legislature recognized asbestosis as an occupational disease as of 1952. *Id.*; *Exxon Mobil v. Altimore*, 256 S.W.3d 415 (Tex. 2008) (concluding, based on witness testimony, that by 1972, experts agreed that a certain degree of exposure to asbestos could cause asbestosis or cancer); *Alcoa v. Behringer*, 235 S.W.3d 456 (Tex. 2007) (holding that the Walsh–Healey Act only applied to workers, and therefore “did not put employers on notice of the hazards of non-occupational exposure to asbestos”).

145. Under Washington law, workers' compensation provides an exclusive remedy for workers injured on the job. See, e.g., *Doty v. Town of S. Prairie*, 155 Wash. 2d 527, 120 P.3d 941 (2005) (trial court erroneously dismissed claim brought by volunteer firefighter); *Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 118 P.3d 311 (2005) (trial court properly dismissed claim based on coverage of the Longshore and Harbor Workers' Compensation Act); *Garibay v. State*, 131 Wash. App. 454, 128 P.3d 617 (Wash. Ct. App. 2005) (trial court properly dismissed claim against Department of Labor & Industries for failure to enforce safety regulations); *Crow v. Boeing Co.*, 129 Wash. App. 318, 118 P.3d 894 (2005) (trial court properly dismissed claim against employer where injury was unintentional); see also *Schuchman v. Hoehn*, 119 Wash. App. 61, 79 P.3d 6 (2003) (14-year-old employee's serious injuries were covered by remedies and limitations of WASH. REV. CODE § 52.24.020; no violation of public policy favoring protection of children, nor of the Equal Protection Clause).

146. *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at \*1, \*4 (Wash. App. Aug. 13, 2007). (“Employers generally owe their employees a duty to provide a reasonably safe work environment . . . Mrs. Rochon was not an employee of Kimberly-Clark, and she cites to no Washington case extending liability to family members of employees under this theory.”).

147. *Id.* at \*5. (“Mrs. Rochon cannot escape the fact that she has not alleged that she entered Kimberly-Clark's land. And she cites no Washington case extending liability under this theory to persons who were not at least adjacent to the real property in question.”).

148. *Condon v. Union Oil Co. of Cal.*, No. A102069, 2004 WL 1932847, at \*1 (Cal. Ct. App. Aug. 31, 2004); *Simpkins v. CSX Corp.*, 929 N.E.2d 1257 (Ill. App. Ct. 2010); *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171 (La. Ct. App. 2006); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d

jurisdictions upheld the claims on the basis that the harm to the plaintiff was a foreseeable consequence of the defendant's actions.<sup>149</sup> Plaintiffs have utilized a number of methods to establish that the defendant knew or should have known that the harm to them was foreseeable at the time of exposure.

Some of these courts have highlighted the defendant's internal data to demonstrate that the employer had the requisite knowledge.<sup>150</sup> For example, in a case against Exxon Mobil, the New Jersey Supreme Court cited a 1937 report that was specifically prepared for the petroleum industry.<sup>151</sup> Additionally, the court found that as early as 1916, industrial hygiene texts recommended that plant owners provide workers with the opportunity to change in and out of their work clothes to prevent them from bringing home contaminants on their clothes.<sup>152</sup> Because Exxon did not provide workers with an opportunity to change their clothes at the worksite, the risk to the plaintiff was foreseeable.<sup>153</sup>

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1143 (N.J. 2006); *Satterfield v. Breeding Insulation*, 266 S.W.3d 347 (Tenn. 2008); *Rochon*, 2007 WL 2325214, at \*1.

149. *See, e.g., Satterfield*, 266 S.W.3d at 367 (“[Defendant] was aware of the presence of significant quantities of asbestos fibers on its employees’ work clothes. It was also aware of the dangers posed by even small quantities of asbestos and that asbestos fibers were being transmitted by its employees to others. Nevertheless, despite its extensive and superior knowledge of the dangers of asbestos, [defendant] allegedly (1) failed to inform its employees that they were working with materials containing asbestos; (2) failed to provide its employees with or to require them to wear protective covering on their clothes; (3) actively discouraged its employees’ use of on-site bathroom facilities for changing or cleaning; and (4) failed to inform its employees of the dangers posed by the asbestos fibers on their work clothes. Under these circumstances, it was foreseeable that Ms. Satterfield would come into close contact with Mr. Satterfield’s work clothes on an extended and repeated basis.”).

150. *See, e.g., Olivo*, 895 A.2d at 1149; *see also Condon*, 2004 WL 1932847, at \*2 (finding that expert testimony demonstrated requisite internal knowledge of the dangers that asbestos posed to both employees and household members). In *Condon*, an expert for the plaintiff testified that the defendant was a member of the American Petroleum Institute. *Id.* He explained that as early as the beginning of the twentieth century, the group’s medical advisory committee was aware of research that linked lung cancer to industrial carcinogens. *Id.* Additionally, he cited recognition in the United States and England that workers handling toxic substances should have separate lockers for work and street clothes to prevent their families from being exposed to toxic dust from the workers’ clothes. *Id.* In both *Condon* and *Olivo*, the workers worked for independent contractors, rather than for the premises owners themselves. However, the courts reasoned that a premises owner, not the independent contractor, is liable for the harm where the premises owner controls the worksite conditions that contributed to the plaintiff’s injuries. *Condon*, 2004 WL 1932847, at \*7; *Olivo*, 895 A.2d at 1151.

