COMMENT

TAKING DUTY HOME: WHY ASBESTOS LITIGATION REFORM SHOULD GIVE COURTS THE CONFIDENCE TO RECOGNIZE A DUTY TO SECOND-HAND EXPOSURE VICTIMS

INTRODUCTION

Ever since American courts began recognizing claims against asbestos manufacturers in the early 1970s,[1] litigation in the field of occupational asbestos exposure has been one of the most divisive arenas in tort law. On the one hand, exposure to asbestos in the workplace has spawned what has justifiably been called "the worst occupational health disaster in U.S. history."[2] According to one widely cited study, occupational exposure before 1980 was projected to cause almost a quarter-million cancer-related deaths between 1985 and 2009 alone.[3] This level of damage clearly warrants compensation through tort law's role as a corrective justice mechanism.

On the other hand, asbestos litigation has become so rampant that many judges and commentators have long since concluded that the courts simply cannot handle these claims.[4] As former U.S. Attorney General Griffin Bell has written, "In the history of our legal system, no other type of litigation has been as profuse, long-standing, and difficult to resolve."[5] Several opinions of the United States Supreme Court have even acknowledged this problem, famously referring to the "asbestos-litigation crisis"[6] and the "elephantine mass of asbestos cases" that "defies customary judicial

1. *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 501–02 (2009) (noting that *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), was one of the earliest cases in which a court allowed an employee to sue an asbestos manufacturer for on-the-job exposure).

2. Dennis Cauchon, *'Nobody Can Plead Ignorance': At Least 1 Million Likely To Die Over 30 Years in Poor Nations*, USA TODAY, Feb. 8, 1999, at A1.

3. William Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality 1980–2030*, 3 AM. J. INDUS. MED. 259, 304 tbl.XXV (1982) (projecting annual death rates in five-year increments and showing an annual rate of 8206 deaths in 1982, rising to a peak annual rate of 9739 deaths in 1992, and declining to 7975 deaths annually by 2007).

4. *See infra* Part I.

5. GRIFFIN B. BELL, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS 2 (2002).

6. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

administration and calls for national legislation."[7] In the face of this "litigation crisis," it is not surprising that judges might be reluctant to embrace any new theory of liability that could further burden their dockets. Despite this reluctance, "take-home" asbestos-exposure plaintiffs advance just such a novel theory.

The majority of these "take-home" or "second-hand" cases adhere to the following blueprint (the facts of which reflect admittedly outdated gender stereotypes): An employee works for years for the defendant, coming into routine contact with asbestos dust at the defendant's facility. The defendant either does not supply laundry facilities for soiled work clothing or simply does not require that employees leave soiled clothing at the facility. Consequently, the employee wears his work clothing home and brings the dust with him. Several times a week, the plaintiff—the employee's spouse—launders her husband's work clothing, inhaling asbestos fibers in the process. Eventually, this regular exposure causes a very serious illness—an illness substantially similar to one caused by traditional occupational exposure. The spouse sues her husband's employer, advancing various theories of negligence. However, under the emerging majority view, the court dismisses the suit, holding that an employer can have no legal duty to an employee's spouse who never stepped foot inside the employer's facility.[8]

This Comment takes a critical look at "take-home" asbestos claims from a historical perspective and considers whether some courts have allowed the history of asbestos litigation to irrationally influence their no-duty holdings. Part I examines this history and summarizes some of the main reasons behind the sometimes unmanageable glut of asbestos injury claims. Part II reviews some recent reform efforts affecting asbestos litigation at the state level, many of which suggest that courts have begun to untangle the worst aspects of the crisis. Part III reviews existing case law on "take-home" asbestos claims and critiques the different approaches that courts have used to resolve the duty question in such cases. This Part concludes by arguing that certain courts have been unduly influenced by the history of asbestos litigation, and have failed to consider the impact that state reform efforts have made on the legal landscape. Finally, Part IV sets forth some concluding observations about how the treatment of duty in the *Restatement (Third) of Torts* impacts the types of policy-based arguments that are sometimes advanced in take-home asbestos cases.

7. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

8. *See, e.g.*, Riedel v. ICI Ams. Inc., 968 A.2d 17, 25–26 (Del. 2009); Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 939 (Ill. App. Ct. 2009); *In re* Certified Question from Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206, 222 (Mich. 2007).

I. THE BREAKING POINT—HOW ASBESTOS LITIGATION REACHED "CRISIS" LEVEL

Regular exposure to asbestos can lead to numerous diseases, including various types of cancer, asbestosis (scarring of the lung tissue), and pleural thickening (scarring of chest and lung membranes).[9] Despite the often tragic consequences of these diseases, however, the "crisis" that courts reference in discussing asbestos litigation is generally unrelated to health issues. From a legal perspective, the biggest problem that asbestos has caused has been the crippling effect it has had on the judiciary. In 1991, Chief Justice William Rehnquist appointed a special committee to investigate and report on the state of asbestos litigation.[10] In its report, the committee observed that "the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively."[11]

Since this report was released, the situation has only worsened. Through 2002, an estimated 730,000 individuals had filed asbestos exposure claims.[12] The total cost to defendants and their insurers through this same year was approximately seventy billion dollars.[13]

However, as numerous commentators have argued, asbestos litigation did not become the "longest running mass tort"[14] in American history without significant help from opportunistic plaintiffs' attorneys pushing dubious cases and from overwhelmed judges permitting those cases to proceed.[15] Based on the relevant literature, there appear to have been several major practices, discussed below, that have unnecessarily inflated the number of asbestos claims over the past several decades. Working in

9. STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 17–18 (2002); *see also* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 544–48 (1992) (classifying categories of asbestos-related injuries).

10. *See* Christopher J. O'Malley, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1110.

11. AD HOC COMM. ON ASBESTOS LITIG., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE 2 (1991).

12. STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 71 (2005).

13. *Id.* at 92.

14. Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 511 (2008).

15. *See* BELL, *supra* note 5, at 8–9; Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 CONN. INS. L.J. 477, 477–79 (2006); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 946–47 (2003); James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, MEALEY'S TORT REFORM UPDATE, Jan. 18, 2006, at 12.

combination, these practices have effectively "transformed asbestos litigation from a national tragedy into a national disgrace."[16]

A. Mass Screenings and Claims by Asymptomatic Plaintiffs

Perhaps the most troubling practice contributing to the asbestos litigation explosion was the use of mass x-ray screenings initiated by labor unions and attorneys in search of clients.[17] When conducting these screenings, attorneys would travel to industrial communities and solicit workers to submit to x-rays, which physicians who were retained by the attorneys then reviewed.[18] Before the screening, a worker would typically sign an agreement, pledging a specific percentage of any future legal recovery to the attorney's office if the x-ray revealed any asbestos-related lung abnormalities.[19] Aside from the fact that there was often no medically supported reason to conduct the screenings in the first place, the credibility and neutrality of the physicians who conducted these tests has since been largely undermined. As one judge concluded, "The interpretation of lung x-rays is more of an art than a science, and equally skilled [readers] can disagree as to the correct interpretation. . . . Certain pro-plaintiff [readers] were so biased that their readings were simply unreliable."[20]

As a direct and natural consequence of these mass screenings, courts saw a huge increase in occupational asbestos-exposure claims, many of which were made by plaintiffs with no outward symptoms of illness.[21] Many of these claims were filed by "exposure only" plaintiffs—persons who had been exposed to asbestos at some point, but who never actually developed any recognizable symptoms.[22] Instead, claims were filed after one of the for-hire physicians concluded that a worker's x-rays showed markings that were simply "consistent with" some asbestos-related disease.[23]

16. Henderson, *supra* note 15, at 12.

17. *See* Behrens & Goldberg, *supra* note 15, at 479; Schuck, *supra* note 9, at 564.

