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A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure†

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I. Introduction

The killer of as many as 265,000 people by the year 2015.[1] The cause of illness for 10,000 people per year.[2] "[T]he longest-running mass tort litigation in the United States."[3] The reason over $70 billion was spent in litigation costs through 2002.[4] The source of over 400 pending cases in the state of Delaware alone as of October 2012.[5] "[A] tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s."[6]

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1. JUDICIAL CONFERENCE OF THE U.S. AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991).

2. Perry Cooper, *As Asbestos Litigation Enters Sixth Decade, New Approaches to Old Problems*, OCCUPATIONAL SAFETY & HEALTH DAILY (BNA) OHD Issue No. 27 (Feb. 8, 2013), *available at* www.bloomberglaw.com.

3. *Id.*

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

5. Telephone Interview with Judge John A. Parkins, Jr., Super. Ct. of Del., New Castle Cnty. (Oct. 31, 2012).

6. Anchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997) (quoting JUDICIAL CONFERENCE OF THE U.S. AD HOC COMM. ON ASBESTOS LITIG., REPORT OF

These phrases describe the unexpected and devastating effects of asbestos, a natural mineral with chemical and physical characteristics that have made it extremely useful for industrial work.[7] Since the early 1900s, asbestos has affected American workers in almost every industry, including the manufacturing, shipbuilding, insulation, and automobile industries.[8] The federal government has now classified asbestos as a human carcinogen because exposure to asbestos can increase the risk of lung cancer, mesothelioma (a cancer of the lining of the chest cavity), and asbestosis (a nonmalignant lung disorder).[9] These disorders represent just a few of the health hazards posed by asbestos exposure.[10] In fact, asbestos is responsible for approximately half of the deaths caused by occupational cancer, and though use of asbestos has decreased, the number of those affected by asbestos-related illnesses continues to rise.[11]

Legal scholar Victor E. Schwartz summarizes the current state of asbestos litigation: "The war is still being waged but the battlegrounds have shifted to new issues."[12] The "next decade of asbestos litigation" looks to the consequences of asbestos exposure extending beyond industrial workers.[13] Industrial workers' family members have increasingly brought claims of "take-home" asbestos

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THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991)).

7. *See Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST. (May 1, 2009), http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos (last visited Jan. 28, 2014) (describing the nature of asbestos fibers) (on file with the Washington and Lee Law Review).

8. *See id.* (listing the industries in which asbestos exposure has most likely occurred).

9. *See id.* (stating that asbestos causes different cancers of the lung).

10. *See id.* ("In addition to lung cancer and mesothelioma, some studies have suggested an association between asbestos exposure and gastrointestinal and colorectal cancers, as well as an elevated risk for cancers of the throat, kidney, esophagus, and gallbladder.").

11. *See* WORLD HEALTH ORG., ELIMINATION OF ASBESTOS-RELATED DISEASES 1 (2006), http://www.who.int/occupational_health/publications/asbestosrelated diseases.pdf (describing the impact asbestos exposure has had on public health). Even if industries stop using asbestos, because the signs of asbestos-caused diseases do not materialize until many years after the exposure, the number of asbestos-related deaths will remain steady for several more decades. *Id.*

12. Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1, 32 (2012).

13. *Id.* at 20.

exposure (also designated as "secondary exposure," "bystander exposure," or "nonoccupational exposure") against the workers' employers. The claimants allege that they contracted asbestos-related illnesses from exposure to the asbestos fibers brought home on a family member's work clothes.

Though these claimants never entered the employer's facility, they argue that the employer who used asbestos on his premises should have known of the dangers posed by the mineral. They contend that the employer had a duty, as an employer or as a premises owner, to prevent the asbestos fibers from contaminating households either by warning the family or by ensuring that workers changed clothes prior to returning home. Oftentimes, the plaintiffs in these cases are spouses who had laundered their husbands' asbestos-covered work clothes after he returned from his employer's facility each day. The victims of take-home asbestos exposure also include children of asbestos workers who had contact with their father while he wore his contaminated work clothes.[14]

Take-home asbestos exposure represents a new method for prolonging asbestos litigation. Lawsuits arising from take-home asbestos exposure have been finding their way onto the dockets of state courts, which are already overwhelmed with litigation centered on asbestos.[15] In these cases, courts must determine whether an employer should face liability for the asbestos-related injuries of its employee's family member.[16] Courts struggle with answering this question. While the hazardous nature of asbestos troubles them such that they want to allow recovery to its victims, the courts are also wary of the consequences of extending employers' liability too far,[17] especially when asbestos litigation has already rendered almost one hundred corporations bankrupt.[18]

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14. *See, e.g.*, Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 353 (Tenn. 2008) (explaining the facts of a take-home asbestos exposure case).

15. *See* CARROLL ET AL., *supra* note 4, at xxiv (stating that approximately 730,000 people filed an asbestos claim through 2002); *see also supra* note 5 and accompanying text (citing an interview in which a Delaware judge discussed the increasing amount of asbestos litigation on his docket).

16. *See infra* Part II.

17. *See infra* notes 96–101 and accompanying text (reviewing cases in which the courts worried about the consequences of extending liability to employers in take-home asbestos cases).