151. *Olivo*, 895 A.2d at 1149. The report discussed the hazards associated with “occupational dust,” including asbestos particles, which were pervasive at petroleum plants. *Id.*

152. *Id.*

153. *Id.* (“[Plaintiff’s husband’s] soiled work clothing had to be laundered and Exxon Mobil . . . should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing . . .”). An appeals court in Illinois also relied upon this

Other jurisdictions have relied upon a statutory or regulatory duty to establish that the harm to the household member was a foreseeable consequence of the defendant's actions. In *Exxon Mobil v. Altimore*,<sup>154</sup> a Texas court of appeals concluded that OSHA's 1972 asbestos rule<sup>155</sup> represented a consensus within the scientific community that there was no safe level of asbestos exposure.<sup>156</sup> Other courts have pointed to the 1936 passage of the Walsh–Healey Act<sup>157</sup> as effective notice of the risks of take-home exposure by requiring employers to provide a change of clothing.<sup>158</sup>

In addition to foreseeability, courts that upheld take-home exposure claims have considered a number of policy factors in determining whether a defendant owed a duty to the plaintiff.<sup>159</sup> Such factors include

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argument in noting that an employee's soiled work clothing must be laundered, and therefore, the defendant should have foreseen the risk to the plaintiff. The court declined to decide whether the duty should extend beyond immediate family members to include those "who regularly come into contact with employees who are exposed to asbestos-containing products." *Simpkins v. CSX Corp.*, 929 N.E.2d 1257, 1266 (Ill. App. Ct. 2010).

154. 256 S.W.3d 415 (Tex. Ct. App. 2008).

155. Standards for Exposure to Asbestos Dust, 37 Fed. Reg. 11,318, 11,320 (June 7, 1972) (to be codified at 29 C.F.R. § 1910.93a).

156. *Exxon Mobil*, 256 S.W.3d at 422. State courts in Louisiana and Tennessee followed Texas's recognition of 1972 as a proper point in time after which to hold defendants accountable. *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171, 183 (La. Ct. App. 2006); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 353 (Tenn. 2008).

157. Walsh–Healey Public Contracts Act, ch. 881, 49 Stat. 2036 (1936) (codified as amended at 41 U.S.C. §§ 35–45 (2006)). The Walsh–Healey Public Contracts Act establishes minimum wage, maximum hours, and safety and health standards for work on government contracts. *Id.*

158. *See, e.g., Catania v. Anco Insulations, Inc.*, No. 05-1418-JJB, 2009 WL 3855468, at \*1 (M.D. La. Nov. 17, 2009). The federal district court held that the Walsh–Healey Act "addressed the hazards of asbestos and required that employers provide a change of clothing to employees to prevent them from carrying asbestos home." *Id.* at \*2. It cited the Louisiana Supreme Court in declaring that the Act indicated knowledge that asbestos posed a "serious problem." *Id.* Based on that knowledge, in combination with the fact that the Louisiana legislature defined asbestosis as an occupational disease in 1952, the court held that risk to the plaintiff from the employee carrying asbestos home on his work clothes was foreseeable. *Id.*

159. *See, e.g., Satterfield*, 266 S.W.3d at 365 ("[C]ourts have considered, among other factors: (1) the foreseeable probability of the harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct."); *see also Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1148–49 (N.J. 2006) ("Once the foreseeability of an injured party is established, the determination of whether imposing a duty is fair involves weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." (internal citation omitted) (internal quotation marks omitted) (citing *Carvalho v. Toll Bros. & Devs.*, 675 A.2d 209, 212 (N.J. 1996))); *Simpkins v. CSX Corp.*, 929 N.E.2d 1257, 1262 (Ill. App. Ct. 2010)

the foreseeable likelihood of the injury,<sup>160</sup> the nature of the risk,<sup>161</sup> the alternative conduct,<sup>162</sup> the burden on the defendant in protecting the plaintiff from the risk,<sup>163</sup> and the social value of the defendant's activity.<sup>164</sup> Based on these considerations, courts have held that there was a high likelihood of injury to the plaintiff relative to the burden on the defendant to take protective measures.<sup>165</sup> Therefore, it was proper to hold the defendant employer responsible for not only protecting its employees but also for protecting against take-home exposure.<sup>166</sup>

*B. Jurisdictions Focusing on the Relationship Between the Employer and the Household Member Tend to Reject Take-Home Exposure Claims*

Jurisdictions that do not consider foreseeability in the duty analysis tend to hold that an employer does not owe a duty to an employee's

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("Whether a relationship exists between the parties that will justify the imposition of a duty depends upon four factors: (1) the foreseeability of the harm, (2) the likelihood of the injury, (3) the magnitude of the burden involved in guarding against the harm, and (4) the consequences of placing on the defendant the duty to protect against the harm . . . . As a matter of public policy, it is best to place the duty to protect against a harm on the party best able to prevent it.").

160. *See, e.g., Satterfield*, 266 S.W.3d at 365 (considering "foreseeable probability of the harm or injury occurring").

161. *See id.* (considering "possible magnitude of the potential harm or injury"); *see also Olivo*, 895 A.2d at 1148–49 (considering "nature of the attendant risk" (citing *Carvalho*, 675 A.2d at 212)).

162. *See, e.g., Satterfield*, 266 S.W.3d at 365 ("[C]ourts have considered . . . (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct."); *Olivo*, 895 A.2d at 1148–49 (considering "public interest in the proposed solution" (citing *Carvalho*, 675 A.2d at 212)).

163. *See, e.g., Olivo*, 895 A.2d at 1148–49 (considering "opportunity and ability to exercise care" (citing *Carvalho*, 675 A.2d at 212)).

164. *See, e.g., Satterfield*, 266 S.W.3d at 365 (considering "the importance or social value of the activity engaged in by the defendant").

165. *See, e.g., Simpkins v. CSX Corp.*, 929 N.E.2d 1257, 1265 (Ill. App. Ct. 2010) ("We find that the burden of guarding against take-home asbestos exposure is not unduly burdensome when compared to the nature of the risk to be protected against.").