18. *See* Robin Jones, Comment, *Searching for Solutions to the Problems Caused by the "Elephantine Mass" of Asbestos Litigation*, 14 TUL. ENVTL. L.J. 549, 558 (2001).

19. *See* David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 12–13 (2003).

20. Owens Corning v. Credit Suisse First Bos., 322 B.R. 719, 723 (Bankr. D. Del. 2005).

21. *See* 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, 823 (2002) ("By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who have been exposed to asbestos but who, with rare exceptions, are completely asymptomatic.").

22. *Id.*

23. AM. BAR ASS'N, COMM'N ON ASBESTOS LITIG., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 6 (2003), http://www.cdc.gov/docket/archive/pdfs

Claims for nonmalignant injuries—including those made by plaintiffs with "little or no . . . functional impairment"—are estimated to have accounted for "[a]lmost all the growth in the asbestos caseload" throughout the second half of the 1990s and early 2000s.[24] According to one scholar who has written extensively on the subject, "[T]he 'asbestos litigation crisis' would never have arisen and would not exist today" without these "so-called 'exposure only' cases."[25]

In response to this deluge of claims filed by members of the plaintiff's bar, the Board of Governors of the American Bar Association created the Commission on Asbestos Litigation ("Commission"), which it tasked with recommending an industry-wide standard for the initiation of asbestos suits.[26] In its 2003 report, the Commission adopted a detailed standard for the filing of nonmalignant asbestos injury claims. The standard required all claims to be accompanied by extensive medical history reports and objective test results, and set specific minimum levels of lung impairment that a plaintiff must suffer before he could file a claim.[27] Under this standard, the diagnosing physician was also required to certify his conclusion that "the claimant's medical findings and impairment were not more probably the result of other causes revealed by [the] claimant's employment and medical history."[28] In other words, the physician could no longer simply file a report stating that a worker had symptoms that were "consistent with" asbestos exposure without inquiring about other potential contributing factors (e.g., smoking, exposure at previous jobs, etc.). Finally, the Commission urged Congress to enact federal legislation in line with these standards—legislation that it hoped would provide a fair and uniform solution to the asbestos litigation crisis.[29] While Congress has considered such a bill, no national legislation has been passed.[30]

As a brief aside, there *was* a time when plaintiffs had to file their claims before any serious symptoms developed. Under the "discovery rule," followed in most states, the statute of limitations starts to run on tort claims upon discovery of a legally cognizable

/NIOSH-015/020103-Exhibit12.pdf.

24. CARROLL ET AL., *supra* note 12, at 73.

25. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 272–73 (2001).

26. *See* AM. BAR ASS'N, *supra* note 23, at 4.

27. *Id.* at 1–3.

28. *Id.* at 2.

29. *Id.* at 17–18.

30. *See* Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 163 (2009). Despite the lack of federal legislation governing asbestos litigation, the Commission's report seems to have influenced statutory reform at the state level. *See infra* Part II.A.

injury.[31] And under the "single-action rule," a tort plaintiff generally must make one claim for all damages running from that injury.[32] Therefore, if a person who had been exposed to asbestos incurred even the slightest cognizable injury (minor scarring on the chest membrane, for example), but did not develop any symptoms causing impairment until years later, a defendant could attempt to dismiss the lawsuit on statute-of-limitations grounds. Under such a defense, the defendant would claim that the plaintiff suffered a cognizable injury when he developed pleural scarring and that any subsequent damages were the result of the same tortious act.[33] In other words, a plaintiff could either sue for "exposure only" or else risked losing any claim.[34]

To resolve this dilemma, courts adopted the "separate disease rule," which creates a separate statute-of-limitations start date for each successive and distinct disease or condition caused by asbestos exposure.[35] Under this rule, a person can now file a claim for mild scarring of chest membranes and still preserve his right to sue in the future if he develops a more serious illness. The adoption of the "separate disease rule," combined with the recent innovation of "inactive dockets,"[36] has eliminated any legitimate reason for asymptomatic parties to file anticipatory claims.

B. Abandoning the Typical Requirements of Causation and Injury

As explained above, the sheer volume of asbestos exposure claims filed in some jurisdictions has had a stifling effect on the proper administration of justice. When judges have been overwhelmed by claims, "[l]egal principles that normally require proof of causation and injury as conditions of recovery have been suspended in some jurisdictions in the context of the asbestos litigation."[37]

1. Proof of Causation

In pursuing a negligence claim, a plaintiff ordinarily must prove, among other things, that the defendant's actions were both

31. *See* DAN B. DOBBS, THE LAW OF TORTS § 218, at 554 (2000).
32. *See* Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 152 n.12 (2003).
33. Henderson & Twerski, *supra* note 21, at 820.
34. Schuck, *supra* note 9, at 563 ("In jurisdictions that treat unimpairing pleural conditions and subsequent impairing conditions as a single cause of action for statute-of limitations and single-judgment-rule (sometimes called the rule against splitting causes of action) purposes, plaintiffs probably file early to avoid a subsequent bar."); *cf.* Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 984–89 (1988) (describing this scenario as the "prematurity phenomenon" and discussing its impact on the settlement of cases).
35. *Norfolk & W. Ry. Co.*, 538 U.S. at 152.
36. *See infra* Part II.B.
37. BELL, *supra* note 5, at 9.

the "cause in fact" and the "proximate cause" of the plaintiff's injury.[38] When a plaintiff claims that an injury was caused by the actions of two or more actors, most courts hold that any defendant who was a *substantial factor* in causing the harm may be held legally responsible—the appropriately named "substantial factor" test.[39]

With this framework in place, the problem that most asbestos-exposure plaintiffs might *expect* to encounter in proving causation would be twofold. First, because of the long latency period between exposure and disease,[40] it could be difficult to find witnesses capable of identifying the specific products manufactured in the past by defendants named in a present lawsuit.[41] Second, even if a plaintiff succeeded in finding a capable witness, the manufacturer would likely no longer be an attractive target for litigation due to insolvency. Through the middle of 2006, "an estimated 85 companies [had] filed for bankruptcy claiming asbestos liabilities as the cause."[42]

Fortunately for plaintiffs, however, many courts in the past simply did not have time to verify product identification claims or to sort through complex issues of proof. As former U.S. Attorney General Griffin Bell observed in 2002 when discussing the litigation crisis: "In practice . . . plaintiffs invariably identify the product of solvent companies that have available funds to pay inventory settlements. The system rarely accommodates a determination of whether plaintiffs made [a] valid product identification, one of the most basic elements of establishing an asbestos tort."[43] When courts fail to require any concrete proof of causation, manufacturers and employers stand little chance of successfully defending against fact-based claims of liability for asbestos exposure. Clearly, this is not the way in which our tort system is designed to operate. And while lesser (and sometimes nonexistent) standards of causation may have helped some deserving plaintiffs to obtain compensation, these relaxed standards also depleted available resources for many other victims by encouraging questionable claims.[44]

38. *See* DOBBS, *supra* note 31, § 166, at 405, § 180, at 443.

39. *See id.* § 171, at 415–16.

40. *See Norfolk & W. Ry. Co.*, 538 U.S. at 168 (citing several medical journals that calculated the average time elapsed between exposure to asbestos and the manifestation of symptoms of various related diseases as between fifteen and forty years).

41. *See* BELL, *supra* note 5, at 11.

42. Martha Neil, *Backing Away from the Abyss*, 92 A.B.A. J. 26, 29 (2006).

43. BELL, *supra* note 5, at 11; *accord* David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & POL'Y 589, 636 (2008) ("Because of the practice of naming scores, sometimes hundreds, of defendants, product identification can be particularly weak, such as the vague recollection by a co-worker that a particular defendant's product was at a workplace.").

