Premises Liability—How Far Does the Duty Extend?

Sandra F. Clark

MehaffyWeber PC

2615 Calder Ste 800
Beaumont, TX 77702

C. Paul Cavender

Burr & Forman LLP

420 N 20th St Ste 3400
Birmingham, AL 35203

Jeanne F. Loftis

Bullivant Houser Bailey PC

888 SW 5th Ave Ste 300
Portland, OR 97204-2089

Sandra F. Clark is a shareholder in the law firm of MehaffyWeber PC in Beaumont, Texas. She is board certified in personal injury trial by the Texas Board of Legal Specialization. Ms. Clark is a member of the American Board of Trial Advocates, the Federation of Defense and Corporate Counsel, the Product Liability Advisory Council and the Texas State Bar Committee on Professionalism.

C. Paul Cavender is the leader of Burr & Forman LLP's TIPS practice group. His practice focuses upon complex litigation involving toxic torts, products liability and commercial disputes. He serves as national coordinating counsel and national trial counsel in the asbestos litigation having appeared as trial counsel in numerous jurisdictions and successfully tried cases to verdict during almost 30 years of asbestos defense work.

Jeanne F. Loftis is a shareholder at Bullivant Houser Bailey PC in Portland, Oregon. She holds a physiology degree from UC-Davis and received her J.D. degree from the McGeorge School of Law in 1991. Her practice encompasses commercial and casualty cases with a focus on asbestos product liability claims and other mass torts. Ms. Loftis is DRI's State Representative for Oregon.

This paper attempts to discuss the law as it is found at this time in several states, and it could change in one or more jurisdictions at any time. The points raised and comments made do not necessarily reflect the position of any client of any of the authors. We would like to thank Chris Douglas, Brendan Hanrahan, Nancy Fouad-Carey and Thomas Carter for their assistance in writing the paper.

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Premises Liability—How Far Does the Duty Extend?

Asbestos litigation has been a major force in the modern economy, touching nearly every industrial sector and involving more than 8,000 different companies as named defendants. Meanith Huon, *Asbestos Litigation: Defending the Premises Owner*, 47 No. 10 DRI For Def. 63 (October 2005). As the manufacturers of asbestos containing thermal insulation products have disappeared as potential defendants, generally through bankruptcy, plaintiffs' attorneys have sought to find other potential targets for their claims. *Id.* In particular, plaintiffs' attorneys have actually managed to simultaneously expand the number of potential plaintiffs and defendants using several forms of premises liability. *Id.* When traditional defendants began to file for bankruptcy court protection, "the net had spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Layers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A15, *abstract at* 2001 WLNR 1993314.

Claims and claimants still continue to evolve. And unfortunately, courts have yet to uniformly circumscribe the borders of a defendant's duty in the realm of premises liability asbestos claims. With no clear roadblock before them, plaintiffs' attorneys continue to experiment with claimants and claims in hopes of expanding the breadth of asbestos litigation. Premises defendants are not limited to large industrial sites but in fact can include more non-traditional sites such as airports, bakeries, and other premises on which there are construction renovation, and/or maintenance projects.

I. Independent Contractor

Premises liability is generally defined as "[a] landowner's or landholder's tort liability for conditions or activities on the premises." Black's Law Dictionary (9th ed. 2009). The most common form of premises liability that has been used to date as a theory for asbestos based liability centers around employees of independent contractors who are hired by the premises owner to perform work on the premises. Meanith Huon, *Asbestos Litigation: Defending the Premises Owner*, 47 No. 10 DRI For Def. 63 (October 2005).