166. *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171 (La. Ct. App. 2006). The court limited the duty to workers' household members to account for policy concerns. It held that a reasonable company that "was aware of the 1972 OSHA regulations regarding the hazards of household exposure to asbestos, had a duty to protect third party household members from exposure to asbestos from a jobsite it knew contained asbestos." *Id.* at 183. In contrast, in *Satterfield*, the court concluded: "[T]he duty we recognize today extends to those who regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time, regardless of whether they live in the employee's home or are a family member." 266 S.W.3d at 374. In *Olivo*, the Court emphasized that the duty would be limited based on the foreseeability of the harm to the particular plaintiff. 895 A.2d at 1150.

household member regarding the risk of take-home asbestos exposure. Courts in Maryland,<sup>167</sup> Georgia,<sup>168</sup> New York,<sup>169</sup> Michigan,<sup>170</sup> Kentucky,<sup>171</sup> Texas,<sup>172</sup> Delaware,<sup>173</sup> Iowa,<sup>174</sup> and Ohio<sup>175</sup> refused to uphold plaintiffs' take-home exposure claims, primarily on the basis that there was no legal relationship between the plaintiff and the defendant.<sup>176</sup> In those jurisdictions, the courts based their analyses on the policy concern with extending a duty to "legal strangers."<sup>177</sup> For example, the Supreme Court of Georgia does not examine the foreseeability of the injury to determine whether a duty exists.<sup>178</sup> Rather, in analyzing a take-home exposure claim, the Court held that while an employer has a duty to provide a safe work environment for its employees, "those to whom [the defendant] would owe the duty advanced by the plaintiffs were not at the time of the alleged breach of duty employees of [the defendant] and were not exposed to any danger in the workplace, so that duty was not owed to them."<sup>179</sup> In its reasoning,

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167. *Adams v. Owen-Illinois*, 705 A.2d 58 (Md. 1998).

168. *Williams v. Owens-Corning Fiberglas Corp.*, 405 F.3d 1291 (11th Cir. 2009); *CSX Transp. v. Williams*, 608 S.E. 2d 208 (Ga. 2005).

169. *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115 (N.Y. 2005); *In re Eighth Judicial Dist. Asbestos Litig.*, 815 N.Y.S.2d 815 (N.Y. Sup. Ct. 2006).

170. *In re Certified Question from the Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d 206 (Mich. 2007).

171. *Martin v. Cincinnati Gas and Electric Co.*, 561 F.3d 439 (6th Cir. 2009).

172. *Exxon Mobil v. Altimore*, 256 S.W.3d 415 (Tex. Ct. App. 2008); *Alcoa v. Behringer*, 235 S.W.3d 456 (Tex. Ct. App. 2007).

173. *Riedel v. ICI Ams.*, 968 A.2d 17 (Del. 2009).

174. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009).

175. *Boley v. Goodyear*, 929 N.E.2d 448 (Ohio 2010).

176. *See, e.g., In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115, 119 (N.Y. 2005) ("[F]oreseeability bears on the scope of a duty, not whether a duty exists in the first place."); *see also Riedel*, 968 A.2d 17, 26–27 (Del. 2009) (holding that the defendant did not owe a duty to the plaintiff because the plaintiff and the defendant were "legal strangers in the context of negligence").

177. *See, e.g., Riedel*, 968 A.2d at 26–27 (defendant's newsletters regarding off-the-job safety did not establish a legal duty; plaintiff and defendant are "legal strangers in the context of negligence"); *CSX Transp. v. Williams*, 608 S.E. 2d 208, 210 (Ga. 2005) ("[W]e decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace."); *Adams v. Owen-Illinois*, 705 A.2d 58, 66 (Md. 1998) (holding that employer did not owe a duty to strangers based upon duty to provide a safe workplace for employees; concern about extending employer's duty too far); *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d at 119 (expressing policy concern of limitless liability and holding that "foreseeability bears on the scope of the duty, not whether a duty exists in the first place").

178. *CSX Transp.*, 608 S.E. 2d at 210.

179. *Id.* at 209.

the court applied a very narrow view of the duty that the defendant owed to another party.

Taking a different approach, the Delaware Supreme Court held that an employer could not be held liable for a failure to act.<sup>180</sup> The Court followed the Restatement (Second) of Torts in holding that the legislature, not the court, would have to create a new duty in order to hold the defendant liable.<sup>181</sup> In the absence of federal legislation to reduce the asbestos caseload, two states adopted their own solutions. State legislatures in Kansas and Ohio managed take-home exposure cases by barring claims against premises owners unless the exposure occurred at the owner's property.<sup>182</sup> By refusing to recognize claims for take-home asbestos exposure, courts and state legislatures leave household members unable to seek relief from those parties who caused their injuries.

### III. THE WASHINGTON COURT OF APPEALS CORRECTLY APPLIED THE STATE SUPREME COURT'S ORDINARY NEGLIGENCE TEST IN *ROCHON*

The Washington State Supreme Court has yet to decide a take-home asbestos exposure claim. But like the five states that have upheld negligence claims for take-home exposure, the Washington State

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180. *Riedel*, 968 A.2d at 22. The plaintiff did not allege misfeasance during the trial, so the Delaware Supreme Court would not allow her to make that argument on appeal. *Id.* at 23. The Court followed the Restatement (Second) of Torts in its analysis. *Id.* at 20. It refused to adopt the Restatement (Third) of Torts, which permits the court to decide whether a duty exists. *Id.* at 21. However, in applying the Restatement (Second) of Torts, which the Delaware Supreme Court concluded was consistent with its own precedent, the Court held that the legislature was responsible for determining whether a duty exists as a matter of social policy. *Id.* at 20. In declining to create a new duty, the court rejected the plaintiff's argument that the employer's publishing a newsletter regarding maintaining safe homes established a legal duty. *Id.* at 26. Moreover, the employer did not undertake a duty to warn employees' families of all dangers. *Id.* at 17. The court found, like the trial court, that the employer did not undertake a duty to warn its employees' families of all dangers. Therefore, the plaintiff and the defendant were "legal strangers in the context of negligence." *Id.* at 26–27.

181. *Id.* at 20.

182. OHIO REV. CODE ANN. § 2307.941(A)(1) (West 2010) ("A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property."). In *Boley v. Goodyear*, 929 N.E.2d 448 (Ohio 2010), the Supreme Court of Ohio held that this state statute effectively prohibits take-home exposure claims against employers. The concurring opinion notes that the plaintiff may have an action against the asbestos manufacturer or supplier, which are not premises owners; KAN. STAT. ANN. § 60-4905(a) (Supp. 2009) ("No premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property.").