44. *See* Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE,

2. Proof of Injury

As discussed above, mass x-ray screenings initiated by attorneys and labor unions led to a massive surge in claims by asymptomatic plaintiffs—claims that were generally less expensive to settle than to defend in court. However, even when these claims did proceed to trial, courts frequently loosened their standards on the final (and perhaps most important) element of a tort claim: injury.[45]

In a standard tort action, "no claim for negligence will be recognized unless the plaintiff suffers actual harm."[46] Nevertheless, in the midst of the asbestos litigation crisis, courts sometimes overlooked this requirement. In one well-chronicled case, a jury awarded a total of $150 million to a group of six plaintiffs, none of whom had incurred a single dollar of medical expenses or missed a day of work due to asbestos-related sickness.[47] Despite the plaintiffs' lack of symptoms, the court allowed them to put on evidence of "asbestos-related conditions"—essentially imperfections appearing on x-ray film—to satisfy the "injury" element of their tort claims.[48] In other instances, courts have allowed "anticipatory claims" based on present fear of future sickness, increased risk of future sickness, or medical monitoring costs.[49] By allowing these types of claims to reach juries, trial courts placed even more pressure on defendants to settle, further depleting resources for those victims who really were sick.

C. Procedural Abuses—Irrational Forum Shopping and Improper Joinder

The volume of claims filed for asbestos exposure during the past several decades would be crushing for the judicial system even if these claims were evenly distributed throughout the country. However, this has not been the case. As the last millennium drew to a close, courts in just eleven states were handling over eighty percent of the nation's state-court asbestos litigation.[50] This concentration was not an accident, nor was it entirely the result of

Mar. 4, 2002, at 155, 155, 164 (observing that "asbestos defendants are very likely now paying compensation for every occupational disease known to man" and "the genuinely sick and dying will have no one left to collect from").

45. *See* BELL, *supra* note 5, at 10.

46. DOBBS, *supra* note 31, § 110, at 258.

47. *See* BELL, *supra* note 5, at 10 (describing the plaintiffs and exorbitant jury verdict in a Mississippi asbestos class action lawsuit); Parloff, *supra* note 43, at 155 (lamenting the absence of actual injury among the Mississippi plaintiffs).

48. Parloff, *supra* note 44, at 155.

49. *See, e.g.*, Mauro v. Raymark Indus., Inc., 561 A.2d 257, 263 (N.J. 1989); Henderson & Twerski, *supra* note 21, at 816–18.

50. Landin et al., *supra* note 43, at 599–600 (citing CARROLL ET AL., *supra* note 12, at 62).

concentrated industry in these states producing a disproportionately high number of injuries. Rather, this concentration developed, in part, in response to specific jurisdictions—referred to as either "judicial hellholes"[51] or "magic jurisdictions"[52] (depending on the perspective)—acquiring plaintiff-friendly reputations.[53] As dockets became otherwise unmanageable, judges in these jurisdictions would permit claims by plaintiffs with no logical connection to the forum, and then would manage cases in ways that gave those plaintiffs significant advantages at trial.[54]

Madison County, Illinois, which was named by the (admittedly biased) American Tort Reform Association as the top "judicial hellhole" of 2003,[55] presents a perfect example. During the height of the asbestos litigation crisis, judges in the county reportedly denied defense motions for summary judgment with such regularity that plaintiffs' attorneys eventually stopped bothering to even file responsive briefs in opposition to such motions.[56] Additionally, once a trial began, judges at times denied defendants the opportunity to even put on evidence to prove that the plaintiff's asbestos exposure occurred before he worked for the defendant.[57] In this climate, plaintiffs wielded massive bargaining power in any preverdict settlement negotiations.[58]

As word of these "magic jurisdictions" spread, and as plaintiffs flocked to them, judges were forced to develop innovative strategies for managing their caseloads. "Initially, some courts dealt with the enormous pressure on their dockets by joining dissimilar claims, either in mass consolidations or in clusters."[59] But these docket-management techniques backfired in some respect, as trial consolidations simply attracted even more claims. This phenomenon was summarized in the axiom, "[i]f you build a superhighway, there will be a traffic jam."[60]

As a practical matter, consolidations were a natural and well-intentioned solution for judges whose dockets were congested with

51. *See generally* AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2009–2010 (2009), http://www.atra.org/reports/hellholes/report.pdf.

52. *See* Benjamine Reid et al., *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001).

53. Behrens & Goldberg, *supra* note 15, at 487.

54. *See, e.g.*, Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235, 243–52 (2004) (detailing the specific history and practices of one such "judicial hellhole" that became an asbestos litigation "mecca").

55. AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES 2003, at 3 (2003), http://www.atra.org/reports/hellholes/2003/report.pdf.

56. Schwartz et al., *supra* note 54, at 249.

57. *Id.* at 250.

58. *Id.* at 251.

59. Behrens & Goldberg, *supra* note 15, at 485.

60. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

asbestos-related claims. Once filed, such claims required disposition. And considering the two options—either leaving claims untouched for years as sick plaintiffs accrued medical expenses or attempting to dispose of cases and securing *some* compensation for victims—these judges should not be vilified for their choices. As Professor Peter Schuck observed, however, this strategy did not come without its costs:

> Consolidation, to which some overburdened courts have . . . turned out of desperation, involves the aggregation of numerous asbestos claims into a single trial or a small number of group trials. The potential for horizontal inequity here is twofold. First, the criteria by which cases are chosen and grouped for consolidation are likely to be crude and categorical compared to the actual variability of the underlying claims. Second, the jury awards are also likely to be similarly crude and categorical.[61]

Once these procedural devices became ingrained in the standard operation of asbestos litigation, defendants had almost no choice but to settle all claims. "Going to trial in a jumbo case was a bet-the-company proposition, one that few defendants were willing to risk."[62] In this perpetual cycle of claims, consolidations, and settlements, it is not surprising that the courts rarely disposed of cases through judicial findings or jury verdicts.[63] Once again, both defendants and truly sick victims fell prey to the asbestos litigation crisis, as resources were largely depleted, often to pay claimants with no cognizable injuries. As described in the next Part, however, state courts and legislatures have responded to this crisis, creating hope that the worst may be over.

II. REVERSING COURSE—REASON FOR OPTIMISM AND TIME FOR REASSESSMENT

Until recently, the asbestos litigation situation in this country was undoubtedly a crisis. In the midst of this crisis, courts might have been entirely justified in rejecting any attempt to expand tort liability to a new group of plaintiffs, such as take-home asbestos claimants. However, developments over the past several years suggest that the states have solved some of the worst problems associated with asbestos litigation. Benefitting from the legal trends described below, judges may once again be in a position to dispose of claims on their individual merits. If used properly and consistently, these innovations should protect defendants from

61. Schuck, *supra* note 9, at 566 (footnotes omitted).

62. Parloff, *supra* note 44, at 164.

63. Faulk, *supra* note 15, at 954 ("There is a stark reality underlying results [of asbestos litigation settlements]: *nothing was truly decided regarding the merits of the controversies*.").

frivolous claims and, most importantly, should reserve compensation for sick plaintiffs who have been injured by the negligence of readily identifiable tortfeasors.

A. Barring Claims by Unimpaired Plaintiffs

As explained above, lawsuits filed by parties who had been exposed to asbestos—but who showed no real signs of disease—accounted for a large proportion of asbestos-related tort claims in the past.[64] To remedy this problem, and to ensure that compensation is reserved for those plaintiffs who are actually sick, lawmakers and judges in many states have taken action.