18. *See* LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, RAND INST. FOR CIVIL JUSTICE, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST

Considering these important issues, courts across the country have not reached a consensus about whether employers owe a duty to the victims of take-home asbestos exposure under the common law of negligence.[19] Part II of this Note addresses this split among state courts, describing the various judicial approaches to take-home asbestos exposure. Part III discusses whether the method of duty analysis proposed in the Restatement (Third) of Torts adequately addresses this issue such that courts should apply it when considering liability in these cases. Part IV provides two suggestions, aside from the Third Restatement, for responding to secondhand exposure to asbestos—a judicial response and a legislative response.

II. Background: State Court Split on Whether Employers Owe a Duty in the Case of Take-Home Asbestos Exposure

Seventeen states have ruled on cases involving liability for asbestos-related injuries caused by secondhand asbestos exposure or have otherwise addressed the issue by statute.[20] The judiciary has

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STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 47 tbl.A.1 (2010) (listing ninety-six companies that have declared bankruptcy with at least some asbestos liability); *id.* at 33 tbl.4.2 (showing that in 2008, bankruptcy trusts paid for 327,000 asbestos claims and spent $2,405,000 in claim payments); *see also* STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION 71 (2002) (stating that up to 2002, paying for asbestos claims resulted in over sixty corporations declaring bankruptcy).

19. *Compare, e.g.*, Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006) (employer or premises owner has a duty), *with In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005) (employer has no duty).

20. *See* KAN. STAT. ANN. § 60-4905(a) (2006) ("No premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property."); Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (employer has no duty under Kentucky substantive law); Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 405 (Ct. App. 2012) (property owner has no duty); Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162, 170 (Del. 2011) (employer has no duty); CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005) (employer has no duty); Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 938 (Ill. App. Ct. 2009) (employer or premises owner has no duty); Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 699 (Iowa 2009) (employer has no duty); Zimko v. Am. Cyanamid, 905 So. 2d 465, 484 (La. Ct. App. 2005) (employer has a duty); Adams v. Owens-Ill., Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (employer has no duty); *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 220

recognized the jurisdictional divergence among holdings, noting that "[c]ourts across the country have disagreed as to how . . . broad principles of tort law should be used to determine whether an employer owes a duty to persons who develop asbestos-related illnesses after exposure to asbestos fibers on its employees' clothing."[21] The variance in state court rulings is attributable to the different state approaches to determining the existence of a legal duty,[22] which is "a question of law for the [c]ourt to determine."[23]

(Mich. 2007) (premises owner has no duty); Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006) (employer or premises owner has a duty); *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005) (employer has no duty); Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448, 452 (Ohio 2010) (holding that Ohio Code § 2307.941 "bars tort liability for asbestos claims stemming from exposure that does not occur at the premises owner's property"); Hudson v. Bethlehem Steel Corp., No. 1991-C-2078, 1995 WL 17778064, at *4 (Pa. Ct. C.P. Dec. 12, 1995) (employer has no duty); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 375 (Tenn. 2008) (employer has a duty); Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 462 (Tex. Ct. App. 2007) (employer has no duty); Rochon v. Saberhagen Holdings, Inc., 140 Wash. App. 1008, at *4 (2007) (finding that employer and premises owner has no duty but still finding it liable under general negligence principles); *see also* Christopher W. Jackson, *Taking Duty Home: Why Asbestos Litigation Reform Should Give Courts the Confidence to Recognize a Duty to Second-Hand Exposure Victims*, 45 WAKE FOREST L. REV. 1157, 1171 (2010) (estimating that a third of the states have considered whether employers can be held legally responsible for asbestos-related injuries to employees' family members caused by take-home asbestos exposure).

21. Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 361 (Tenn. 2008); *see also* Musselman v. Amphenol Corp., MDL No. 875, 2011 WL 6415165, at *1 n.1 (E.D. Pa. Nov. 28, 2011) (discussing the "split of authority throughout the country" on the issue of whether an employer has a duty to warn employees about take-home exposure to asbestos).

22. *See Satterfield*, 266 S.W.3d at 361 ("The courts that ultimately recognize the existence of a duty . . . have focused on the foreseeability of harm . . . . On the other hand, the courts finding that no duty exists have focused on the relationship—or lack of a relationship—between the employer and the injured party."); *see also In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 215 (Mich. 2007) (refusing to adopt the holding of a Louisiana court because "[u]nlike Louisiana, Michigan relies more on the relationship between the parties than foreseeability in determining whether a duty exists" (citing Zimko v. Am. Cyanamid, 905 So. 2d 465, 482 (La. Ct. App. 2005) (holding that the defendant owed a duty to the defendant's employee's son who was a victim of secondhand asbestos exposure))).

23. Riedel v. ICI Ams. Inc., 968 A.2d 17, 20 (Del. 2009); *see also* DAN B. DOBBS, THE LAW OF TORTS 355 (2000) ("Judges rather than juries determine whether the defendant was under a duty of care at all and if so what standard of care applied.").

This Note divides the courts' rationales for determining the duty of premises owners and employers in take-home asbestos exposure cases into three categories. The first category represents cases in which the courts focused on the foreseeability of harm.[24] Using foreseeability as a guide has led to some cases in which the court finds a duty and other cases in which the court rejects the existence of a duty.[25] The second category covers cases in which the courts found the relationship between the parties to be the most important factor in determining the existence of a duty.[26] The take-home asbestos exposure cases that turn on relationship have denied the existence of a legal relationship between the defendant and the household member of an employee.[27] As such, the courts have found that the defendants owed no duty to the bystanders for their asbestos-related injuries.[28] The third category includes cases in which the court based its holding on whether the defendant's action constituted misfeasance (duty exists) or nonfeasance (duty does not exist).[29] This method originates from the Restatement (Second) of Torts.[30] This Part

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24. *See infra* Part II.A (discussing the judicial approach that focuses on foreseeability of harm).