Supreme Court focuses on foreseeability of the harm in its negligence jurisprudence.<sup>183</sup> In *Rochon v. Saberhagen Holdings*,<sup>184</sup> a case of first impression in Washington regarding take-home asbestos exposure, the Washington Court of Appeals correctly applied Washington's negligence test. The court began its inquiry by examining whether the harm to the plaintiff was a foreseeable consequence of the defendant's action.<sup>185</sup> Reasoning that the harm to a take-home exposure victim could have been foreseeable, the court reversed the trial court's denial of the claim and remanded the case for further proceedings.<sup>186</sup>

A. *The Washington State Supreme Court's Negligence Test Focuses on the Foreseeability of the Harm to the Plaintiff*

Similar to other jurisdictions that recognize claims for take-home asbestos exposure,<sup>187</sup> the Washington State Supreme Court holds that the existence of a legal duty depends upon the foreseeability of the harm.<sup>188</sup> Foreseeability determines the scope of an actor's duty to others.<sup>189</sup> If an

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183. *King v. City of Seattle*, 84 Wash. 2d 239, 525 P.2d 228 (1974) (concluding city's wrongful act caused foreseeable damage, which was compensable even though the exact manner of the injury was not foreseeable); *Wells v. City of Vancouver*, 77 Wash. 2d 800, 467 P.2d 292 (1970) (concluding city could properly be forced to compensate visitor to airplane hangar for injuries sustained by flying debris; city owed a duty based on foreseeability of injury).

184. *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at \*1 (Wash. App. Aug. 13, 2007).

185. *Id.* at \*2 ("A risk is 'unreasonable,' and thus a party has a duty to prevent resulting harm, only if a reasonable person would have foreseen the risk. Conversely, if the risk is not foreseeable, the person who created the risk generally does not have a duty to prevent it.")

186. *Id.* at \*1.

187. *Condon v. Union Oil Co. of Cal.*, No. A102069, 2004 WL 1932847, at \*1 (Cal. Ct. App. Aug. 31, 2004); *Simpkins v. CSX Corp.*, 929 N.E.2d 1257 (Ill. App. Ct. 2010); *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171 (La. Ct. App. 2006); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006); *Satterfield v. Breeding Insulation*, 266 S.W.3d 347 (Tenn. 2008).

188. *King*, 84 Wash. 2d at 248, 525 P.2d at 234; *Wells*, 77 Wash. 2d at 802, 467 P.2d at 295. A common law negligence claim requires proof of four factors: (1) the existence of a duty that the actor owes to the complainant, (2) a breach of such duty, (3) an injury resulting from such a breach, and (4) proximate causation. *Folsom v. Burger King*, 135 Wash. 2d 658, 958 P.2d 301, 308 (1998).

189. *Seeberger v. Burlington N.R.R. Co.*, 138 Wash. 2d 815, 982 P.2d 1149 (1999) (concluding FELA claim against railroad employer could be maintained based on danger posed by tool used to close grain car door); *Hansen v. Friend*, 118 Wash. 2d 476, 824 P.2d 483 (1992) (noting that whether duty was owed to minor to avoid injury from alcohol consumption depended upon whether such harm was foreseeable); *Christen v. Lee*, 113 Wash. 2d 479, 780 P.2d 1307 (1989) (concluding that drinking establishment may be liable for criminal assault by patron, but only if such assault is foreseeable based on obvious intoxication and notice of propensity for violence); *Rucshner v. ADT, Sec. Sys., Inc.*, 149 Wash. App. 665, 204 P.3d 271 (2009) (concluding trial court erroneously dismissed claim against local company that agreed to conduct criminal background check but failed to do so); *Higgins v. Intex Recreation Corp.*, 123 Wash. App. 821, 99 P.3d 421 (2004) (concluding

actor affirmatively creates a risk to another, the actor has a responsibility to prevent foreseeable harm from that risk.<sup>190</sup> As such, if the actor does not take appropriate precautions to prevent such harm, the actor is responsible for the foreseeable consequences of the risk.<sup>191</sup>

*B. The Washington Court of Appeals Applied Washington's Negligence Test in Recognizing the Potential Validity of a Take-Home Exposure Claim*

In a case that represents a typical take-home exposure claim, Adeline and Lawrence Rochon filed a lawsuit against Kimberly-Clark,<sup>192</sup> Mr. Rochon's former employer, in 2005.<sup>193</sup> The Rochons alleged that the

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where risk of injury is not foreseeable, defendant owes no duty to prevent injury); *Meneely v. S.R. Smith, Inc.*, 101 Wash. App. 845, 5 P.3d 49 (2000) (concluding trial court properly ruled that trade association owed ultimate consumer of pool equipment a duty to use reasonable care in adopting safety standards; harm to consumer was foreseeable); *Mauch v. Kissling*, 56 Wash. App. 312, 783 P.2d 601 (1989) (concluding that scouting organization owed no duty to anticipate potential for injury from airplane ride furnished to scout).

190. *Minahan v. W. Wash. Fair Ass'n*, 117 Wash. App. 881, 73 P.3d 1019, 1027 (2003) (“[E]very actor whose conduct involves an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the risk from taking effect.” (internal citation omitted)).

191. *Burkhart v. Harrod*, 110 Wash. 2d 381, 755 P.2d 759, 766 (1988) (concluding social host serving alcohol did not owe duty to guest to prevent guest's excessive consumption of alcohol); *Wells v. City of Vancouver*, 77 Wash. 2d 800, 802, 467 P.2d 292, 295 (1970). According to the Washington State Supreme Court, “Harm is foreseeable if the risk from which it results was known or in the exercise of reasonable care should have been known.” *Travis v. Bohannon*, 128 Wash. App. 231, 115 P.3d 342, 346 (2005) (trial court improperly dismissed claim for injuries received by student during off-campus “workday”); *McLeod v. Grant Cnty. Sch. Dist.*, 42 Wash. 2d 316, 255 P.2d 360, 363 (1953). Additionally, harm is foreseeable if it can “reasonably be perceived as being within the general field of danger covered by the specific duty owed by the defendant.” *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at \*1, \*2 (Wash. Ct. App. Aug. 13, 2007) (citing *Christen v. Lee*, 113 Wash. 2d 479, 780 P.2d 1307, 1313 (1989)) (internal quotations omitted). It is not necessary to foresee the exact manner of harm. *King*, 84 Wash. 2d at 248, 525 P.2d at 234. The actor's actions do not have to be the sole cause of the harm to another for the actor to be liable, but must make it more likely than not that harm will result. *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wash. App. 675, 183 P.3d 1118, 1122 (Wash. Ct. App. 2008). Whether a duty exists is a question of law that the court determines, and foreseeability is an issue of fact that the jury usually assesses. Where reasonable minds cannot differ as to foreseeability, the court determines that issue as matter of law. *Estate of Jones v. State*, 107 Wash. App. 510, 15 P.3d 180, 184–85 (2000) (where juvenile under supervision for burglary convictions later raped and murdered, issue of foreseeability on the part of those responsible for supervision was a question for jury); *Christen*, 113 Wash. 2d at 492, 780 P.2d at 1313; *Rikstad v. Holmberg*, 76 Wash. 2d 265, 456 P.2d 355, 359 (1969).