The simple explanation for this theory is that "[t]he employee of an outside contractor is generally deemed a business 'invitee' for purposes of a premises liability analysis." Kenneth R. Meyer *et al.*, *Emerging Trends in Asbestos Premises Liability Claims Understanding Current Theories of Liability and Proposed Legislation to Protect Your Client*, 72 Def. Couns. J. 241, 243 (2005). The specific legal standards for premises liability vary widely from state to state, but in general, most states have adopted some form of the Restatement Second of Torts in terms of laying out the overall structure for a premises liability claim, even in asbestos litigation. *Id.*; Kristin Donnelly-Miller and Ryan Johanningsmeier, *Premises Liability Case Law Review: Relevant Restatement Sections*, 18-22 Mealey's Litig. Rep. Asb. 24 (2003). The Restatement defines an invitee as:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Restatement (Second) of Torts §332 (1965). In terms of his or her own actions and behavior, a premises owner "is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or

realize the danger, or will fail to protect themselves against it." Restatement (Second) of Torts §341A (1965). Furthermore, when it comes to dangers that may be hidden or are intrinsic to the premises itself:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts §343 (1965). Likewise, the premises owner "is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts §343A (1965).

II. Certain States' Handling of the Contractor Premises Liability Theory

Here is a sampling of how some key states address premises liability in the context of employees of independent contractors.

A. California

Between 1993 and 2005, California courts had generally operated under a modified version of the Restatement (Second) of Torts, at least insofar as the employee of an independent contractor was concerned. In *Privette v. Superior Court*, 5 Cal. 4th 689, 693, 854 P.2d 721, 724 (1993), and a series of cases following, the Supreme Court of California established that when there was a known hazard or danger on the employer's premises, the premises owner could essentially delegate responsibility to take reasonable safety precautions to the independent contractor itself, thereby escaping liability for failure to "to exercise reasonable care to protect them against the danger." *See* Restatement (Second) of Torts §343 (1965). In *Kinsman v. Unocal Corp.*, 2 Cal. Rptr. 3d 87, 100 (Cal. Ct. App. 2003) review granted and opinion superseded, 78 P.3d 1050 (Cal. 2003) and aff'd in part, rev'd in part, 37 Cal. 4th 659, 123 P.3d 931 (2005), the Court of Appeals for the First District of California held that "a contractor's employee such as Kinsman may not recover under section 343 from a landowner such as Unocal absent proof Unocal had control over the allegedly dangerous condition on its property and affirmatively contributed to the injury." The Supreme Court of California, however, felt that a return to earlier common law principles was in order, and found that "the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." Kinsman v. Unocal Corp., 37 Cal. 4th 659, 675, 123 P.3d 931, 940 (2005). The Court did make special note that the expanded liability only applied to pre-existing hazards and not to "hazard created by the independent contractor itself, of which that contractor necessarily is or should be aware." *Id.* at 675 n.3.

B. Illinois

Madison County in Illinois is a hotspot for all types of asbestos-related litigation." Victor E. Schwartz *et al.*, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 Wash. U. J.L. & Pol'y 235, 243

(2004). In *Gregory v. Beazer E.*, 384 Ill. App. 3d 178, 179, 892 N.E.2d 563, 572 (2008), an Illinois appellate court finds that "in construction negligence cases such as this one, it is the general rule that an owner who employs an independent contractor to do work is not liable for the independent contractor's acts or omissions." The Court went on to explain that the fact that the premises owner "had the general right to stop work, monitor its completion and control access to the site" was insufficient to show that they "retain[ed] the degree of control necessary to impose liability upon it." *Id.* at 573–74. While not addressing the specific facts of an asbestos exposure case, the Court of Appeals for the Fifth District of Illinois, has also adopted the general rule that the premises owner must exercise substantial control over the activities of the independent contractor before liability will attach. *See Alvis v. City of Du Quoin*, 5-09-0543, 2011 WL 10500871 (Ill. App. Ct. Feb. 16, 2011).