A handful of state courts actually solved the problems associated with unimpaired claimants before the asbestos litigation crisis even began. Courts in seven states—Arizona, Delaware, Hawaii, Maine, Maryland, Massachusetts, and Pennsylvania—have all ruled that mere exposure to asbestos, without present physical impairment, is insufficient to satisfy the "injury" requirement of a tort cause of action.[65] Under such a regime, would-be plaintiffs who are not impaired need not worry about a statute-of-limitations defense to their exposure claims because no legally cognizable injury has yet occurred.

On the legislative side, some state lawmakers have enacted "medical criteria" statutes, which establish objective diagnostic standards for plaintiffs filing asbestos-exposure claims.[66] To date, criteria laws have been passed in Ohio,[67] Texas,[68] Florida,[69] Kansas,[70] South Carolina,[71] and Georgia.[72] Of particular note, the first three states to pass such laws—Ohio, Texas, and Florida—had

64. CARROLL ET AL., *supra* note 12, at 73.

65. *In re* Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1566–67 (D. Haw. 1990); *In re* Mass. Asbestos Cases, 639 F. Supp. 1, 2–3 (D. Mass. 1985); Burns v. Jaquays Mining Corp., 752 P.2d 28, 29 (Ariz. Ct. App. 1987); *In re* Asbestos Litig. Leary Trial Grp., Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763, at *3 (Del. Super. Ct. June 14, 1994), *rev'd on other grounds sub nom*. Mancari v. A.C. & S., Inc., 670 A.2d 1339 (Del. 1995) (unpublished table decision); Bernier v. Raymark Indus., Inc., 516 A.2d 534, 543 (Me. 1986); Owens-Ill. v. Armstrong, 591 A.2d 544, 560–61 (Md. Ct. Spec. App. 1991), *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md. 1992); Simmons v. Pacor, Inc., 674 A.2d 232, 236–37 (Pa. 1996).

66. *See* Behrens, *supra* note 1, at 505–06; Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts To Control the Asbestos Litigation*, 37 SW. U. L. REV. 671, 677–81 (2008); Philip Zimmerly, *The Answer Is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets To Better Facilitate Asbestos Litigation*, 59 ALA. L. REV. 771, 778–84 (2008).

67. *See* OHIO REV. CODE ANN. §§ 2307.91–.96 (LexisNexis 2010).

68. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001–.003, 90.005–.012 (West 2009).

69. *See* FLA. STAT. §§ 774.201–.209 (2007).

70. *See* KAN. STAT. ANN. §§ 60-4901 to -4911 (2009).

71. *See* S.C. CODE ANN. §§ 44-135-10 to -110 (2009).

72. *See* GA. CODE ANN. §§ 51-14-1 to -13 (2009).

previously been among the nation's leaders in the number of asbestos-exposure filings per state.[73] According to attorneys who specialize in asbestos litigation in these states, the statutes have made an immediate and significant impact on both the total number of claims being filed and on the quality of those claims.[74] Assuming these trends continue, medical-criteria laws should eliminate many of the problems that have overwhelmed judges and frustrated commentators in the past.

B. Inactive Dockets

To solve potential statute-of-limitations issues and to ensure that the most seriously injured claimants can be compensated, many jurisdictions have created special "inactive dockets"—also known as "pleural registries"—for asbestos cases.[75] In these jurisdictions, parties who have been exposed to asbestos but have yet to develop any symptoms of asbestos-related illnesses can file claims, but do not proceed immediately with litigation.[76] By filing on the inactive docket, these plaintiffs ensure that their claims will not be time-barred. If an inactive-docket plaintiff ever develops an actionable injury, he can simply petition the court to be placed on the regular trial docket and proceed to litigate his claim as normal.[77]

The first formal inactive docket for asbestos claims was established in Massachusetts in 1986.[78] Since that time, jurisdictions in seven other states have adopted inactive docket plans specifically for these claims.[79] At its core, the device is simply another tool for judges to utilize in managing their caseloads, similar to the mass consolidations of the past. However, unlike mass consolidations, pleural registries prioritize claims for sick plaintiffs and allow for case-by-case determinations of causation, liability, and injury. In this respect, they represent a balancing of interests that ultimately protects the most deserving plaintiffs.[80]

C. Imposition and Enforcement of Procedural Rules

Until recently, certain state courts had "vastly liberalized, to the point of ignoring altogether, traditional rules governing joinder,

73. *See* CARROLL ET AL., *supra* note 12, at 62.

74. *See* Peter Geier, *States Taking Up Medical Criteria: Move Is To Control Asbestos Caseload*, NAT'L L.J., May 22, 2006, at 1, 21.

75. David G. Owen, *Against Priority*, 37 SW. U. L. REV. 557, 561 (2008).

76. Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 286–87 (2003).

77. *Id.*

78. *See id.* at 288.

79. Behrens, *supra* note 1, at 507–08.

80. For a persuasive and thorough argument in support of mandatory deferral registries, see generally Schuck, *supra* note 9.

choice of law, and venue to allow the bringing of so-called mass tort actions."[81] However, the past several years have seen something of a return to normalcy in this area, even in traditionally plaintiff-friendly jurisdictions. Since 2004, high courts in several states have severed or prohibited massive asbestos claim consolidations that would have almost certainly been allowed in the past.[82] In addition, Ohio amended its Rules of Civil Procedure in 2005 to prevent joinder in asbestos cases unless either: (1) all parties consent to the joinder, or (2) the claims all relate "to the same exposed person and members of the exposed person's household."[83]

At least three other states have passed legislation preventing the types of huge trial consolidations[84] that previously existed as powerful tools for attorneys trying to extract settlements. Statutes in Georgia and Kansas track the language of the Ohio rule, requiring separate trials unless the parties unanimously consent to joinder, or unless all claims are made by the members of a single household.[85] The Texas law is similar, providing that "[u]nless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial."[86]

In a similar vein, courts that were previously willing to hear cases filed by plaintiffs with no logical connection to the jurisdiction have started to enforce venue rules.[87] Other states that previously did not have venue statutes have enacted such laws in the past decade.[88] By striving to eliminate procedural abuses, these reform efforts have refocused attention on the individual merits of specific cases, conserved resources, and prevented unimpaired plaintiffs from enjoying the "piggyback effect" of mass settlement agreements.[89]

D. Requiring Actual Proof of Causation

As discussed earlier, when trying asbestos-related cases in the past, courts frequently relaxed the common law requirement of causation, allowing plaintiffs to simply list numerous still-solvent

81. Henderson, *supra* note 15, at 12.

82. *See, e.g.*, Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493, 495 (Miss. 2004); Prohibition on "Bundling" Cases, Mich. Sup. Ct. Admin. Order No. 2006-6 (Aug. 9, 2006).

83. OHIO R. CIV. P. 42(A)(2).

84. Behrens, *supra* note 1, at 512.

85. GA. CODE ANN. § 51-14-11 (2009); KAN. STAT. ANN. § 60-4902(j) (2009).

86. TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (West 2009).

87. *See, e.g.*, Gridley v. State Farm Mut. Auto. Ins. Co., 840 N.E.2d 269, 277–78 (Ill. 2005).

88. *See* Behrens & Goldberg, *supra* note 15, at 497 ("State legislatures are taking their courts back from 'litigation tourists' by enacting venue and *forum non conveniens* reforms.").