192. Lawrence Rochon was employed by Scott Paper Company, the predecessor to Kimberly-Clark Worldwide, Inc., Kimberly Clark Global Sales, Inc., and Kimberly-Clark Corporation, which the court collectively referred to as Kimberly-Clark. *Rochon*, 2007 WL 2325214, at \*1.

193. *Rochon v. Saberhagen Holdings, Inc.*, No. 052073258 (Snohomish County, Wash. Super. Ct. filed Mar. 21, 2005).

employer's negligence caused Mrs. Rochon to develop mesothelioma as a result of inhaling asbestos fibers after laundering his work clothes from 1956–1966.<sup>194</sup> Mrs. Rochon died of mesothelioma in 2006. The trial court granted Kimberly-Clark's motion for summary judgment after concluding that the company did not owe Mrs. Rochon a duty of care in its status as an employer and a landowner.<sup>195</sup> The court did not find the foreseeability of her injury relevant.<sup>196</sup> In an unpublished opinion, the Washington Court of Appeals reviewed the decision de novo and reversed.<sup>197</sup>

While Kimberly-Clark did not owe Mrs. Rochon a duty as an employer or a premises owner, the court of appeals held that there was a genuine issue of material fact as to whether the company still owed her a duty under an ordinary negligence test.<sup>198</sup> The court of appeals remanded the case so the trial court could assess whether Kimberly-Clark affirmatively created an unreasonable risk that caused Mrs. Rochon's mesothelioma.<sup>199</sup> The case ultimately settled before Mrs. Rochon's negligence claim was retried.<sup>200</sup>

#### IV. THE WASHINGTON COURT OF APPEALS WAS CORRECT IN APPLYING AN ORDINARY NEGLIGENCE TEST

As explained above, the Washington State Supreme Court has not ruled on a take-home asbestos exposure claim. However, in *Rochon*, the Washington Court of Appeals correctly applied Washington's ordinary

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194. *Rochon*, 2007 WL 2325214, at \*1.

195. *Id.* at \*2. Mrs. Rochon did not allege that she ever entered the employer's premises. *Id.* at \*5.

196. *Id.* at \*2.

197. *Id.* at \*1.

198. *Id.* at \*3.

199. *Id.* (“Whether Kimberly-Clark knew or should have known about the health risks of asbestos during the relevant time period, what precautions it should have taken to prevent any resulting harm, and whether Mrs. Rochon was a foreseeable victim are all questions that are at issue.”). In its opinion, the court of appeals cited *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wash. App. 784, 106 P.3d 808, 811 (2005), a products liability case against an asbestos manufacturer. Although that case did not establish whether there is a negligence duty owed to an employee's household member, the court determined, as a factual matter, that a family member who launders clothing could be a foreseeable victim of asbestos exposure. *Rochon*, 2007 WL 2325214, at \*4.

200. The case settled in 2007. E-mail from Matthew Bergman, Att’y at Bergman, Draper, and Frockt, to author (Feb. 11, 2011, 13:15 PST) (on file with author); Motion to Withdraw Motion to Publish Opinion, *Rochon*, 2007 WL 2325214, at \*1 (Wash. Ct. App. Aug. 13, 2007); Court of Appeals Mandate Terminating Review, *Rochon*, 2007 WL 2325214, at \*1 (Wash. Ct. App. Jan. 11, 2008); Stipulation and Order of Dismissal As to All Remaining Defendants, *Rochon v. Saberhagen Holdings, Inc.*, No. 052073258 (Snohomish County, Wash. Super. Ct. Aug. 21, 2009).

negligence test to a take-home exposure claim, ruling in favor of the plaintiff. This approach is consistent with the Washington State Supreme Court's negligence jurisprudence. As a matter of public policy, applying an ordinary negligence test provides the fairest means for holding a party liable for creating an unreasonable risk of harm. Washington courts should follow the *Rochon* decision when handling future take-home exposure asbestos claims.

A. *The Washington Court of Appeals Was Correct in Its Interpretation of Washington Law Regarding Negligence Claims*

When ruling on negligence claims, the Washington State Supreme Court focuses on the foreseeability of the harm.<sup>201</sup> If the defendant affirmatively creates a risk to another, the defendant has a responsibility to prevent foreseeable harm from that risk.<sup>202</sup> If the defendant does not take proper precautions, it is responsible for the foreseeable consequences of the actions.<sup>203</sup>

In determining whether Kimberly-Clark owed a duty to Mrs. Rochon, the court used the foreseeability of the harm to Mrs. Rochon to determine whether a duty existed.<sup>204</sup> Consistent with Washington law, the court declined to focus on the relationship between the plaintiff and the defendant.<sup>205</sup> The court correctly concluded that if Kimberly-Clark's affirmative acts created an unreasonable and foreseeable risk to Mrs. Rochon, and it failed to protect her from that risk, the company should be held liable for causing the harm.<sup>206</sup>

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201. King v. City of Seattle, 84 Wash. 2d 239, 525 P.2d 228 (1974); Wells v. City of Vancouver, 77 Wash. 2d 800, 467 P.2d 295 (1970).

202. Minahan v. W. Wash. Fair Ass'n, 117 Wash. App. 881, 897, 73 P.3d 1019, 1027 (2003) ("[E]very actor whose conduct involves an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the risk from taking effect." (internal citation omitted)).