C. Maryland

Maryland is unique in that in a case between an employer and an employee of an independent contractor, the courts will look to §414 of the Restatement (Second), which reads:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts §414 (1965). In *Wajer v. Baltimore Gas & Elec. Co.*, 157 Md. App. 228, 850 A.2d 394 (2004), the Maryland Appellate Court applied this particular section of the restatement to an asbestos claim for premises liability. In order for liability to attach to the premises owner, the plaintiff must show that they "had the right to control the details of [the asbestos installers'] movements during [their] performance of the business agreed upon." *Id.* at 402. (internal quotations omitted). In particular, the Court held that "[t]he key element of control, or right to control, must exist[ ] in respect to the very thing from which the injury arose." *Id.* (internal quotations omitted)." In the end, however, the Court found that the level of care was comparable to that found in §343 explaining that:

> Although the premise owner must exercise reasonable care to ensure that his or her property is safe for the employees of an independent contractor at the onset of the work, the owner will not stand in the shoes of the contractor for liability during the progress of work unless it is demonstrated that he or she has control of the details and the manner in which the work is to be accomplished."

Id. at 405 (internal quotations omitted).

D. Pennsylvania

In *Chenot v. A.P. Green Servs., Inc.*, 895 A.2d 55 (Pa. Super. Ct. 2006), the Pennsylvania Appellate court reaffirmed the state's adherence to the Restatement (Second) of Torts §343. The Court did note its continued adherence to the peculiar risk doctrine which states in relevant part that a premises owner may be liable to the employee of an independent contractor if:

> (1) a risk is foreseeable to the employer of an independent contractor at the time the contract is executed (that is, if a reasonable person in the position of the employer would foresee the risk and recognize the need to take special measures); and (2) the risk is different from the usual and ordinary risk associated with the general type of work done (that is, the specific project or task chosen by the employer involves circumstances that are substantially out-of-the ordinary).

Id. at 64. The state also continues to follow the superior knowledge doctrine which states that "[a] landowner's duty to warn exists irrespective of whether an independent contractor exercises full control over the premises if the landowner possesses superior knowledge, which places him in a better position to appreciate risks posed by a dangerous condition." *Id.* (internal quotations omitted). Ultimately, however, the appellate court left it up to the trial court to make a fact sensitive inquiry as to "[w]hether the risk of exposure to asbestos is different from the usual and ordinary risk associated with the general type of work done by [the contractor]. . . ." *Id.* at 67.

E. Texas

Texas has established an MDL for all asbestos cases. Texas Asbestos MDL Judge Mark Davidson rules on all motion practice, including admissibility of expert testimony, and conducts the pre-trial of all cases prior to a remand to the county of origin for trial. With respect to premises owners, Texas common law recognizes both negligent-activity and premises-liability theories of liability. Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 753 (Tex.1998). For claims of contractors claiming exposure from work on a defendant's premises, the Texas legislature enacted Chapter 95. Chapter 95 limits a premises owner's liability for injuries of an independent contractor unless the plaintiff can prove that the property owner (1) exercised or retained control over the manner in which the work was performed, and (2) had actual knowledge of the danger or condition resulting in the personal injury and failed to adequately warn of that danger. TEX. CIV. PRAC. & REM. CODE ANN. §95.003. Judge Davidson has found a fact issue, and therefore denied summary judgments, as to control based on a premises owner's instructions for the application of dry insulation as well as the use of scheduling software that put the plaintiff in close proximity to insulators. Judge Davidson also has found that even if a case is barred by Chapter 95, a plaintiff may proceed under a "negligent activity" theory for exposure caused by a premises defendant's employees. Judge Davidson has found that there is no "negligent supply of chattel" cause of action based upon a premises defendant's supply of the asbestos containing materials used at the plant.

F. West Virginia

Under West Virginia law, in determining the duty of the owner or occupant of the premises toward a party injured on the premises, the courts of West Virginia have traditionally ascertained the status of the injured party. Where the party has been deemed an invitee, the Court has stated:

> The owner or the occupant of premises owes to an invited person the duty to exercise ordinary care to keep and maintain the premises in a reasonably safe condition.