25. *Compare* Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006) (holding that the 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"), *with* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (applying Kentucky law to find that the defendant had no duty to the plaintiff because, based on the lack of knowledge of the danger of bystander exposure in the asbestos industry at the time, the harm to the plaintiff was not foreseeable).

26. *See infra* Part II.B (discussing the judicial approach that focuses on the relationship between the parties).

27. *See In re* Asbestos Litig., C.A. No. N10C-04-203 ASB, 2012 WL 1413887, at *2 (Del. Super. Ct. Feb. 21, 2012) (noting that "where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the foreseeability of injury, the courts uniformly hold that an employer/premises owner owes no duty to a member of a household injured by take-home exposure to asbestos" (citations omitted)).

28. *See* 1 JAMES T. O'REILLY, TOXIC TORTS PRACTICE GUIDE § 5.4 (2012) (outlining the cases in which the court did not impose a duty of care because no relationship existed between the parties).

29. *See infra* Part II.C (discussing the judicial approach that focuses on whether the defendant's conduct constitutes misfeasance of nonfeasance).

30. *See* RESTATEMENT (SECOND) OF TORTS § 284 (1965)

outlines each of these categories, highlighting specific cases to further illustrate the various methods used for determining the existence of a legal duty.

A. First Category: Foreseeability of Harm

Many jurisdictions have analyzed the foreseeability of harm to the plaintiff when determining the defendant's legal duty, if any, owed to the plaintiff. State courts in New Jersey,[31] Washington,[32] Louisiana,[33] and California[34] have found that the

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> Negligent conduct may be either: (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

The duty described in part (b) arises if "there is a special relation between the actor and the other." *Id.* § 302 cmt. a. The Restatement notes that this rule originates from the "early common law distinction between action and inaction, or 'misfeasance' and 'non-feasance.'" *Id.* § 314 cmt. c.

31. *See* Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006) (holding that the defendant had a duty to the spouses of workers based on the foreseeable risk of exposure to asbestos).

32. *See* Hoyt v. Lockheed Martin Corp., No. 13-35573, 2013 WL 4804408, at *1 (9th Cir. Sept. 10, 2013) (explaining that "[u]nder Washington law, foreseeability is one of the elements of negligence," and "[o]n this record, no reasonable factfinder could conclude that harm from take-home asbestos should have been foreseeable" (citation omitted)); Rochon v. Saberhagen Holdings, Inc., 140 Wash. App. 1008, at *4 (2007) (holding that the trial court erred in dismissing the case as a matter of law because an issue of material fact existed about whether the plaintiff's injury was a foreseeable consequence of the defendant's "risky" conduct). *But see* Simonetta v. Viad Corp., 197 P.3d 127, 131 n.4 (Wash. 2008) (holding that foreseeability of harm does not imply the existence of duty).

33. *See* Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 184 (La. Ct. App. 2006) (upholding the trial court's determination that the employer owed a duty to the wife of an employee for her asbestos-related injuries); Zimko v. Am. Cyanamid, 905 So. 2d 465, 483 (La. Ct. App. 2005) (concluding that the defendant owed a duty to the plaintiff based on the foreseeable risk of danger resulting from exposure to asbestos fibers carried home on employees' clothing).

34. *See* Condon v. Union Oil Co., No. A102069, 2004 WL 1932847, at *5 (Cal. Ct. App. Aug. 31, 2004) (upholding the jury's decision for the plaintiff because the defendant could foresee that family members exposed to a worker's contaminated clothing would be in danger of asbestos exposure). Note that recently, another court of appeals in California has reached the opposite holding in a take-home asbestos exposure case. *See* Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 405 (Ct. App. 2012) (concluding that "a property owner has no

defendant–employer owed a duty to the household members of employees because the danger that asbestos presented to them was foreseeable. Courts in Texas[35] and Pennsylvania[36] and the Sixth Circuit Court of Appeals applying Kentucky law[37] have rejected creating a duty on the part of the defendant, stressing that the defendant could not have foreseen the harm. In this category of cases, the courts usually begin by distinguishing their approach to duty analysis from that of other states, emphasizing the importance of foreseeability.[38] Then, the courts analyze the facts to determine whether the defendant "knew or should have known of the dangers of secondary exposure."[39]

The courts often look to the date on which the exposure occurred and whether the defendant should have known of the risks of secondhand exposure based on the information known

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duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business"). Subsequent California cases have affirmed *Campbell*'s holding. *See, e.g.*, Swanson v. Simpson Timber Co., B244266, 2013 WL 5469261, at *1 (Ct. App. Oct. 2, 2013) ("[L]ike *Campbell*, we conclude that . . . a premises owner has no duty to protect an employee from secondary exposure to asbestos off the premises arising from his association with a family member and fellow employee who wore asbestos-contaminated work clothes home.").

35. *See* Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 462 (Tex. Ct. App. 2007) (reversing the judgment of the lower court because the defendant could not have foreseen the harm to the plaintiff).