203. Burkhart v. Harrod, 110 Wash. 2d 381, 755 P.2d 759, 766 (1988) (concluding that social host serving alcohol did not owe duty to guest to prevent guest's excessive consumption of alcohol); Wells, 77 Wash. 2d at 803, 467 P.2d at 295.

204. *Rochon*, 2007 WL 2325214, at \*3 ("Kimberly-Clark may have had no affirmative duty to act to protect Mrs. Rochon from outside forces, but it had a duty to prevent injury from an unreasonable risk of harm it had itself created. This assumes, of course, that the risk of harm to Mrs. Rochon was foreseeable.").

205. *Id.* at \*2.

206. *Id.* at \*3; see also *Burkhart*, 110 Wash. 2d at 395, 755 P.2d at 766; *Wells*, 77 Wash. 2d at 803, 467 P.2d at 295.

*B. Defendants Should be Held Liable for Creating an Unreasonable Risk of Harm*

In addition to being consistent with Washington negligence law, the Washington Court of Appeals' decision in *Rochon* is consistent with public policy. Unfortunately, few opportunities exist for take-home asbestos exposure claimants to seek relief for their injuries. As a result, these claimants are unable to utilize the same legal theories as employees.<sup>207</sup> An ordinary negligence claim is one of the few options they have to recover damages for their injuries. In a number of cases, plaintiffs established that if the employee was exposed to asbestos in the workplace, it was foreseeable that household members could be exposed as well.<sup>208</sup> Given the risk to magnitude and likelihood of the risk to household members, it is proper to hold employers accountable. Applying an ordinary negligence theory is the best way to allow relief while still preventing an employer from facing endless legal claims.

*1. Applying an Ordinary Negligence Test Provides the Best Opportunity for Relief*

Take-home asbestos exposure claimants have limited means to seek relief for their injuries. Workers' compensation statutes do not apply to those who are not employees injured in the workplace.<sup>209</sup> Household

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207. See, e.g., *Rochon*, 2007 WL 2325214, at \*1, \*4 (Wash. App. Aug. 13, 2007) ("Employers generally owe their employees a duty to provide a reasonably safe work environment. This can even include the duty to protect employees from outside forces such as the criminal conduct of third parties. Mrs. Rochon . . . cites to no Washington case extending liability to family members of employees under this theory.").

208. See, e.g., *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008) ("[Defendant] was aware of the presence of significant quantities of asbestos fibers on its employees' work clothes. It was also aware of the dangers posed by even small quantities of asbestos and that asbestos fibers were being transmitted by its employees to others."); see also *Condon v. Union Oil Co. of Cal.*, No. A102069, 2004 WL 1932847, at \*1, \*2 (Cal. Ct. App. Aug. 31, 2004) (finding that expert testimony demonstrated requisite internal knowledge of the dangers that asbestos posed to both employees and household members).

209. See, e.g., *Doty v. Town of S. Prairie*, 155 Wash. 2d 527, 120 P.3d 941 (2005) (concluding that trial court erroneously dismissed claim brought by volunteer firefighter); *Gorman v. Garlock, Inc.*, 155 Wash. 2d 198, 118 P.3d 311 (2005) (concluding that trial court properly dismissed claim based on coverage of the Longshore and Harbor Workers' Compensation Act); *Garibay v. State*, 130 Wash. App. 1042, 128 P.3d 617 (Wash. Ct. App. 2005) (concluding that trial court properly dismissed claim against Department of Labor and Industries for failure to enforce safety regulations); *Crow v. Boeing Co.*, 129 Wash. App. 318, 118 P.3d 894 (Wash. Ct. App. 2005) (concluding that trial court properly dismissed claim against employer where injury was unintentional); see also *Schuchman v. Hoehn*, 119 Wash. App. 61, 79 P.3d 6 (2003) (holding that 14-year-old employee's serious injuries were covered by remedies and limitations of WASH. REV.

members are not able to rely upon the same legal theories as employees, such as employer or premises liability, because they were not exposed while on the employer's premises.<sup>210</sup> While remedies such as strict liability are available to take-home exposure claimants,<sup>211</sup> the elements of the claim are more difficult to prove.<sup>212</sup>

Applying an ordinary negligence test to take-home asbestos exposure cases provides a fair means for relief. Under this test, the plaintiff does not have to prove an independent "special relationship."<sup>213</sup> Rather, the test accounts for the fact that there was no legal relationship between the plaintiff and the defendant but for the unreasonable and foreseeable risk of harm that the defendant affirmatively created.<sup>214</sup> If the defendant did not produce such a risk, the plaintiff would not have suffered harm.<sup>215</sup> Alternatively, if the defendant prevented the employee from removing asbestos from the premises, it might have prevented the plaintiff's injuries.<sup>216</sup>

## 2. *The Risk of Harm to a Household Member Was Foreseeable*

An employer that did not prevent employees from removing asbestos from the premises created a foreseeable risk of harm to the employee's household members.<sup>217</sup> OSHA's 1972 asbestos rule<sup>218</sup> reflected scientific

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CODE § 52.24.020; no violation of public policy favoring protection of children, nor of the Equal Protection Clause)

210. *Rochon*, 2007 WL 2325214, at \*1, \*4 (Wash. Ct. App. Aug. 13, 2007).

211. *See, e.g.*, *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wash. App. 784, 106 P.3d 808 (2009).

212. *See id.* at 809 ("Manufacturers and sellers of unreasonably dangerous products are strictly liable for injuries to users and consumers of those products."). Strict liability is more difficult to prove because it involves establishing that a specific manufacturer or seller provided the product to the employer. Then, the household member must be determined to be a "user" or "consumer" of the product.

213. *Rochon*, 2007 WL 2325214, at \*1, \*4 (Wash. Ct. App. Aug. 13, 2007) ("In short, even in the absence of any special relationship between them, Kimberly-Clark had a duty to prevent Mrs. Rochon's injury if its use of asbestos was unreasonably risky, and if Mrs. Rochon's injury was a foreseeable consequence of its risky actions.").