McMillion v. Selman, 456 S.E.2d 28, 30 (W. Va. 1995)

On the other hand, where the injured party is a licensee, the Court has applied a different rule:

> Mere permissive use of the premises, by express or implied authority ordinarily creates only a license, and as to a licensee, the law does not impose upon the owner of the property an obligation to provide against dangers which arise out of the existing condition of the premises inasmuch as the licensee goes upon the premises subject to all the dangers attending such conditions.

Id. The question of whether a person is a licensee or invitee has generally been resolved by focusing on the purpose of his visit. If the purpose was for the advancement of the business or interests of the occupant of the premises, then the entering party has generally been considered an invitee. On the other hand, if the purpose of the visit or entry on the premises has been for the visitor's pleasure, convenience, or benefit, he has generally been considered to be a licensee. *Id.* at 31.

An independent contractor who works on premises where his contract requires him to be is an invitee, and while thus engaged he is entitled to the protection of ordinary care on the part of the owner or occupier of the premises, and such invitee must be furnished a reasonably safe place in which to work. *Hall v. Nello Teer Co.,* 203 S.E.2d 145, 149 (W. Va. 1974). The owner or the occupant of a premise used for business purposes is not an insurer of the safety of an invited person present on such premises and, if such owner or occupant is not guilty of negligence or willful or wanton misconduct and no nuisance exists, he is not liable for injuries there sustained by such invited person. *Neely v. Belk Inc.,* 668 S.E.2d 189, 198-99 (W. Va. 2008) citing to *Puffer v. The Hub Cigar Store, Inc.,* 84 S.E.2d 145 (W. Va. 1954), *overruled on other grounds by Mallet v. Pickens,* 522 S.E.2d 436 (W. Va. 1999). In *Mallet v. Pickens,* the Court set forth guidelines for the trier of fact to ascertain whether a premises liability defendant has breached its legal duty of care by holding that:

> [i]n determining whether a defendant in a premises liability case met his or her burden of reasonable care under the circumstances to all non-trespassing entrants, the trier of fact must consider (1) the foreseeability that an injury might occur; (2) the severity of the injury; (3) the time, manner and circumstances under which the injured party entered the premises; (4) the normal or expected use made of the premises; and (5) the magnitude of the burden placed upon the defendant to guard against injury."

Neely, 668 S.E.2d at 570. The element of foreseeability is particularly crucial in premise liability cases because before an owner or occupier may be held liable for negligence, "he must have had actual or constructive knowledge of the defective condition which caused the injury." *Id.* citing to *Hawkins v. United States Sports Assoc., Inc.,* 633 S.E.2d 31, 35 (W.Va. 2006).

III. Bystander Exposure

Premises liability for bystander exposure injuries represents potentially expanding frontier in asbestos litigation. These claims attempt to extend the scope of premises liability beyond owner or occupier's property. Premises liability sounds in negligence. Therefore, a plaintiff who suffers an injury from asbestos exposure must prove that the defendant owed a duty of care to a person like the plaintiff, that the defendant breached that duty, and that this breach proximately caused the plaintiff's harm.

This section of the paper discusses whether a premises owner has a duty to an injured bystander who has never set foot on the owner's property. State courts are split in how they construe their duty analysis for bystander asbestos exposure. To determine whether a premises owner or employer owes a duty for bystander exposure, courts focus on either: (1) the foreseeability of the harm, (2) the relationship between the parties; or (3) the malfeasance or nonfeasance of the defendant. Consequently, before an attorney structures his or her defense, he or she should first determine whether the jurisdiction basis its duty analysis on the foreseeability of the injury or the relationship of the parties.

A. Foreseeability of the Harm

Many jurisdictions analyze the foreseeability of harm to determine the defendant's legal duty owed to the plaintiff. State courts in New Jersey, Washington, and Louisiana find that defendants owed a duty to the household members of employees because the danger that asbestos presented by them was foreseeable. Texas, on the other hand, has precluded creating a duty on the part of premises owners because the defendants could not have foreseen the harm.