36. *See* Hudson v. Bethlehem Steel Corp., No. 1991-C-2078, 1995 WL 17778064, at *4 (Pa. Ct. C.P. Dec. 12, 1995) ("Because Bethlehem Steel could not have foreseen that Mrs. Hudson would be exposed to the asbestos fibers, the threshold question of duty is not satisfied.").

37. *See* Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (rejecting the finding of a duty based on secondary exposure to asbestos because defendants could not have known of the risk of secondary exposure).

38. *See Chaisson*, 947 So. 2d at 182 (stating that Louisiana "relies more heavily upon foreseeability in its duty/risk analysis than Georgia does in determining negligence").

39. *See* Zimko v. Am. Cyanamid, 905 So. 2d 465, 483 (La. Ct. App. 2005) (citation omitted); *see also* DOBBS, *supra* note 23, at 335 ("What the defendant should have foreseen often depends a great deal on the knowledge and information he has or should have."). The knowledge reasonable people can possess "changes over time and varies over place." *Id.* at 289. Dobbs offers the example of asbestos to illustrate this point. *Id.* In the 1930s, society would not expect an architect who designed a building insulated with asbestos to know of the serious injuries asbestos could cause, but, today, the danger posed by asbestos fibers is common knowledge. *Id.*

throughout the asbestos industry at that time.[40] In *Condon v. Union Oil Co. of California*,[41] for example, the California court used an expert's testimony in its determination that UNOCAL could have foreseen the risk of a worker's family members becoming affected by asbestos exposure.[42] The expert testified that "as early as the beginning of the last century, it was known that a worker's clothing could be a source of contamination to others."[43] Thus, because UNOCAL had access to this information at the time of the plaintiff's exposure, it was "foreseeable that family members who were exposed to this clothing would also be in danger of being exposed."[44] Accordingly, the court upheld the jury's finding against UNOCAL.[45]

Similarly, in *Anderson v. A.J. Friedman Supply Co.*,[46] the Appellate Division of the Superior Court of New Jersey reviewed witness testimony on the "history of asbestos and the current medical and scientific reports on its hazards."[47] The plaintiff's expert testified that the defendant's management knew by 1969 about the risks of asbestos exposure to workers and their families.[48] Based on the merit of this testimony, the court affirmed the trial judge's denial of summary judgment on the defendant's liability.[49]

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40. *See* Condon v. Union Oil Co., No. A102069, 2004 WL 1932847, at *4 (Cal. Ct. App. Aug. 31, 2004) (explaining that information on the dangers of contaminating a worker's home with toxic substances was available to the defendant at the time of the plaintiff's exposure).

41. No. A102069, 2004 WL 1932847 (Cal. Ct. App. Aug. 31, 2004).

42. *See id.* at *2 (recalling the testimony of a public health expert).

43. *Id.*

44. *Id.* at *5; *see also* Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006) ("As early as 1916, industrial hygiene texts recommended that plant owners should provide workers with the opportunity to change in and out of work clothes to avoid bringing contaminants home on their clothes."). The court held that the risk of injury to the wife of an asbestos worker "is one that should have been foreseeable to [the defendant] Exxon Mobile." *Id.*

45. *See Condon*, 2004 WL 1932847, at *5 (concluding that "substantial evidence supported the jury's finding that UNOCAL's own actions contributed to [the employee's] clothes containing asbestos and to [the employee's] leaving the premises with this toxic dust, which then exposed his then-wife . . .").

46. 3 A.3d 545 (N.J. Super. Ct. App. Div. 2010).

47. *Id.* at 553.

48. *See id.* (summarizing the testimony of an expert in public health).

49. *See id.* at 557 (finding genuine issues of material fact regarding the

Courts also consider the federal regulations or laws that existed at the time of the exposure to evaluate what the defendant should have known. In *Catania v. Anco Insulations, Inc.*,[50] the District Court for the Middle District of Louisiana stated that the Walsh–Healey Act[51]—passed in 1951—"required that employers provide a change of clothing to employees to prevent them from carrying asbestos home."[52] Though this Act applied solely to federal contractors, its existence "evidence[d] a level of knowledge that pervaded the industry and [showed] a growing understanding and awareness of a serious problem regarding asbestos."[53] Thus, the risk of asbestos caused by employees carrying it home on their clothing was foreseeable at the time of plaintiff's exposure in 1955.[54] Another case considered the Occupational Health and Safety Administration's (OSHA) 1972 standards on the dangers of household exposure to asbestos.[55] The Louisiana court held that because the exposure occurred after OSHA published these regulations, the defendant should have known about the risks posed to the plaintiff—the wife of an employee.[56]

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extent of the plaintiff's exposure to asbestos). In addition to take-home exposure, the plaintiff in *Anderson* also alleged direct occupational exposure, for which the defendant could not be held liable because of the Worker's Compensation Act. *Id.* But the court stated that the defendant could still be held liable for the plaintiff's injuries based on her "separate exposure" to the asbestos brought home on her husband's clothes while working for the defendant. *Id.*

50. No. 05-1418-JJB, 2009 WL 3855468 (M.D. La. Nov. 17, 2009).

51. 41 U.S.C. § 6502 (2012) (formerly codified as 41 U.S.C. § 35 (2006); 41 U.S.C. § 45 (2006)).

52. *Catania*, 2009 WL 385468, at *2.

53. *Id.* (citation omitted).