214. *Id.* at \*3 ("Kimberly-Clark may have had no affirmative duty to act to protect Mrs. Rochon from outside forces, but it had a duty to prevent injury from an unreasonable risk of harm it had itself created. This assumes, of course, that the risk of harm to Mrs. Rochon was foreseeable.").

215. *Id.*

216. *Id.* ("Whether Kimberly-Clark knew or should have known about the health risks of asbestos during the relevant time period, what precautions it should have taken to prevent any resulting harm, and whether Mrs. Rochon was a foreseeable victim are all questions that are at issue.").

217. *Id.* at \*4 (citing the conclusion in *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash. 2d 264, 106 P.3d 808 (2009) and declaring "that, as a factual matter, a family member who launders clothes could be a foreseeable victim of asbestos exposure is persuasive").

218. *Id.*

data that revealed the risk of asbestos take-home exposure.<sup>219</sup> It also established that where employees used asbestos in the workplace, an employer should or could have known that there was a potential danger to those outside the workplace who might come into contact with the employee's contaminated clothing.<sup>220</sup> In cases in which the plaintiffs were exposed prior to 1972, like *Rochon*, plaintiffs have demonstrated that companies maintained internal or industry knowledge of the risk of take-home exposure.<sup>221</sup>

### 3. *An Employer Is in the Best Position to Prevent Take-Home Exposure*

Household members exposed to asbestos did not voluntarily or knowingly assume the risk of exposure.<sup>222</sup> As symptoms of adverse

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218. Standards for Exposure to Asbestos Dust, 37 Fed. Reg. 11,318 (June 7, 1972) (to be codified at 29 C.F.R. § 1910.93a).

219. See *supra* note 55 and accompanying text.

220. See, e.g., *Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171, 183 (La. Ct. App. 2006) (“[A] company aware of the 1972 OSHA standards regarding the hazards of household exposure to asbestos, had a duty to protect third party household members from exposure to asbestos from a jobsite it knew contained asbestos.”); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 353 (Tenn. 2008) (“Contrary to the OSHA regulations, Alcoa failed to educate Mr. Satterfield and its other employees regarding the risk of asbestos or how to handle materials containing asbestos . . . . Alcoa’s employees . . . left the plant each day unaware of the dangers posed by the asbestos fibers on their contaminated work clothes and without Alcoa making an effort to prevent others from being exposed to the asbestos fibers on its employees’ clothes.”); *Exxon Mobil v. Altimore*, 256 S.W.3d 415, 422 (Tex. Ct. App. 2008) (noting the 1972 OSHA regulations were intended to prevent asbestosis and also concluding that “[b]y 1972, experts agreed that a certain degree of exposure to asbestos could cause asbestosis or cancer”).

221. See, e.g., *Condon v. Union Oil Co. of Cal.*, No. A102069, 2004 WL 1932847, at \*1, \*2–4 (Cal. Ct. App. Aug. 31, 2004) (finding that expert testimony demonstrated requisite internal knowledge of the dangers that asbestos posed to both employees and household members). An expert for the plaintiff testified that the defendant was a member of the American Petroleum Institute. He explained that as early as the beginning of the twentieth century, the group’s medical advisory committee was aware of research that linked lung cancer to industrial carcinogens. Additionally, he cited recognition in the United States and England that workers handling toxic substances should have separate lockers for work and street clothes to prevent their families from being exposed to toxic dust from the workers’ clothes. *Id.*; *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (citing internal and industry data indicating the risk of asbestos exposure as early as 1916, and concluding that “Anthony’s soiled work clothing had to be laundered and Exxon Mobil, as one of the sites at which he worked, should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks”).

222. See, e.g., *Satterfield*, 266 S.W.3d at 353 (“Alcoa’s employees, including Mr. Satterfield, left the plant each day unaware of the dangers posed by the asbestos fibers on their contaminated work clothes and without Alcoa making an effort to prevent others from being exposed to the asbestos fibers on its employees’ clothes.”).

health effects from exposure do not generally develop for at least ten years,<sup>223</sup> household members would have difficulty realizing the dangers of exposure until they were exposed for a considerable period of time and suffered irreversible health consequences.

A large employer engaged in interstate commerce, such as Kimberly-Clark, was in the best position to protect workers exposed to asbestos in the workplace and therefore, to protect household members.<sup>224</sup> It is reasonable to expect that such an employer had superior access to information regarding asbestos exposure, such as access to industry knowledge,<sup>225</sup> applicable state or federal statutes or regulations,<sup>226</sup> or relevant scientific data.<sup>227</sup> It is also reasonable to expect that the employer knew that Mr. Rochon's work involved constant and routine exposure to asbestos.<sup>228</sup> As Mr. Rochon's work clothes needed to be laundered, if the employer did not provide a facility to wash the clothing then it was foreseeable that Mr. Rochon would bring them home to be laundered.<sup>229</sup> A household member such as Mrs. Rochon would not have had access to such knowledge to appreciate the dangers of asbestos exposure.<sup>230</sup> Even if she were aware of the risk she faced, it would have

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223. *Asbestos*, *supra* note 62.

224. *See, e.g., Satterfield*, 266 S.W.3d at 353 (“Despite the fact that Alcoa was aware of the dangers posed by asbestos before Mr. Satterfield became an employee, it failed to apprise him or its other employees of the dangers of asbestos or specifically of the danger associated with wearing home their asbestos-contaminated work clothes . . . Alcoa’s employees, including Mr. Satterfield, left the plant each day unaware of the dangers posed by the asbestos fibers on their contaminated work clothes and without Alcoa making an effort to prevent others from being exposed to the asbestos fibers on its employees’ clothes.”).

225. *See, e.g., Olivo*, 895 A.2d at 1149.

226. *See, e.g., Chaisson v. Avondale Indus., Inc.*, 947 So.2d 171, 183 (La. Ct. App. 2006) (“A reasonable company. . . a company aware of the 1972 OSHA standards regarding the hazards of household exposure to asbestos, had a duty to protect third party household members from exposure to asbestos from a jobsite it knew contained asbestos.”).