Under the foreseeability school of thought, the defendant's knowledge is paramount. However, duty is not necessarily limited to known dangers, it also extends to unknown dangers as well. Courts analyze the

facts to determine whether a defendant "knew or should have known" of the dangers of household exposure. Meghan E. Flinn, *Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 Wash. & Lee L. Rev. 707, 715 (2014).

Courts also look at the time range of the exposure and whether a defendant should have known of the risks of secondhand exposure based on information thought to be available at that time. *Id.* 715-16. Additionally, courts consider the federal regulations or laws that existed at the time of the exposure to evaluate what the defendant should have known. *Id.* at 717.

B. Harm Foreseeable

Under New Jersey law, the imposition of a duty is based on foreseeability. In *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1148 (2006), the Supreme Court of New Jersey held that the premises owner Exxon Mobil owed a duty of care to the plaintiff's wife who died from mesothelioma allegedly caused by inhaling asbestos fibers while she handled and washed her husband's work clothes. It established a two-prong analysis for imposing a duty: (1) determine whether the danger is foreseeable; and (2) if so, determine whether imposing the duty would be fair. Barry N. Mesher & Jeffrey M. Odom, *The Current Status of the Potential Liability of Premises Owners*, at 138. Fairness involves balancing several factors, including "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." *Olivo*, 895 A.2d at 1149.

Olivo held that risk of injury to someone like the plaintiff's wife should have been foreseeable to Exxon Mobil. *Id.* The evidence showed that, by 1937, Exxon Mobil was aware of the risks that occupational asbestos exposure posed to employees who worked directly with asbestos. *Id.* To the extent that Exxon Mobil owed a duty to workers on its premises for the foreseeable risk of exposure to asbestos, it similarly owed a duty to spouses handling workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing. *Id.* In other words, the plaintiff was not required to prove that the harms of secondhand asbestos were known (or even knowable) at the time of exposure. Christopher W. Jackson, *Taking Duty Home: Why Asbestos Litigation Reform Should Give Courts the Confidence to Recognize A Duty to Second-Hand Exposure Victims*, 45 Wake Forest L. Rev. 1157, 1174 (2010). To presume that members of an employee's household would be exposed to the same risks as employees "require[d] no leap of imagination." *Olivo*, 895 A.2d at 1149.

C. Harm Not Foreseeable

In *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 461 (Tex. App. 2007), the Dallas Court of Appeals refused to extend liability for unforeseeable exposures to asbestos. The plaintiff sued Alcoa for household exposure. She claimed that she contracted mesothelioma by breathing asbestos dust on her husband's work clothes during 1953-1955 and 1957-1959. Although Congress enacted the Walsh-Healey Act in 1950s, the court concluded that the Act did not demonstrate to employers the dangers of non-occupational asbestos exposure. *See Id.* at 462.

Instead, the *Behringer* court relied on a 1965 case study that first discussed *non-occupational* exposure and the 1972 OSHA regulations that first imposed restrictions related to "take-home" exposure. *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 461-62 (Tex. App. 2007). Based on the record, the Court held that in the 1950s Alcoa neither knew, nor could have reasonably foreseen, that asbestos dust on worker's clothing taken home would have posed a risk of harm to family members. *Id.* at 462.

A Louisiana decision runs counter to the *Behringer* court's interpretation of the Walsh-Healey Act. In *Catania v. Anco Insulations, Inc.*, CIV.A. 05-01418-JJB, 2009 WL 3855468 (M.D. La. Nov. 17, 2009) the District

Court for the Middle District of Louisiana acknowledged that the Act applied solely to federal contractors. However, it held that its existence "evidence[d] a level of knowledge that pervaded the industry and [showed] a growing understanding and awareness of a serious problem regarding asbestos." *Id.* at *2. Therefore, unlike *Behringer*, the risk of asbestos caused by employees carrying it home on their clothing was foreseeable at the time of plaintiff's exposure in the 1950s. *Id.* (finding foreseeability based on the legislation existing at the time of the exposure).