89. *See* Parloff, *supra* note 44, at 164; Schuck, *supra* note 9, at 566–67 (describing the inequities that naturally occur in settlements when dissimilar asbestos-exposure claims are consolidated).

manufacturers without any specific proof of exposure to those manufacturers' products.[90] However, as dockets have become somewhat more manageable, it appears that judges have begun taking a renewed interest in the previously ignored element of causation.[91]

Ironically, the test that most recent opinions employ for proving causation in asbestos cases was announced in 1986, before the litigation crisis truly took hold. In *Lohrmann v. Pittsburgh Corning Corp.*, the Fourth Circuit Court of Appeals rejected the plaintiff's argument that "if a plaintiff [could] present any evidence that a company's asbestos-containing product was at the workplace . . . a jury question [would be] established as to whether that product contributed as a proximate cause to the plaintiff's disease."[92] Instead, the court adopted what has since been known as the "frequency, regularity, and proximity test."[93] Under this test, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."[94]

Over the past decade, this "frequency, regularity, and proximity" test has been endorsed in several states, as appellate courts increasingly grant or uphold summary judgment for defendants on causation grounds.[95] In addition to the increased use of the *Lohrmann* standard, courts have begun relying on both scientific studies and advanced methods of product identification to determine causation issues during summary disposition.[96] Due to the other reforms described above, which have reduced the total number of filings, it appears as though courts in many states are once again able to require plaintiffs to prove causation in asbestos tort suits. Assuming this trend continues, increasing judicial

90. BELL, *supra* note 5, at 11 ("The system rarely accommodates a determination of whether plaintiffs made valid product identification, one of the most basic elements of establishing an asbestos tort.").

91. *See* Landin et al., *supra* note 43, at 634 & n.179.

92. Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986).

93. *See* Henderson v. Allied Signal, Inc., 644 S.E.2d 724, 727 (S.C. 2007) ("In determining whether exposure is actionable, we adopt the 'frequency, regularity, and proximity test' set forth in *Lohrmann v. Pittsburgh Corning Corp.* . . . .").

94. *Lohrmann*, 782 F.2d at 1162–63.

95. *See, e.g.*, Chavers v. Gen. Motors Corp., 79 S.W.3d 361, 369–70 (Ark. 2002); Gorman-Rupp Co. v. Hall, 908 So. 2d 749, 757–58 (Miss. 2005); *Henderson*, 644 S.E.2d at 727; Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 770 (Tex. 2007).

96. *See* Landin et al., *supra* note 43, at 632–33 (noting *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603 (N.D. Ohio 2004), in which the judge relied on medical literature and epidemiological studies in rejecting expert testimony that a "single fiber" of asbestos could be the cause of disease).

scrutiny of asbestos claims should serve as further evidence that the asbestos litigation crisis is waning.

As a whole, the reforms described in this Part are pivotal because they remove many of the unfair advantages that plaintiffs enjoyed throughout the asbestos litigation crisis. Of central importance, however, is the fact that none of the reforms described above seek to bar claims by deserving plaintiffs who have suffered cognizable and foreseeable injuries. Rather, these reform efforts appear to be designed to benefit sick plaintiffs by conserving resources and prioritizing the claims of the most deserving parties.[97]

III. TAKE-HOME ASBESTOS CASE LAW

In the past ten years, appellate courts in around a third of the states have been called on to decide whether an employer that allows employees to carry asbestos home on their clothing can be held legally responsible for injuries sustained by the employees' family members. Obviously, each case is unique, and some decisions have involved more variables than others. However, enough law has been established in this area that some courts and commentators have identified a basic pattern. As one court observed:

> The courts that ultimately recognize the existence of a duty . . . 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

97. There are, of course, exceptions to this general conclusion. For example, Ohio passed a law in 2004 that barred all claims against premises owners "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." OHIO REV. CODE ANN. § 2307.941(A)(1) (LexisNexis 2010). Like many other reforms, the law was passed to address the crippling mass of claims associated with asbestos litigation. As the legislature observed in 2003 as part of the affiliated session law, "The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike." 2003 Ohio Laws 3970, 3988.

However, the result in a recent take-home asbestos case suggests that the Ohio law generates the very type of unfair results that the law was intended to prevent. In *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010), the Ohio Supreme Court held that the statute categorically bars all take-home asbestos claims against employers when exposure occurs off the employers' premises. *Id.* at 449. Under the plain language of the statute, the court was required to dismiss the claim, regardless of whether the employer may have otherwise owed a duty to the decedent. *Id.* at 452–53. In concurring with the judgment, one justice wrote that while she was "not without compassion for [plaintiffs'] position" that the statute created an absolute bar to recovery, judges simply cannot "impose [their] views as to the best policies to address asbestos claims." *Id.* at 454 (O'Connor, J., concurring). By excluding an entire class of claims without properly considering the consequences, the Ohio law seems to address a finely nuanced problem with all the precision of a sledgehammer.

> that no duty exists have focused on the relationship—or lack of a relationship—between the employer and the injured party.[98]

In addition to this general-foreseeability-special-relationship dichotomy, however, another pattern has begun to emerge. In finding that there can be no duty to take-home asbestos plaintiffs, several courts have employed sweeping statements of public policy, opposing the potentially crushing surge of litigation that might follow if they recognized such a duty to nonemployees. These broad statements typically reference the asbestos litigation crisis and warn against the risk of opening yet another floodgate of liability in an area that has already tortured the judiciary for decades.

Finally, some decisions have turned primarily on whether a court characterizes an employer's actions as "nonfeasance," the failure to take some action to protect others,[99] or "misfeasance," an affirmative negligent act that harms others.[100] This characterization can be pivotal. Under the widely followed *Restatement (Second) of Torts* position, acts of misfeasance create an affirmative duty to act reasonably in carrying out any activities that may cause harm to others.[101] On the other hand, nonfeasance is generally only actionable if some special relationship exists between the parties.[102]

For the purposes of this Comment, the appellate cases on take-home asbestos can be divided into three categories. In each case, the relevant issue on appeal was whether an employer should have a duty to protect members of its employees' households from the risk of second-hand asbestos exposure. The categories are as follows: (1) cases in which courts have found a duty to members of the employee's household; (2) cases in which courts have found no liability based on the plaintiffs' failures in pleading or proof; and (3) cases in which courts have found no duty to family members based both on a lack of relationship between the parties and on broad policy concerns about rampant asbestos litigation.[103] The discussion

98. Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 361 (Tenn. 2008); *accord* Behrens, *supra* note 1, at 546–48 (listing states subscribing to each theory of duty analysis).

99. *See* RESTATEMENT (SECOND) OF TORTS § 314 & cmt. c (1965).

100. *See id.* § 302 & cmt. a.

101. *Id.* § 302 cmt. a.

102. *Id.* §§ 302 cmt. a, 314.

103. Absent from the following discussion is one of the more recent state high-court decisions addressing the duty question in a take-home asbestos case, *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009). In *Van Fossen*, a take-home asbestos claim was filed on behalf of the wife of an independent contractor's employee against the company that hired the independent contractor. *Id.* at 691. Because the case involved an independent contractor, the court followed the *Restatement (Second)* approach, under which an employer of an independent contractor has only a limited duty to third parties, absent various exceptions. *Id.* at 696–97. Finding no such exception, the court upheld summary judgment for the defendant. *Id.* However, since the Iowa court's decision turned largely on the presence of an independent

that follows is intended to further illustrate these different approaches that courts have employed in take-home cases. It is also meant to provide insight as to why, in light of the reforms discussed earlier, sweeping policy arguments about crushing liability have overstayed their welcome in asbestos litigation.

