



## CALIFORNIA'S LATEST LITIGATION INVITATION: A DUTY TO PROTECT AGAINST "TAKE-HOME" EXPOSURE

by Curt Cutting

In late 2016, the Supreme Court of California addressed an issue that has divided courts across the country: whether employers and landowners owe a duty to protect off-site persons from “take home” or “household” exposures (those exposures to asbestos and other toxins carried home by workers on their person or clothing). Most courts addressing this issue, including two intermediate appellate courts in California, have declined to recognize such a duty. However, the California Supreme Court unanimously rejected the view held by a majority of state courts and recognized a duty in *Kesner v. Superior Court*.<sup>1</sup>

Courts in other jurisdictions have concluded that imposing a duty in take-home cases runs contrary to fundamental principles of public policy. Those courts have emphasized the remoteness of any connection between the defendant’s conduct and the plaintiff’s claimed injury, given that most take-home plaintiffs never had any direct contact with the defendant and are typically unknown to them.

Courts rejecting take-home claims have also cited the intolerable burden that would be placed on defendants if they are exposed to lawsuits from a potentially limitless pool of plaintiffs who could claim take-home exposures. Of even greater concern, perhaps, is that imposing such a duty would permit plaintiffs to expand the number of defendants in most mesothelioma lawsuits, which already include dozens of defendants. As a result, complex cases will become even more unwieldy and an enormous burden will be shifted to classes of employers, premises owners, and other businesses who have not previously been the target of these lawsuits.

The California Supreme Court, however, swept these concerns aside. The *Kesner* court started its analysis from the premise that California law imposes a general duty of care on everyone, owed to everyone else, “to take ordinary care in the conduct of one’s activities.”<sup>2</sup> The court acknowledged that prior California cases have carved out exceptions based on various public-policy principles. But the court held that of these factors, foreseeability of harm to the plaintiff is the most important. The court then framed the issue in take-home cases as primarily a question of “whether household exposures were categorically unforeseeable.”<sup>3</sup>

By focusing on the foreseeability of exposure, the court sidestepped the defendant’s main foreseeability argument in *Kesner*—that even if take-home exposures were foreseeable, there was no scientific consensus during the relevant time period that any *harm* would result from the sort of sporadic,

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intermittent exposures claimed by plaintiff Johnny Kesner. He said that as a child he regularly visited his uncle, an Abex employee who came home with asbestos dust on his clothing. The California Supreme Court concluded that household exposures were foreseeable as of 1972, when the federal Occupational Safety and Health Administration (OSHA) adopted regulations requiring employers to provide changing rooms and special clothing for employees who might face significant exposures. Although there was no evidence that Kesner's uncle experienced such exposures, the supreme court concluded that the OSHA regulations put Abex on notice of a *potential* risk (essentially, a *risk of a risk*), and therefore warranted imposition of a duty of care.

The California Supreme Court distinguished the contrary out-of-state and federal authorities on the premise that foreseeability is more important in California than in jurisdictions that place more weight on the relationship between the parties (or the lack thereof). The court partially addressed the potentially boundless scope of take-home liability by holding that take-home claims can be pursued only by "household members" of the defendant's workers.<sup>4</sup> Thus, a plaintiff who regularly carpooled with a worker, but was not part of the worker's household, could not bring a take-home claim. That limitation, however, does nothing to address the problem of plaintiffs who have their own occupational exposures and will now sue take-home defendants for marginally adding to the cumulative dose or exposure.

Although *Kesner* was an asbestos case, the issue of take-home liability is not limited to that context. Plaintiffs have asserted claims for household exposures to various other toxins, including beryllium, creosote, formaldehyde, lead, perchloroethylene, radioactive materials, and even ordinary cleaning solutions. Presumably, this list will expand now that *Kesner* recognized employers' responsibility for off-site persons' exposure.

It remains to be seen how the California Supreme Court's opinion will sway courts in other jurisdictions that have not yet addressed the issue. Even California has yet to determine whether *manufacturers* owe the same duties as employers and landowners to prevent third-party exposures. The California Supreme Court noted that, unlike the employer-defendant in *Kesner*, manufacturers of toxic substances have no control over the workplaces in which their products are used, and thus "have no control over the movement of asbestos fibers once the products containing those fibers are sold."<sup>5</sup> The California Supreme Court concluded that the duty analysis for manufacturers would "differ significantly" from the analysis for employers and landowners. As California's asbestos docket continues to be one of the largest in the nation, the duty of manufacturers is likely to come before the California appellate courts and may be a pivot point for courts in other jurisdictions as they consider the limits of expanded asbestos liability.

## **Endnotes**

<sup>1</sup> 210 Cal. Rptr.3d 283 (2016).

<sup>2</sup> *Id.* at 292 (citation omitted).

<sup>3</sup> *Id.* at 291.

<sup>4</sup> *Id.* at 297.

<sup>5</sup> *Id.* at 307.