D. Relationship Between the Parties

Duty is essentially an obligation to observe a particular course of action in relation to others. *See* William L. Prosser, *Handbook of the Law of Torts*, §53, at 324 (4th ed. 1971). It only makes sense that a majority of jurisdictions focus on the relationship between the defendant and the plaintiff. State courts in New York, California, Illinois, Maryland, Ohio, Michigan, Georgia, and Iowa base their duty analysis on the relationship between the parties. Furthermore, each of these states has uniformly rejected the duty of care in bystander exposure cases.

The New York Court of Appeals (*i.e.*, the highest court in New York) held that the premises owner, the Port Authority, did not owe a duty to its worker's (Mr. Holdampf) spouse who alleged take home asbestos exposure from her husband's work clothes. *In re New York City Asbestos Litigation* (*Holdampf v. A.C. & S. Inc.*), 840 N.E.2d 115 (N.Y. 2005). The court notably recognized that the defendant knew of the dangers of bystander asbestos exposure during the relevant time period of the alleged exposure. *Id.* at 118. The court explained that foreseeability alone does not define duty; rather, it merely determines the scope of the duty once it is determined to exist. *Id.* at 119. Moreover, foreseeability bears on the scope of a duty, not whether a duty exists in the first place. *Id.*

The Court agreed that landowner generally must exercise due care to avoid harming people offsite; however, the Court was not persuaded by other jurisdictions that held a duty was owed. Unlike *Olivo*, the Court did not rely on foreseeability in its duty analysis. Moreover, the Court distinguished *Olivo* factually. Unlike the landowner in *Olivo* that did nothing to prevent workers from bringing asbestos-covered clothing into the family home, the Port Authority supplied laundry services to its employees, but Mr. Holdampf chose not to comply with such risk reduction measures because he only used the services about half of the time. *Id.* at 120. It was up to him to comply with the risk reductions measure (such as not wearing the work clothes home). *Id.* at 120.

The court focused on public policy and determined that the extension of a duty of care to employers and premises owners under household exposure circumstances would create an unlimited asbestos liability. *Id.* at 122. The Court reiterated "the specter of limitless liability" was limited when " the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." Given the emphasis on a direct relationship, New York remains one of the safest states for premises owners with respect to bystander liability.

In *Campbell v. Ford Motor Co.*, 141 Cal. Rptr. 3d 390, 405 (Ct. App. 2012), the California Court of Appeals concluded that property owners owe no duty to protect family members of workers from secondary asbestos exposure. The court noted that even if Ford could foresee that workers on its premises could be exposed to asbestos an injury suffered by a worker's family member who never set foot on the premises is "far more attenuated." Furthermore, Court reiterated the public policy concerns discussed in *Campbell*. *Id.* at 402.

In a Delaware case applying Pennsylvania law, the court found no duty existed under the relationship analysis. *In re Asbestos Litigation*, 2012 WL 1413887, at *4 (Del. Super. Feb. 21, 2012). There, an employee sued the premises owner for his wife's contraction of mesothelioma. *Id.* at *1. The plaintiff alleged that his wife contracted the illness by washing his work clothes, which were covered with asbestos dust. *Id.* at *1.

To determine whether a duty exists, the Delaware court looked to the Pennsylvania Supreme Court for guidance and determined that Pennsylvania courts consider "several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." *Id.* at *2. (*quoting Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000)). In weighing the factors as a whole the scale tips in favor of no duty existing. *In re Asbestos Litigation*, 2012 WL 1413887, at *4.

E. Malfeasance vs. Nonfeasance

Some jurisdiction deviate from the bipolar foreseeability *versus* relationship of the parties framework. Delaware and Tennessee case have applied the Restatement (Second) of Torts to determine the defendant's liability in household asbestos exposure cases. The Restatement (Second) distinguishes between "misfeasance" and "nonfeasance." When an individual engages in acts of misfeasance, he or she owes a general duty to those whom his or her conduct harms. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 167 (Del. 2011). In contrast, when the person's acts constitute nonfeasance, no duty exists to protect others unless there is a "special relationship" between the parties. *Id.* Nevertheless, the outcome varies under this approach. *See infra*.