54. *See id.* (finding foreseeability based on the legislation existing at the time of the exposure); *see also* Zimko v. Am. Cyanamid, 905 So. 2d 465, 482 (La. Ct. App. 2005) (considering whether the Walsh–Healey Act can support the existence of a legal duty).

55. *See* Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 182–83 (La. Ct. App. 2006) (distinguishing the case from *Exxon Mobil Corp. v. Altimore* because the exposure in *Altimore* occurred before the release of OSHA's 1972 regulations (citing Exxon Mobil Corp. v. Altimore, No. 14-04-01133-CV, 2006 WL 3511723, at *1 (Tex. Ct. App. Dec. 7, 2006), *superseded by* Exxon Mobil Corp. v. Altimore, 256 S.W.3d 415 (Tex. Ct. App. 2007))).

56. *See id.* at 183 ("Mr. Chaisson worked for Zachry from 1976 to 1978 after OSHA revealed the risks of household exposure to asbestos. Therefore, the

Differing accounts exist, however, about when the asbestos industry became aware of the risks to household family members, resulting in courts reaching different conclusions on foreseeability of harm and, consequently, different conclusions on the existence of a duty. In *Alcoa, Inc. v. Behringer*,[57] the plaintiff's asbestos exposure began in 1953.[58] The Texas Court of Appeals questioned "whether the evidence introduced at trial establishe[d] that it was generally foreseeable in the 1950s, to an ordinary employer . . . , that intermittent, non-occupational exposure to asbestos could put people at risk of contracting a serious illness."[59] The court determined that researchers published the first study of non-occupational asbestos exposure in 1965.[60] Further, though Congress enacted the Walsh–Healey Act in the 1950s, the court concluded that the Act did not demonstrate to employers the dangers of non-occupational asbestos exposure.[61] Based on these findings about the lack of information available in the industry at the time of the plaintiff's exposure, the court held that the defendant could not have known or reasonably foreseen the danger of exposure to asbestos dust on workers' clothes in the 1950s.[62] But in

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foreseeability reasoning used by the Texas Court of Appeals [in *Altimore*] is inapplicable.").

57. 235 S.W.3d 456 (Tex. Ct. App. 2007).

58. *Id.* at 458.

59. *Id.* at 460–61.

60. *Id.* at 461. The court was referring to the case study performed in London on hospitalized patients with mesothelioma. *Id.* The study found that 52.6% of these patients had a "history of occupational or domestic (living in the same house as an asbestos worker) exposure." *Id.* M.L. Newhouse and H. Thompson authored this study following a rise in the presence of asbestos in the London area. *See* Ellen P. Donovan et al., *Evaluation of Take Home (Para-Occupational) Exposure to Asbestos and Disease: A Review of the Literature*, *in* 42 CRITICAL REVIEWS IN TOXICOLOGY 703, 708 (Roger McClellan ed., 2012).

61. *See Alcoa*, 235 S.W.3d at 462 (determining that the Act did not "put employers on notice of the hazards of non-occupational exposure to asbestos"). Note that the court's interpretation of the Walsh–Healey Act counters the Louisiana district court's interpretation in *Catania v. Anco Insulations, Inc.*, discussed *supra* notes 50–56 and accompanying text.

62. *See id.* (concluding that the complete lack of foreseeability of any danger to one in the plaintiff's situation cannot be overcome by "other factors relevant to establishing a duty"); *see also* Hoyt v. Lockheed Martin Corp., No. 13-35573, 2013 WL 4804408, at *1 (9th Cir. Sept. 10, 2013) (reviewing expert

Condon, the court reviewed other studies relied upon by an expert witness and came to a very different conclusion about when the asbestos industry became aware that an employee's clothing could be a source of asbestos contamination to others.[63]

In nearly every case in which a court has used foreseeability as the primary consideration in duty analysis, the court has recognized a duty of care in take-home exposure cases.[64] Those cases that focus on foreseeability and yet deviate from this majority trend do so based on evidence demonstrating that the asbestos industry lacked knowledge about take-home asbestos exposure at the time the plaintiff's exposure occurred.[65]

B. Second Category: Relationship Between the Defendant and the Plaintiff

Other state courts have analyzed the issue of liability for take-home asbestos exposure using a method that focuses on

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testimony and federal regulations to determine that the defendant could not have known of the risk of take-home exposure to asbestos by 1958); Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 445 (6th Cir. 2009) (reviewing an expert report, which found that the risk to family members was unknown until the 1950s to determine that the asbestos industry did not know of bystander exposure at the time of plaintiff's exposure from 1951 to 1963); Hudson v. Bethlehem Steel Corp., No 1991-C-2078, 1995 WL 17778064, at *4 (Pa. Ct. C.P. Dec. 12, 1995) (finding "nothing in the record which would have put Bethlehem Steel on notice, prior to 1960, that Mrs. Hudson was in a position to contract mesothelioma").

63. *See* Condon v. Union Oil Co., No. A102069, 2004 WL 1932847, at *2 (Cal. Ct. App. Aug. 31, 2004) (recalling the testimony of an expert in public health who stated that evidence about the risk that a worker's clothing could carry toxic asbestos fibers existed before 1948, when the plaintiff's exposure occurred).

64. *See In re* Asbestos Litig., No. 04C-07-099-ASB, 2007 WL 4571196, at *11 (Super. Ct. Del. Dec. 21, 2007) ("In nearly every instance where the courts *have* recognized a duty of care in a take-home exposure case, the decision turned on the court's conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis.").