227. *See, e.g., Exxon Mobil v. Altimore*, 256 S.W.3d 415, 422 (Tex. Ct. App. 2008) (“By 1972, experts agreed that a certain degree of exposure to asbestos could cause asbestosis or cancer.”).

228. *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at \*1, \*3 (Wash. Ct. App. Aug. 13, 2007) (“According to her allegations, Kimberly-Clark used asbestos in an unsafe manner and required Mr. Rochon to work with and around asbestos as part of his job.”); *see also Satterfield*, 266 S.W.3d at 353 (“Alcoa failed to educate Mr. Satterfield and its other employees regarding the risk of asbestos or how to handle materials containing asbestos. Even though Alcoa’s employees worked extensively with materials containing asbestos, these materials did not contain warning labels or notices stating that they contained asbestos.”).

229. *See, e.g., Simpkins v. CSX Corp.*, 929 N.E.2d 1257, 1264 (Ill. App. Ct. 2010); *Olivo*, 895 A.2d at 1149; *Satterfield*, 266 S.W.3d at 353.

230. *See, e.g., Satterfield*, 266 S.W.3d at 353 (“Despite the fact that Alcoa was aware of the dangers posed by asbestos before Mr. Satterfield became an employee, it failed to apprise him or its other employees of the dangers of asbestos or specifically of the danger associated with wearing

been difficult for her to protect herself from the asbestos that her husband carried home if he were not able to wash the clothing, shower, or otherwise remove the asbestos before returning home.<sup>231</sup>

4. *Holding an Employer Liable for Take-Home Exposure Will Not Lead to Endless Litigation*

Holding an employer–defendant liable for asbestos take-home exposure will not subject the defendant to unlimited liability. In determining whether the defendant owed a duty to the plaintiff, the plaintiff must establish that the harm was a foreseeable consequence of the defendant’s actions.<sup>232</sup> Accordingly, if a plaintiff is unable to demonstrate that the defendant should have had the requisite knowledge of the risk at the time of exposure, the harm was not foreseeable.<sup>233</sup>

For a valid take-home exposure claim, a plaintiff also has to demonstrate that the harm is attributable to the risks that the defendant itself created.<sup>234</sup> The defendant would not be liable for a third party’s acts or for circumstances that it did not create.<sup>235</sup> Another reason that the defendant would not be exposed to unlimited liability is that if the court finds that the defendant owed the plaintiff a duty as a matter of law, the fact-finder can limit the scope of the duty at the causation stage of the negligence analysis.<sup>236</sup> At that stage, the fact-finder can limit the duty in

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home their asbestos-contaminated work clothes . . . Alcoa’s employees, including Mr. Satterfield, left the plant each day unaware of the dangers posed by the asbestos fibers on their contaminated work clothes and without Alcoa making an effort to prevent others from being exposed to the asbestos fibers on its employees’ clothes.”)

231. *See, e.g.,* *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (“Anthony’s soiled work clothing had to be laundered and Exxon Mobil, as one of the sites at which he worked, should have foreseen that whoever performed that task would come into contact with the asbestos that infiltrated his clothing while he performed his contracted tasks.”).

232. *Burkhart v. Harrod*, 110 Wash. 2d 381, 755 P.2d 759, 766 (1988) (concluding that social host serving alcohol did not owe duty to guest to prevent guest’s excessive consumption of alcohol); *Wells v. City of Vancouver*, 77 Wash. 2d 800, 802, 467 P.2d 292, 295 (1970) (holding that city could properly be forced to compensate visitor to airplane hangar for injuries sustained by flying debris; city owed a duty based on foreseeability of injury).

233. Harm is foreseeable “if the risk from which it results was known or in the exercise of reasonable care should have been known.” *Travis v. Bohannon*, 128 Wash. App. 231, 115 P.3d 342, 346 (2005); *McLeod v. Grant Cnty. Sch. Dist.*, 42 Wash. 2d 316, 255 P.2d 360 (1953).

234. *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at \*4 (Wash. Ct. App. Aug. 13, 2007) (“[T]he duty is only one to act reasonably to prevent injury from Kimberly-Clark’s own risky acts, not to protect Mrs. Rochon from the acts of third parties or from circumstances it did not create.”).

235. *Id.* at \*4.

236. *Id.* (“[C]ourts exercise their gatekeeping function in determining whether liability *should* attach through the legal causation element, and juries must decide whether the negligence actually

determining whether the defendant's actions were both the cause-in-fact and legal cause of the plaintiff's injuries.<sup>237</sup> In order to control the number of take-home exposure claims, a court could limit the scope of the duty to household members or to immediate family members.

## CONCLUSION

The Rochons represent typical plaintiffs in asbestos take-home exposure cases. In their case, the Washington Court of Appeals applied an ordinary negligence test that is consistent with the Washington State Supreme Court and other jurisdictions that follow a similar negligence scheme. A number of policy considerations also support this approach. The test that the court of appeals applied in *Rochon* represents an important means to empower plaintiffs who might otherwise be unable to seek relief from the party responsible for their suffering. Mrs. Rochon did not have access to requisite knowledge regarding the threat of asbestos exposure, nor did she have access to the means to properly protect herself from the risk that the defendant created. For those reasons, it is proper to place the burden on the defendant employer, who had both superior knowledge of the risk and a greater capacity to prevent employees from carrying asbestos off of the premises and into the home. In order to avoid inundating the courts and employers with frivolous claims, the scope of the duty is limited based on the foreseeability of the harm from the risk that the employer affirmatively created. Because asbestosis and mesothelioma only develop as a consequence of long-term exposure to asbestos, individuals who were only exposed to the worker or the worker's clothing for very limited periods of time would be less likely to develop these conditions. The actual impact of asbestos take-home litigation remains unclear, particularly given the lack of data on the potential number of plaintiffs. As these claims arise, it is essential that the courts hold responsible those parties who affirmatively created a public health risk and failed to take appropriate action to prevent resulting harm.

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caused the injury before liability will attach." (citing *Keller v. City of Spokane*, 146 Wash. 2d 237, 252 n.15, 44 P.3d 845, 853 n.15 (2002))).

<sup>237</sup>. *Id.*