A. Findings of Duty Owed by Employers to Victims of Take-Home Asbestos

Perhaps the most comprehensive analysis of the duty issue in a take-home asbestos case was undertaken by the Tennessee Supreme Court in *Satterfield v. Breeding Insulation Co.* in 2008.[104] In that case, the injured claimant was the daughter of an employee. The defendant, who was apparently aware of the risks of take-home asbestos, failed to educate its employees about these known dangers and took no action to stop employees from wearing contaminated work clothing home.[105] On appeal, the defendant argued that imposing a duty to an employee's family "would improperly create an affirmative obligation to act despite the absence of any special relationship between [defendant] and [plaintiff]."[106] The court rejected this argument, holding that by routinely allowing asbestos fibers to leave its property, the employer was creating an unreasonably dangerous condition—a standard case of misfeasance.[107] Perhaps more importantly, the court also rejected an argument that a finding of duty in this case would unfairly expose defendants to infinite liability from a limitless universe of plaintiffs. Instead, it noted that "in light of the magnitude of the potential harm from exposure to asbestos and the means available to prevent or reduce this harm, we see no reason to prevent [even nonfamilial injured parties] from pursuing negligence claims against an employer" for second-hand asbestos exposure.[108]

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contractor relationship, this case is materially distinguishable from every other case discussed in this section and was therefore excluded.

104. Satterfield v. Breeding Insulation Co., 266 S.W.3d 347 (Tenn. 2008).

105. *Id.* at 353.

106. *Id.* at 354–55.

107. *Id.* at 364.

108. *Id.* at 374. It should be noted that this rule—with its emphasis on the magnitude of the risk, the probability of resulting harm, and the burden of taking adequate precautions—moves dangerously close to a full-scale "standard of care" analysis under the Learned Hand formula for determining breach based on an individual set of facts. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). The incorporation of such particularized inquiries into a court's determination of whether a duty should be imposed, as a matter of law, has been rightly criticized at times. *See, e.g.*, W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 671 & n.2, 701 & n.182 (2008). For purposes of this Comment, however, the Tennessee court's holding is instructive. That is, the court's reasoning demonstrates a flat rejection of a defendant's policy-based "crushing liability" argument, which was based, in part, on the historical asbestos litigation crisis.

This general model of analysis has been followed in several other states that have recognized an employer's duty to exercise reasonable care toward employees' family members in take-home asbestos cases. For example, in *Rochon v. Saberhagen Holdings, Inc.*, a Washington state appellate court rejected the defendant's attempt to characterize a failure to prevent take-home asbestos exposure as mere nonfeasance.[109] The court acknowledged that the employer had no generalized duty to protect the plaintiff from "outside forces," but held that the employer *was* required to protect her from the unsafe manner in which it had operated its own facility.[110] The defendant-employer in this case also advanced the familiar policy argument that extending a duty to employees' families would lead to "endless litigation."[111] The court wisely rejected this argument, noting that the duty would only extend to reasonably foreseeable victims of take-home asbestos (e.g., family members), and that fact-finders would retain the power to limit the extension of employers' liability, when appropriate, on causation grounds.[112]

As noted above, other state courts deciding take-home asbestos claims have used foreseeability as the primary basis for finding that an employer has a duty to act reasonably toward its employees' families. In the most far-reaching of these decisions, *Olivo v. Owens-Illinois, Inc.*, the New Jersey Supreme Court held that an employer owed such a duty in a case in which the employer was simply aware of the risks that occupational asbestos exposure posed to *employees who worked directly with asbestos*.[113] In other words, the plaintiff was not required to prove that the dangers of *second-hand asbestos* were known (or even knowable) at the time of exposure. According to the court, the conclusion that members of an employee's household would be exposed to the same risks "require[d] no leap of imagination."[114] This approach likely goes too far, as it essentially charges employers with constructive knowledge of a risk that medical professionals had not yet confirmed at the time the plaintiff was exposed. Nevertheless, since adopting this liberal stance on the duty issue in 2006, there are no reports of New Jersey trial courts being overwhelmed by second-hand exposure claims. At

109. Rochon v. Saberhagen Holdings, Inc., No. 58579-7-I, 2007 WL 2325214, at *3 (Wash. Ct. App. Aug. 13, 2007).

110. *Id.*

111. *Id.* at *4.

112. *Id.*

113. Olivo v. Owens-Ill., 895 A.2d 1143, 1149 (N.J. 2006) ("[T]o the extent [defendant] owed a duty to workers on its premises for the foreseeable risk of exposure to . . . asbestos and asbestos dust, similarly, [defendant] 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.").

114. *Id.*

least anecdotally, New Jersey's experience offers persuasive evidence that other courts have overstated the danger of permitting take-home asbestos claims.

Finally, and most recently, an appellate court in Illinois agreed that an employer may have a duty to protect the family of its employees from the risks of take-home asbestos exposure.[115] In *Simpkins v. CSX Corp.*, the defendant-employer argued that imposing a duty to employees' families in take-home cases "would expose employers to limitless liability to 'the entire world.'"[116] In rejecting this argument, the Illinois court began with the bedrock principle that "every person owes every other person the duty to use ordinary care to prevent any injury that might naturally occur as the reasonably foreseeable consequence of his or her own actions."[117] Taking the plaintiff's allegations as true for the purposes of ruling on a motion to dismiss, the court held that the risk of take-home exposure was reasonably foreseeable, the likelihood of injury from such exposure was substantial, and the burden on an employer to guard against the risk was relatively low.[118] In rejecting the defendant's "unlimited liability" argument, the court observed that "the scope of liability will be inherently limited by the foreseeability of the harm."[119] In other words, the court believed that the recognition of a duty to employees' family members—the highly foreseeable victims of take-home asbestos exposure—would not necessarily lead to the next great wave of lawsuits in the asbestos litigation crisis.[120]

B. No-Liability Determinations Based on Specific Claim Deficiencies

Of course, just because a court finds that an employer was not liable for failing to protect against take-home asbestos does not necessarily mean that the court was misguided. Each case is different, and courts will sometimes have perfectly valid reasons for granting a defendant's motion for summary judgment on duty grounds. A review of the cases addressing take-home asbestos claims reveals two such scenarios: (1) when a plaintiff fails to plead a valid cause of action under existing law in the jurisdiction; and (2) when the dangers of take-home asbestos were unknown at the time of exposure, making the employer's failure to protect against such a risk reasonable as a matter of law.

115. Simpkins v. CSX Corp., 929 N.E.2d 1257, 1258–59 (Ill. App. Ct. 2010).
116. *Id.* at 1265.
117. *Id.* at 1261–62.
118. *See id.* at 1264–65.
119. *Id.* at 1265.
120. *See id.* at 1265–66.

1. Pleading Deficiencies

In *Riedel v. ICI Americas Inc.*, the Delaware Supreme Court reviewed a suit by an employee's spouse who based her complaint solely on theories of nonfeasance.[121] The plaintiff produced evidence that the employer was aware of the danger of asbestos during the period when her husband worked there, and that the employer did not take action to prevent the spread of asbestos fibers beyond the walls of its facility.[122] However, under Delaware law, which adheres to the *Restatement (Second) of Torts* approach, an act of *nonfeasance* gives rise to a duty only when some form of special relationship exists between the parties.[123] Finding no such relationship between the plaintiff-spouse and the defendant-employer, the court affirmed summary judgment for the employer.[124] Importantly, the court rejected the plaintiff's midtrial attempts to recharacterize her allegations as claims of misfeasance since she had alleged only nonfeasance before the trial court.[125] If the plaintiff had been successful in recasting her claims, the court may have reached a different conclusion in this case.[126]

Similarly, the Appellate Court of Illinois affirmed summary judgment for a defendant-employer in a case affected by even more blatantly defective pleading. In *Nelson v. Aurora Equipment Co.*, the plaintiffs, as administrators of the decedent's estate, advanced a negligence claim based on just one theory—premises liability.[127] Unfortunately for the plaintiffs, the decedent had never been on the defendant's land—a prerequisite under Illinois premises liability law.[128] In ruling for the employer, the court concluded, almost regretfully, that "[w]e must consider whether a duty arises within the context of the cause of action actually pleaded, not whether some other theory of liability not pleaded would dictate a different result."[129] Based on the Illinois court's holding in *Simpkins*,[130] it

121. Riedel v. ICI Ams. Inc., 968 A.2d 17, 18 (Del. 2009).

122. *Id.* at 19.