65. *See supra* note 62 and accompanying text (listing cases in which the court held that the defendant lacked the knowledge about the dangers of secondhand asbestos exposure necessary to create a duty).

relationships.[66] State courts in Maryland,[67] Ohio,[68] California,[69] Michigan,[70] Georgia,[71] New York,[72] Illinois,[73] and Iowa[74] have rejected the duty, looking to the lack of relationship between the parties as well as public policy concerns. In some cases, the claimant of take-home asbestos exposure argued that the employer's negligence in failing to maintain a safe workplace for its employees caused the plaintiff's secondhand exposure to asbestos.[75] The courts have rejected this argument, refusing to

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66. *See, e.g.*, CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005) (declining to "extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace").

67. *See* Adams v. Owens-Ill., Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (refusing to expand the defendant's duty to provide a safe workplace to nonemployees).

68. *See* Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448, 453 (Ohio 2010) (holding that a "premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property, unless the exposure occurred at the owner's property").

69. *See* Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 405 (Ct. App. 2012) (concluding that property owners owe no duty to protect family members of workers from secondary asbestos exposure).

70. *See In re* Certified Question from the Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 213 (Mich. 2007) (declining to "extend the common law" to protect the plaintiff, a victim of secondhand asbestos exposure, from the defendant's conduct).

71. *See CSX Transp., Inc.*, 608 S.E.2d at 210 ("Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace.").

72. *See In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005) (refusing to "upset" the "long-settled common-law notions of an employer's and landowner's duties" to include members of an employee's household).

73. *See* Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1097 (Ill. 2012) (considering relationship as the "touchstone" of the court's duty analysis and refusing to make a determination on the existence of duty without further facts (citation omitted)); Estate of Holmes v. Pneumo Abex, L.L.C., 955 N.E.2d 1173, 1178 (Ill. App. Ct. 2011) (concluding that there was no duty because the defendant had no legal relationship with the victim of secondhand asbestos); Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 938 (Ill. App. Ct. 2009) (determining that the defendant owed no duty for lack of a legal relationship).

74. *See* Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 698–99 (Iowa 2009) (refusing to extend the duty of employers and premises owners to plaintiffs alleging secondhand asbestos exposure for public policy reasons rather than foreseeability).

75. *See, e.g.*, Adams v. Owens-Ill., Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App.

extend an employer's duty to maintain a safe workplace to persons other than employees.[76] The Supreme Court of Georgia came to this conclusion by applying Georgia common law, which limits an employer's duty to "furnish a reasonably safe place to work" for its employees.[77] Thus, because the plaintiffs were third-party nonemployees, the defendant did not owe them this duty.[78]

Other courts have performed a balancing test, weighing various factors to determine whether a duty exists in the specific case.[79] Though each court has not used the same factors in its analysis, the test has usually considered relationship, foreseeability, consequences of imposing a burden on the defendant, and overall public interest.[80] The courts have cited the relationship factor as most important in establishing a duty.[81] A Delaware case applying Pennsylvania law provides a helpful illustration of this approach as applied in the context of

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1998) (considering plaintiff's motion for a new trial for failure to instruct the jury on the employer's duty to maintain a safe workplace for its employees).

76. *See id.* ("Bethlehem's duty to its employees was not an issue, because [the plaintiff] was not an employee."); *cf.* DOBBS, *supra* note 23, at 853 (stating that without a special relationship between the defendant and the plaintiff, "defendants are not liable in tort for a pure failure to act for the plaintiff's benefit").

77. CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 209 (Ga. 2005).

78. *See id.* (answering the federal district court's certified question on whether Georgia negligence law imposes any duty on an employer to a third-party nonemployee who comes into contact with its employee's asbestos-tainted work clothing away from the workplace).

79. *See, e.g.*, *In re* Asbestos Litig., No. N10C-04-203 ASB, 2012 WL 1413887, at *2 (Del. Super. Ct. Feb. 21, 2012) (applying Pennsylvania law to this issue and recognizing that "Pennsylvania courts look to many factors in considering duty").

80. *See id.* (weighing relationship, social utility of the actor's conduct, foreseeability, consequences of imposing a duty on the actor, and overall public interest in the proposed solution); *see also* Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1097 (Ill. 2012) (weighing relationship, foreseeability, likelihood of the injury, magnitude of the burden of guarding against the injury, the consequences of placing that burden on the defendant, and policy); Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 400 (Ct. App. 2012) (examining "the foreseeability of the harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, and the closeness of the connection between the defendant's conduct and the injury suffered" (citation omitted)).

