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Calif. High Court Creates Take-Home Asbestos Liability

By **Daniel Siegal**

Law360, Los Angeles (December 1, 2016, 11:01 PM EST) -- The California Supreme Court on Thursday held that employers can be held liable for injuries caused by secondhand asbestos exposure suffered by the household members of employees exposed to the material, ruling employers have a duty to prevent their workers from carrying asbestos home with them.

In a 39-page unanimous ruling, the state's seven-member high court held that it is appropriate to expand the general duty of care that employers have to keep their employees safe from foreseeable harm to include bearing liability when members of the employees' households suffered repeated, prolonged exposure to asbestos fibers originating with the employer. The court also held this expanded duty of care also applies to property owners who use asbestos on their property.

"Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission," Justice Goodwin Liu wrote for the panel.

The ruling came in a consolidated appeal of two separate suits appeals of suits seeking to hold brake lining manufacturer Pneumo Abex LLC and BNSF Railway Co. liable for asbestos-related injuries suffered by the nephew of a Pneumo employee, and the wife of a man who worked at a BNSF rail yard, respectively.

Justice Liu wrote that employers and property owners should have been able to reasonably predict that if they needed to keep their employees safe from asbestos — which is undisputed — then they should also have known they had to ensure the workers weren't incidentally taking the dangerous material home with them, stuck on their clothes and person, where other people might be exposed to it.

"It is a matter of common experience and knowledge that dust or other substances may be carried from place to place on one's clothing or person, as anyone who has cleaned an attic or spent time in a smoky room can attest," he wrote.

As a result of the ruling, the court affirmed a lower appeals court's ruling finding Pneumo Abex can be held liable for the mesothelioma suffered by Johnny Blaine Kesner, whose uncle worked for the company in the 1970s, should the lower courts find that Kesner was a member of his uncle's household.

Pneumo Abex attorney Lisa Perrochet of Horvitz & Levy LLP told Law360 on Thursday that she was disappointed the ruling "opened the door to vastly expanding" the number of defendants that will have to defend against asbestos-related injury claims, as well as allowing existing asbestos claim plaintiffs to add on "take-home" claims against the premises owners and employers of other people in their household.

"I appreciate that the court emphasized that a duty finding is not the same as a liability finding, because these claims are really marginal at best," she said. "But the burden of responding to all

these claims, even when they are meritless, is still enormous.”

Representatives for BNSF and the plaintiffs did not immediately respond to requests for comment on Thursday.

Kesner filed suit in 2011 against 19 defendants after he was diagnosed with mesothelioma, but specifically alleged that Pneumo Abex bore liability because his uncle worked at the company's factory and was exposed to asbestos — asbestos that traveled in the uncle's clothing to his home, where Kesner was a regular visitor for years, according to the parties' appellate briefing.

A trial court granted nonsuit on Kesner's negligence claim against Abex, but a lower appeals court reversed that ruling, finding that Abex could be held liable for that secondhand exposure

Perrochet had argued during **September's oral arguments** that it was not foreseeable for Pneumo Abex in the 1970s that it had to guard against take-home exposure, especially since it was meeting Occupational Safety and Health Administration regulations governing worker exposure to asbestos at the time.

In the other case at issue in Thursday's ruling, the three children of the deceased Lynn Haver accused the predecessor company of BNSF Railway Co. of having responsibility for Haver's mesothelioma, which they contended she developed due to exposure to the clothes of her husband, who worked at an asbestos-containing BNSF rail yard.

In that suit, the trial court granted BNSF's bid to dismiss the suit, and that judgment was affirmed by a state appeals court.

During oral arguments, Michael B. Gurien of Waters Kraus & Paul, representing the Haver children, urged the panel to reverse that ruling, arguing that even as early as the 1930s and 1940s governments and companies recognized the take-home hazard of asbestos.

On Thursday, the high court agreed to an extent, with Judge Lui writing that cases of mesothelioma caused by take-home exposure to asbestos were known as early as 1965, and that OSHA regulations as early as 1972 clearly contemplated the possible dangers of secondary exposure to asbestos.

The court reversed the dismissal and remanding the Haver suit for further proceedings.

Kesner is represented by Josiah W. Parker of Weitz & Luxenberg PC and Ted W. Pelletier of Kazan McClain Satterley & Greenwood APLC. Haver is represented by Paul C. Cook and Michael B. Gurien of Waters Kraus & Paul.

Pneumo Abex is represented by Lisa Perrochet and Robert H. Wright of Horvitz & Levy LLP and Edward R. Hugo, James C. Parker and Jeffrey Kaufman of Brydon Hugo & Parker. BNSF is represented by Selim Mounedji of Sims Law Firm LLP and Veronica Lewis, Theodore J. Boutrous Jr., Joshua Lipshutz and Alexander M. Fenner of Gibson Dunn & Crutcher LLP.

The cases are Johnny Blaine Kesner v. Superior Court of California and Joshua Haver v. BNSF Railway Co., case numbers S219534 and S219919, respectively, both in the Supreme Court of California.