In Delaware, an employer does not owe a duty to protect third parties from harm because the defendant's inaction constituted nonfeasance. *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 170 (Del. 2011). The Delaware Supreme Court held that the defendant's failure to prevent its employee from taking his clothes home, or its failure to warn of the dangers of asbestos, constituted "pure nonfeasance." *Price*, 26 A.3d at 168-69. Thus, pursuant to the Second Restatement, the court stated that she must prove the existence of a special relationship between her and DuPont for DuPont to owe her a duty of care.113.

Whereas in *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 353 (Tenn. 2008), the Supreme Court of Tennessee characterized the defendant's conduct as misfeasance. The court believed Alcoa's conduct should be seen as an instance where risk is created through Alcoa's affirmative conduct that created a significant risk of harm to the decedent.

The Delaware courts held that an employer's failure to warn its employees of take-home exposure to asbestos constitutes nonfeasance, and the employer was not liable unless a "special relationship" existed between the parties. The Tennessee court, however, called such action misfeasance and required no showing of a special relationship between the parties to hold the premises own liable.

The variance in state court rulings is attributed to the different state approaches to determining the existence of a duty. Nevertheless, guiding trends exist that reconcile the different states courts decision with regard to imposition of duty upon a premise owner in bystander exposure cases. In jurisdictions where the duty analysis focuses on the relation between the parties and not simply the foreseeability of the injury, the courts uniformly hold that a premise owner owes no duty to family member from bystander exposure. In almost every case where a court used foreseeability as the primary consideration in duty analysis, the court has recognized a duty of care in take-home exposure cases. *In re Asbestos Litigation*, 2007 WL 4571196, at *11. In the outlier cases that focus on foreseeability yet find no duty, they do so based on evidence demonstrating a lack of knowledge about household exposure at the time the plaintiff's exposure occurred. Flinn, *Continuing War with Asbestos*, at 719.

IV. Fringe Claims

"Fringe claims"—claims that appear to be the very edge of a defendant's duty—soon become the status quo as they amass and survive summary judgment. The below section provides two examples of fringe premises liability claims that threaten to become the status quo.

A. The Next Generation of Claimants: Take-Home Claims by Children

As stated above, in take-home cases around the nation, courts have been forced to confront the "specter" of limitless liability. *In re New York City Asbestos Litigation*, 840 N.E.2d 115, 122 (N.Y. 2005). In *Miller v. Ford Co.,* the Michigan Supreme Court stated its legitimate fear of this specter when it aptly recognized:

> Plaintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes . . . .

In re Certified Questions from the Fourteenth Dist. Court of Appeals of Texas, 740 N.W.2d 206 (Mich. 2007) (original case name *Miller v. Ford Motor Co.*).

In *Miller,* the court decided whether premises owners owed a duty to the step-daughter of an independent contractor who relined the interior of the premises owners' blast furnaces. In holding that no duty exists, the court found that the claimants had asked the court to "recognize a cause of action that ***departs drastically*** from our traditional notions of a valid negligence claim." *Id.* at 220 (citing to *Henry v. Dow Chemical Co*., 701 N.W.2d 684 (Mich. 2005)) (emphasis added).

But despite the Michigan Supreme Court's strongly-worded rejection of the take-home claim in *Miller*, plaintiff attorneys have not been deterred from bringing similar—and even more attenuated—take-home claims of children in other jurisdictions.

