
James Nowak in National Law Journal

James Nowak was quoted extensively in the September 24, 2007 issue of The National Law Journal on the increase in asbestos litigation.

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Courts grapple with 'take home' asbestos

Increase in suits, with mixed results. Tresa Baldas / Staff reporter

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A new breed of asbestos lawsuits has been hitting the courts in which plaintiffs are suing employers over secondhand exposure to chemicals brought into the home on clothing. These so-called "take-home" asbestos lawsuits, however, are getting mixed reviews from judges.

In Washington, a state court of appeals ruled on Aug. 27 that families of workers who inadvertently bring asbestos home on clothes may now file their own claims against the employer, paving the way for potentially hundreds of plaintiffs to hold employers liable for asbestos-related illnesses. *Rochon v. SaberHagen Holdings Inc.*, No. 58579-7-I (Wash. Ct. App.).

In Louisiana, an appellate court in December affirmed a \$3 million trial verdict awarded to a man whose wife died from mesothelioma after repeated exposure to his work clothes. *Chaisson v. Avondale Indus. Inc.*, 947 So. 2d 171, 183 (La. Ct. App.).

In New Jersey, the state Supreme Court ruled early last year that a company can be liable for a person's secondhand exposure to asbestos chemicals. The case involved a husband who was exposed to asbestos at work, and alleged that his wife died of mesothelioma after years of washing his clothes. *Olivo v. Owens-Illinois Inc.*, No. a-23-05 (N.J.).

Two cases rejected On the flip side, the Michigan Supreme Court in July rejected a take-home case against Ford Motor Co., finding that Ford did not have a duty to protect a daughter from asbestos exposure because the plaintiff never set foot on the company's premises, and Ford had no special relationship with the plaintiff. The plaintiff alleged she became sick from exposure to her stepfather's clothes. *Miller v. Ford Motor Company*, No. 131517 (Mich.).

In California, a jury in October 2006 found that DaimlerChrysler Corp wasn't responsible for the asbestos-related illness of a woman who claimed she became ill through exposure to relatives who worked as auto mechanics. But, the jury did find that DaimlerChrysler had negligently exposed the woman to asbestos - the negligence just wasn't a "substantial factor" in causing her sickness. *Price v. DaimlerChrysler Corp.*, No. RG06254616 (Alameda Co., Calif., Super. Ct.).

"We are absolutely seeing more of these take-home cases," said James Nowak, who defends companies in toxic tort cases and is currently handling a number of lawsuits concerning asbestos taken home from the workplace. "I think that in regard to the take-home cases, [the courts] are leaning towards the plaintiffs' bar," Nowak said. Nowak of Kenney Shelton Liptak Nowak, a defense firm based in Buffalo, N.Y., believes that the uptick in take-home cases is largely due to the fact that so few asbestos manufacturers and suppliers are around anymore, as most have filed for bankruptcy. There's no one left to sue, he said, so plaintiffs are shifting their attention to employers who used their products. "The plaintiffs' bar, to their credit, is very creative in how they keep asbestos litigation going," Nowak said. "There are many defendants that are now involved in asbestos litigation where 10 to 15 years ago they weren't."

Women filing the suits Timothy Corrison of Connell Foley in Roseland, N.J., who also defends companies in asbestos litigation, said women in particular are filing an increase in take-home asbestos lawsuits, most of them claiming that asbestos was brought into their home by their husbands, fathers or uncles. Corrison said at the heart of these cases is determining whether secondhand exposure is sufficient enough to cause a disease. Meanwhile, Corrison said, employers are concerned about this new frontier of asbestos litigation "because it opens up a whole other class of potential plaintiffs."

But legal recourse for plaintiffs injured by secondhand asbestos exposure is long overdue, countered Matthew Bergman, who won the recent take-home case before the Washington Court of Appeals. "Essentially, this is an emerging issue within toxic tort litigation," Bergman said. "In Washington, prior to this latest ruling, different trial courts had reached different results. A number of trial courts had said an employer has no legal duty to family members of employees, even if it should know that the employees' families face a risk of exposure." But the latest appeals court ruling changes all that, noted Bergman of Seattle's Bergman & Frockt. Bergman's case involved a man who for more than 10 years worked around asbestos products at a paper mill. His wife, who washed his clothes, died in 2004 of mesothelioma. The lawsuit blamed her death on cancerous materials brought into the home from her husband's workplace. According to Bergman, Kimberly Clark Corp., which owned the mill, had successfully argued in a lower court that it had no duty of care to the woman because the potential for harm was not foreseeable. But the Washington Court of Appeals overturned the lower court's ruling, holding that "Kimberly Clark had a duty to prevent injury from an unreasonable risk of harm it had itself

created." "It is clearly an issue of first impression in the state of Washington," Bergman said of the ruling. "It paves the way for more meritorious claims." Kimberly Clark's lawyer, John Michael Mattingly of Steven V. Rizzo in Portland, Ore., was unavailable for comment.