81. *See In re Asbestos Litig.*, 2012 WL 1413887, at *4 ("The court finds the relationship analysis the most persuasive factor."); *see also Simpkins*, 965 N.E.2d at 1097 (recognizing relationship as the "touchstone" of duty analysis (citations omitted)).

secondhand exposure to asbestos. In *In re Asbestos Litigation*,[82] an employee, whose work involved cutting asbestos cement board, sued his employer for his wife's contraction of mesothelioma.[83] The plaintiff alleged that his wife contracted the illness by washing his work clothes, which were covered with asbestos dust.[84] Because the Pennsylvania Supreme Court had not yet ruled on this issue, the Delaware court needed to predict how Pennsylvania law would manage the existence of duty in take-home asbestos exposure cases.[85]

First, the court concluded that the relationship factor weighs against the existence of a duty because the employer did not have a "legally significant relationship" to its employee's family.[86] Moving to the next factor, the court held that social utility did not "tip the scale in either direction" because while society valued the defendant's business activities, society also had an interest in being protected from asbestos exposure.[87] Because courts throughout the country had "found weight for and against applying a duty under foreseeability analysis," the court discounted the foreseeability factor.[88] The court determined that the next factor, the burden on employers, weighed against finding a duty.[89] Requiring the defendant to warn "every potentially foreseeable victim of off-premises exposure to asbestos [would be] simply too great" because it would expose the premises owner to "practically limitless" liability.[90] Finally, because four of the five states surrounding Pennsylvania had refused to create a duty in the context of take-home asbestos exposure, the court decided that the policy factor weighed against a duty.[91] Balancing the

82. No. N10C-04-203 ASB, 2012 WL 1413887 (Del. Super. Ct. Feb. 21, 2012).

83. *See id.* at *1 (describing the plaintiff's job and his wife's asbestos-related illness).

84. *See id.* (recounting that the plaintiff's wife laundered his dirty work clothes two or three times per week).

85. *See id.* (looking to Pennsylvania law to analyze the cause of action).

86. *Id.* at *2.

87. *Id.*

88. *Id.* at *3.

89. *See id.* ("The consequences are economically infeasible . . . and as such this factor weighs against extending a duty.").

90. *Id.* (quoting Judge Learned Hand's risk–benefit analysis).

91. *See id.* at *4 ("Five of the states adjacent to Pennsylvania have

factors, the court concluded that the defendant did not owe a duty to the spouse of an employee.[92]

Some courts have focused predominantly on policy concerns in holding that an employer or premises owner owes no duty to those with whom it has an attenuated relationship, such as the plaintiffs in secondhand exposure cases.[93] In its approach, the Supreme Court of Michigan concentrated on whether or not imposing liability in these cases would raise public policy problems.[94] Recognizing that take-home exposure represents the "latest frontier" in the asbestos litigation crisis,[95] the court feared extending a premises owner's duty "to anybody who comes into contact with someone who has been on the landowner's property."[96] The court worried that imposing such a duty would "create a potentially limitless pool of plaintiffs."[97] Thus, the court declined to extend the law such that the defendant would be liable for the asbestos-related injuries of the plaintiff, who had never been on the defendant's land.[98]

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considered the issue of take-home liability and four of them have rejected it."). The court looked to the states in the same region as Pennsylvania because their interests likely "coincide[d]" more than the interests of distant states. *Id.*

92. *See id.* (concluding that the "scale tips in favor of no duty existing").

93. *See, e.g.*, *In re* Certified Question from the Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 211 (Mich. 2007) ("Thus, 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."); *cf.* DOBBS, *supra* note 23, at 582 (defining duty as "'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection'" (quoting DAN B. DOBBS, ROBERT K. KEETON, DAVID G. OWEN & W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS 358 (1998))).

94. *See In re Certified Question*, 740 N.W.2d at 218 (questioning the public policy ramifications of finding that the defendant owed a duty to the victim of secondhand asbestos exposure).

95. *Id.* at 219 (quoting Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21 MEALEY'S LITIG. REP. ASBESTOS 1, 4 (2006)).

96. *Id.* at 220.

97. *Id.*

98. *See id.* at 213 (declining to "promulgate a policy" to "extend the common law" to hold the defendant liable in this case (citation omitted)); *see also In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005) ("[T]he 'specter of limitless liability' is banished only when 'the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship.'" (citation omitted)); *In re* Eighth Jud. Dist. Asbestos Litig., 815 N.Y.S.2d 815, 820–21 (Sup. Ct. 2006) ("A line must be drawn between the competing policy considerations of

Nearly every case that has turned on relationship or public policy considerations has concluded that the defendant did not owe a duty to the plaintiff.[99] The courts either determined that the relationship between the parties was too attenuated[100] or that the "specter of limitless liability" was too disconcerting to hold the defendant liable.[101] The courts in the following category, though still considering the relationship between parties,[102] have applied a different analysis to take-home asbestos exposure cases.

C. Third Category: Misfeasance and Nonfeasance Under the Second Restatement

Cases originating in Delaware[103] and Tennessee[104] have applied the Restatement (Second) of Torts in determining the defendant's liability in take-home asbestos exposure cases. The Second Restatement distinguishes between "misfeasance" and "nonfeasance."[105] Generally, anyone who commits

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providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit . . . . The court must be cautious of creating an indeterminate class of potential plaintiffs . . . ." (citation omitted)).

99. *See In re* Asbestos Litig., C.A. No. N10C-04-203 ASB, 2012 WL 1413887, at *2 (Del. Super. Ct. Feb. 21, 2012) (noting that courts focusing on relationship in duty analysis "uniformly hold that an employer/premises owner owes no duty to a member of a household injured by take-home exposure to asbestos" (citations omitted)).

100. *See In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 216 (Mich. 2007) (holding that because the plaintiff had "never been on or near defendant's property and had no further relationship with defendant," no duty should be imposed).

101. *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005).

102. *See, e.g.*, Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162, 169–70 (Del. 2011) (determining that the defendant's action was "nonfeasance" rather than "misfeasance," requiring the court to turn to the relationship between the parties).