Two years after *Miller*, the Sixth Circuit Court of Appeals decided *Martin v. Cincinnati Gas and Elec. Co.,* 561 F.3d 439 (6th Cir. 2009). In *Martin*, the claimant alleged that the decedent, the son of a former employee of premises-owning defendants, was exposed to asbestos from his father's clothes. Unlike *Miller*, where the exposure arose from the claimant actively laundering her step-father's dust-laden clothes, the decedent in *Martin* had a more attenuated exposure. As a child, the decedent played in the family home's basement, in close proximity to the laundry room. The claimant alleged that the decedent was exposed to asbestos while the dust-laden clothes were laundered. The court dismissed the claim on summary judgment, holding that the premises-owning defendants owed no duty to the decedent because the decedent's exposure was unforeseeable to the defendants at the time the father worked on their premises. Importantly, the court did not uniformly bar second hand exposure claims, but instead granted summary judgment on the case's specific facts. Without a uniform judicial bar on the take home claims of worker's children, plaintiff attorneys will continue to test the limits of duty with claims similar to *Miller* and *Martin*.

In 2012, a truly fringe claim was filed in Washington. In *Oudinot v. Boeing Co*., a 29-year old claimant diagnosed with mesothelioma brought claims against certain municipal defendant—alleging that she was exposed to asbestos from her father's clothes after he worked on said defendants' premises. *Oudinot v. Boeing Co,* Pierce County Sup. Ct. No. 11-2-07458-2 (Wash. 2012). Yet, unlike *Miller*, where the claimant's father worked in profession where asbestos was commonplace, the work of the *Oudinot* claimant's father consisted of simply delivering copy machines and computers. The claimant alleged that while delivering to the municipal defendants' premises, her father was exposed to airborne asbestos that was result of insulation being installed

and replaced on the premises. After his workday, the claimant's father then came home and played with his infant child. The dust on his clothes was allegedly inhaled by the claimant.

Based on its facts, *Oudinot* was a perfect fringe case. It involved a young claimant who would clearly draw the sympathies of a court and jury. Fortunately, the trial court resisted the urge to expand the premises owner's duty to farfetched defendants. The court granted the premises owners' motions for summary judgment, holding the exposure arising from the municipal defendants' property was too remote to submit to a jury. The claimant did not appeal the court's finding.

Miller, *Martin*, and *Oudinot* represent examples of a new generation of potential plaintiffs. Although the courts in *Martin* and *Oudinot* appropriately granted summary judgment under the unique facts of those cases, it is not hard to imagine a number of factual circumstances where these fringe claimants could withstand summary judgment. Only time will tell if courts are drawing a bright line distinction at the premises liability claims of worker's children, or, as these claimants continue to file, if they will soon represent the new status quo of asbestos premises liability litigation.

B. A "Specter" Realized: Claims by Workers at Commercial Enterprises

At least one form of the specter of limitless liability addressed in *Miller* has become a reality. Unfortunately, it was met with judicial approval.

In *Frieder v. Long Island R. R.,* a former diner cashier brought premises liability claims against a railroad. 966 N.Y.S.2d 835 (2014). Although the diner was owned by a third party, the diner operated on the premises of the railroad's maintenance facility. The claimant alleged that he was exposed to asbestos through the dust on hundreds of railroad employee's clothes who ate at the small diner.

The claimant testified that the employees made no effort to clean the dust off their clothes prior to eating at the diner. Although the claimant could not testify to the individual job duties of the railroad workers who ate at the trailer, the claimant entered into the record the testimony of other employees of the railroad who remembered working with asbestos.

In denying the railroad's motion for summary judgment, the court found as follows: (1) the railroad as premises owner controlled the circumstances of the diner and was in the best position to remedy any dangerous condition, and (2) the concern for limitless liability was circumscribed by the unique nature of the diner's operation on the railroad's premises. *Id.* at 841.

As result of the court's ruling in *Frieder*, we will likely see similar premises liability claims from third parties who operate on the premises of landowners. The employees of these vendors have the potential of representing a significant body of claimants as there are many circumstances in which third-party vendors operate facilities on another's premises—examples include a gift shop within a hospital or a coffee shop within a building.

The expanse of the duty owed by premise owners continues to evolve. Undoubtedly, the body of possible claimants has well exceeded the scope anticipated by any defendant. Yet, history suggests plaintiff attorneys will continue to push the limits of this duty by identifying new fringe claimants and, as such, continue to expand the breadth of asbestos litigation.