123. *Id.* at 22 (citing RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965)).

124. *Id.* at 26–27 ("There are no valid arguments that [plaintiff] and [defendant] shared a legally significant relationship under [the *Restatement (Second)* duty provisions].").

125. *Id.* at 25.

126. Recall that comment a to section 302 provides that "[a]nyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965). Thus, had the plaintiff not been precluded from reframing her complaint, the court likely would have found that a reasonable employer with knowledge of the dangers of asbestos would have provided uniforms or laundry facilities for its employees to protect against the risk of take-home asbestos injuries.

127. Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 934 (Ill. App. Ct. 2009).

128. *Id.* at 935.

129. *Id.* at 934.

130. *See supra* notes 115–20 and accompanying text.

seems that this pleading deficiency may have spoiled an otherwise potentially successful claim.

2. Employer's Actions Not Unreasonable as a Matter of Law

Perhaps the easiest decisions courts make regarding the duty question occur in cases in which the plaintiff fails to put on evidence that the employer either knew or should have known about the dangers of take-home asbestos. Since the vast majority of states use foreseeability as a significant factor in determining whether a duty exists,[131] actual or constructive knowledge of the relevant risk becomes a central consideration. Defendants in these jurisdictions simply cannot be charged with a duty to protect against a risk of which they possessed (or should have possessed) no knowledge at the time the risk was created.

This was the exact situation the Sixth Circuit Court of Appeals encountered in 2009 when deciding a take-home asbestos case under Kentucky law.[132] In that case, *Martin v. Cincinnati Gas & Electric Co.*, the decedent had been exposed to asbestos dust on his father's work uniform during the period from 1952 to 1963.[133] Evidence presented at trial showed that the defendant could not have known about the risks of take-home asbestos until 1965.[134] In framing its duty analysis, the court noted that "[i]n Kentucky, there is a universal duty of care which requires 'every person . . . to exercise ordinary care in his activities to prevent foreseeable injury.'"[135] Judging from the evidence presented at trial, an employer could not possibly have foreseen the risk from second-hand asbestos exposure; therefore, an employer's duty of reasonable care could not have included a duty to warn or protect against this risk.

In *Alcoa, Inc. v. Behringer*, the Court of Appeals of Texas employed a similar rationale in holding, on foreseeability grounds, that an employer had no duty to an employee's family members in a take-home asbestos case.[136] There, the plaintiff had been exposed to second-hand asbestos from 1953 to 1955, and again from 1957 to 1959.[137] Based on evidence produced at trial, the court concluded that the dangers of nonoccupational asbestos exposure were not a matter of industry-wide knowledge until sometime between 1965 and 1972.[138] Because of the timing of this plaintiff's exposure, the

131. *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1260 (2009).

132. Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439 (6th Cir. 2009).

133. *Id.* at 441.

134. *Id.* at 445 ("Plaintiff's expert report concedes that the first studies of bystander exposure were not published until 1965.").

135. *Id.* at 444 (quoting Lee v. Farmer's Rural Elec. Coop. Corp., 245 S.W.3d 209, 212 (Ky. Ct. App. 2007)).

136. Alcoa, Inc. v. Behringer, 235 S.W.3d 456 (Tex. App. 2007).

137. *Id.* at 458.

138. *Id.* at 461.

employer could not have had any duty to protect the plaintiff from second-hand asbestos because even a reasonable employer would not yet have known of such a risk.

C. No-Duty Determinations Influenced by Broad Policy Concerns

As explained above, several courts have determined, on perfectly rational bases, that an employer had no duty to warn or protect victims of take-home asbestos exposure. When a plaintiff fails to advance an actionable theory in her complaint, or when the court finds that the defendant could not have possibly been aware of the risks of take-home exposure, a court is certainly justified in holding that the employer had no duty to warn or protect an employee's family. However, in a very different line of cases, courts have based their no-duty determinations largely on broad policy grounds. These decisions cite concerns about the overwhelming number of suits and the limitless pools of potential plaintiffs that would suddenly emerge if courts recognized take-home asbestos claims. However, given the recent efforts that states have made to control the asbestos litigation crisis, courts must take care not to base their decisions on the "sky-is-falling" rhetoric of the past thirty years of asbestos litigation. The cases that follow mark the most striking examples of this faulty approach.

In *CSX Transportation, Inc. v. Williams*, the Supreme Court of Georgia flatly rejected the notion that an employer could ever have a legal duty to protect victims of take-home asbestos exposure, regardless of how foreseeable the exposure and the harm may have been.[139] The victims in that case were all family members of the defendant's employees and had all developed serious illnesses from asbestos exposure.[140] In denying the existence of a duty, the court expressed concern about creating a new cause of action for a nearly limitless class of plaintiffs.[141] As described above, asbestos-related illnesses are typically caused by some level of prolonged and regular exposure; therefore, plaintiffs with actual injuries would always have more than incidental contact with asbestos. Nevertheless, the court casually concluded that an employer should not have a duty to "all who might come into contact with an employee or an employee's clothing outside the workplace."[142]

This holding is a perfect example of a court panicking at the first mention of expanded liability related to asbestos exposure. In light of the reform efforts of the past decade, asbestos defendants no longer need to fear claims from remote plaintiffs who occasionally encounter the defendant's employees on the street. Under the

139. CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005).
140. *Id.* at 208.
141. *Id.* at 210.
142. *Id.*

"frequency, regularity, and proximity" test for proving causation,[143] the universe of potential plaintiffs in most cases could not possibly extend beyond members of an employee's household. These family members are highly foreseeable victims of take-home asbestos, since employers are likely to have records of their employees' spouses and dependent children. Family members are also usually the only claimants who could encounter the type of prolonged exposure that could cause the types of injuries recognized under state medical criteria laws.[144] By barring the claims of highly foreseeable and severely injured plaintiffs, the court in *Williams* regrettably seemed to forget that asbestos litigation reform has focused primarily on weeding out less deserving claims and on conserving resources for the truly sick.

In a similar case, the Supreme Court of Michigan reversed a wrongful death verdict for a take-home exposure plaintiff and held that the defendant could not have owed a duty to a person who was never on its property and with whom it had no independent relationship.[145] The court framed its duty analysis as a balancing of competing policy interests, stating that "the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty."[146] In calculating these "social costs," the court suggested that imposing a duty in second-hand exposure cases would be inappropriate, "because protecting every person with whom a business's employees . . . come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden."[147] Importantly, the court used the "asbestos-litigation crisis" as a basis for its holding, reiterating the Supreme Court's famous description of the "elephantine mass of asbestos cases"[148] that had overwhelmed judges for decades.

By invoking the history of asbestos litigation and relying on the Supreme Court's powerful language, the Michigan court certainly made its no-duty ruling seem rational. The underlying premise is simple—if courts cannot even handle the claims they have now, then why should they open the door for more suits, especially when a no-duty rule could solve the problem so easily? Unfortunately, this argument ignores two key points that were described above. First, most of the problems associated with unmanageable dockets during the asbestos litigation crisis stemmed from "exposure-only"

143. *See supra* notes 90–94 and accompanying text.
144. *See supra* notes 64–74 and accompanying text.
145. *In re* Certified Question from Fourteenth Dist. Court of Appeals of Tex., 740 N.W.2d 206, 209–10 (Mich. 2007).
146. *Id.* at 211.
147. *Id.* at 217.
148. *Id.* at 219.

claimants, not from truly sick individuals.[149] And second, finding a duty in the limited context of a take-home exposure case is entirely different from creating a tort cause of action for every person who may come into contact with an employee's clothing. The Michigan court, in explaining its policy-based concerns, overlooked the limiting effect that the causation requirement would have on the potential scope of a take-home exposure duty, just as the Georgia court did in the *Williams* case.[150] Nevertheless, by approaching the duty issue against the backdrop of the asbestos litigation crisis of the 1980s and 1990s—rather than by examining how asbestos claims were proceeding in 2007—the court reversed a jury verdict for a decedent whose injuries were as foreseeable as they were lethal.

The New York Court of Appeals reached the same result in 2005, finding that an employer owed no duty to an employee's wife after balancing several factors, including the purportedly likely prospect of uncontrolled liability.[151] In so doing, the court rejected the plaintiff's rational argument that a duty to prevent take-home exposure injuries could be limited to members of employees' households.[152] It held instead that only a blanket prohibition on take-home asbestos claims could control the potentially unmanageable expansion of employer liability.[153] In concluding its duty analysis, the court addressed what it believed would be the "likely consequences" of reaching a contrary result: "While logic might suggest (and plaintiffs maintain) that the incidence of asbestos-related disease allegedly caused by the kind of secondhand exposure at issue in this case is rather low, experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality."[154]

Because so few take-home asbestos cases had been decided at the time the New York opinion was written, one can only conclude that the "experience" to which the court referred was experience with asbestos litigation in general. Assuming this is true, this argument suffers from all of the same flaws as the other cases discussed in this Subpart. Again we see a court panicking at the first mention of expanding asbestos-exposure liability, without pausing to consider the effect that state reform efforts have had in this field. In this instance, the court even admitted that take-home claims were unlikely to become a common occurrence. Nevertheless, it declined to recognize a duty because of its "general experience"

149. *See* CARROLL ET AL., *supra* note 12, at 73; Brickman, *supra* note 25, at 272–73.

150. *See* CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005).

151. *In re* N.Y. City Asbestos Litig., 840 N.E.2d 115, 119 (N.Y. 2005).

152. *Id.* at 122.

153. *Id.*

154. *Id.*

with asbestos litigation in the past.

In each of the cases described in this Subpart, courts appeared to issue no-duty rulings based on outdated ideas about the state of asbestos litigation in this country. Obviously cases involving occupational asbestos exposure are not going away just yet. However, as the previous Parts of this Comment have demonstrated, states have found numerous ways to control the most troubling aspects of the asbestos litigation crisis. Most importantly, reform efforts have accomplished their purpose without adversely affecting those individuals who most deserve compensation—sick and dying victims of asbestos exposure whose injuries are the direct and foreseeable result of third-party negligence. Ignoring the basic spirit behind such reform efforts, courts that have barred all take-home claims on broad policy grounds seem to believe that any limitation of liability is a good limitation.

IV. USING THE *RESTATEMENT (THIRD)* AS A MODEL FOR EXAMINING TAKE-HOME CASES

Because principles of tort law ultimately present questions of state law that are subject to idiosyncratic value judgments,[155] it is helpful to conclude this discussion by reviewing a uniform regime of sorts. Section seven of the *Restatement (Third) of Torts* provides just such a model. The revised *Restatement*, with its broad treatment of duty and its policy-based exception to recognizing a duty, provides insight for courts attempting to answer the duty question in take-home asbestos cases. This section provides as follows:

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.[156]

In many ways, this approach is just a simplification of the factor-based balancing approach employed by many courts in making duty determinations.[157] Subsection (b) provides an

155. *See* Kenneth S. Abraham, *Stable Divisions of Authority*, 44 WAKE FOREST L. REV. 963, 967 (2009) ("[T]here can be no dispute that the scope of particular tort-liability doctrines reflects value choices that are often contestable at the margin. Some states go one way, and others go the other way.").

156. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (2010).

157. *See, e.g.*, Palka v. Servicemaster Mgmt. Servs. Corp., 634 N.E.2d 189, 193 (N.Y. 1994) ("Courts traditionally and as part of the common-law process fix

exception to the basic obligation to exercise due care, but limits no-duty holdings to particular classes of cases.[158] Critics of a policy-based tort defense have attacked this form of duty analysis as being inconsistent with the corrective-justice goals of negligence law.[159] However, as the take-home asbestos cases demonstrate, this type of broad policy-based exception to an ordinary duty of care is already being employed by courts around the country.[160]

The *Restatement (Third)* position is critical in this regard because it emphasizes the *extraordinary nature* of such a policy-based exception. By instructing that a countervailing policy should create a no-duty rule only in "exceptional cases," this rule clarifies the limited nature of this exception.[161] Take-home asbestos exposure cases often involve an employer that knew its employees were wearing asbestos-covered clothing home and knew that those employees lived with their families. When the employer either knew or should have known about the potentially fatal risks of second-hand asbestos exposure, it strains logic to refer to such a class of cases as "exceptional."

This section of the *Restatement (Third)* also reiterates a proposition that many courts seem to have forgotten—that when an actor creates a risk of harm to others, he should be charged with a duty to exercise reasonable care in carrying out his activities.[162] Comment (o) to section seven of the *Restatement (Third)* further clarifies this point, providing that "[a]n actor's conduct creates a risk when the actor's conduct or course of conduct results in greater risk to another than the other would have faced absent the conduct."[163]

Rather than focusing on this seemingly obvious principle, some courts have become distracted by attempts to characterize take-home cases in terms of misfeasance versus nonfeasance.[164] And rather than focusing on recent reform efforts, these same courts

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the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.").

158. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010); *see also* Cardi & Green, *supra* note 108, at 703; Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty To Exercise Reasonable Care*, 44 WAKE FOREST L. REV. 899, 918 (2009).

159. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 750 (2001).

160. *See supra* Part III.C.

161. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010).

162. *Id.* § 7(a).

163. *Id.* § 7 cmt. o.

164. *See, e.g.*, Rochon v. Saberhagen Holdings, Inc., No. 58579-7-I, 2007 WL 2325214, at *3–4 (Wash. Ct. App. Aug. 13, 2007).

have instead recited sweeping policy statements that ignore the current reality surrounding asbestos litigation—that it may finally be under control.[165] By mischaracterizing the current state of asbestos litigation, courts create the illusion of an "exceptional case" in which "an articulated countervailing principle or policy warrants denying or limiting liability."[166] However, recent reform efforts should prompt courts to reevaluate this exception and focus instead on the most basic of all rules in negligence jurisprudence—one who creates a risk of physical harm should have a legal duty to exercise reasonable care.[167]

CONCLUSION

In light of the history surrounding asbestos litigation in this country, it is certainly understandable that judges might be squeamish about opening the door for any new theories of negligence liability. Over the past forty years, asbestos claims have placed an unprecedented strain on the courts, at times making it practically impossible for judges to distinguish worthy claims from frivolous ones, and blameworthy defendants from innocent ones. However, the past decade has been marked by vast improvements, as state courts and legislatures have found ways to solve many of these problems. Importantly, they have strived to do so by prioritizing the claims of the sick and dying, and by filtering out less deserving claims. In light of these developments, courts have a responsibility over the coming years to take a fresh look at take-home asbestos claims. These claims should not be summarily dismissed on broad policy grounds simply because of the abuses and mistakes of the past.

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165. *See supra* Part II.

166. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010).

167. *Id.* § 7(a).

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