103. *See id.* at 166–67 ("To determine whether one party owed another a duty of care, we have often looked to the Restatement (Second) of Torts for guidance."); *see also* Riedel v. ICI Ams. Inc., 968 A.2d 17, 21 (Del. 2009) (using the Restatement (Second) of Torts to analyze the concept of duty and apply it to the facts of the case).

104. *See* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 360 (Tenn. 2008) ("[T]he approach of Tennessee's courts is largely consistent with the Restatement [(Second)] view . . . .").

105. RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965) (defining

"misfeasance"—an affirmative act—has 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."[106] Anyone who "merely omits to act" has "more restricted duties."[107] One who is negligent by nonfeasance—omission of an act—has a duty to protect another from risk only when there is a "special relation" between the actor and the other.[108]

In *Price v. E.I. DuPont de Nemours & Co.*,[109] Mrs. Price, the wife of the defendant's employee, sued the defendant for illnesses allegedly caused by exposure to the asbestos her husband brought home from work on his clothing.[110] Mrs. Price argued that DuPont negligently failed to warn her of the risk associated with take-home asbestos exposure.[111] The Supreme Court of Delaware defined DuPont's action as "pure nonfeasance."[112] Thus, pursuant to the Second Restatement, the court stated that Mrs. Price had to prove the existence of a special relationship between her and DuPont for DuPont to owe her a duty of care.[113] Mrs. Price failed to demonstrate such a relationship, so the court held in favor of DuPont.[114]

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negligence caused by an actor's conduct as "misfeasance" and negligence caused by an actor's failure to act as "non-feasance").

106. *Id.*

107. *Id.*

108. *Id.*; *see also* DOBBS, *supra* note 23, at 855–56 (emphasizing the distinction between nonfeasance and "conduct that includes a negligent omission"). Misfeasance creates a claim of negligence, while nonfeasance does not. *Id.* Dobbs explains that negligence includes "the omission to do something a reasonable person would do," such as failing to apply a car's brakes when approaching a pedestrian. *Id.* at 855 (citation omitted). This omission would result in a charge of negligence and could not be labeled as nonfeasance. *Id.* No settled rule exists to aid courts in making this distinction between nonfeasance and conduct with a negligent omission. *Id.* at 856.

109. 26 A.3d 162 (Del. 2011).

110. *Id.* at 169.

111. *See id.* (noting that Mrs. Price's allegations "generate a reasonable inference" of DuPont's negligence).

112. *Id.*

113. *See id.* (asserting a need of a legal relationship between the defendant and the plaintiff to impose liability on the defendant for nonfeasance).

114. *See id.* at 170 ("Because Mrs. Price and DuPont did not share a 'special relationship,' DuPont owed Price no legal duty."); *see also* Riedel v. ICI Ams. Inc., 968 A.2d 17, 25–27 (Del. 2009) (determining that the defendant acted with nonfeasance in relation to Mrs. Riedel and that there was no legally significant

In *Satterfield v. Breeding Insulation Co.*,[115] a particularly egregious case, the Supreme Court of Tennessee came to the opposite conclusion. The plaintiff was the daughter of an employee who worked at a factory containing high levels of asbestos fibers.[116] The plaintiff, born prematurely, spent the first three months of her life hospitalized.[117] Mr. Satterfield, her father, would visit the hospital every day after work without changing out of his asbestos-contaminated work clothes.[118] Therefore, Mr. Satterfield exposed his daughter to asbestos "from the day of her birth."[119] The plaintiff contracted mesothelioma and sued her father's employer for "negligently permitt[ing] her father to wear his asbestos-contaminated work clothes home from work, thereby regularly and repeatedly exposing her to asbestos fibers over an extended period of time."[120] The daughter died at the age of twenty-five, and her father continued the suit.[121]

The Supreme Court of Tennessee heavily relied on the distinction between misfeasance and nonfeasance in its analysis,[122] an approach that is "largely consistent" with the Second Restatement view.[123] The court characterized the defendant's conduct as misfeasance.[124] The court stated that the

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relationship between the defendant and Mrs. Riedel such that the defendant owed a duty to her).

115. 266 S.W.3d 347 (Tenn. 2008).

116. *See id.* at 353 (discussing the factual background of the case).

117. *Id.*

118. *See id.* ("Mr. Satterfield visited his infant daughter every day she was hospitalized . . . immediately after work wearing his asbestos-contaminated work clothes . . . .").

119. *Id.*

120. *Id.* at 351–52.

121. *Id.* at 354.

122. *See id.* at 355–56

> [T]here is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.

(quoting Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908)).

123. *Id.* at 360.

124. *See id.* at 364 ("[T]he outcome of this case . . . turns on the employer's

employer committed the "injurious affirmative act of operating its facility in such an unsafe manner that dangerous asbestos fibers were transmitted outside the facility to others who came in regular and extended contact with the asbestos-contaminated work clothes of its employees."[125] After qualifying the defendant's conduct as misfeasance, the court next considered the public policy concerns relevant to the case.[126] The court recognized the vast amount of litigation in the United States involving asbestos products liability[127] and that its decision to impose a duty in this case could possibly lead to a great expansion of duty.[128] These public policy concerns, however, did not dissuade the court.[129] It held that the "magnitude of the potential harm from exposure to asbestos and the means available to prevent or reduce this harm" weighed in favor of allowing those who have been "repeatedly and regularly in close contact with an employee's asbestos-contaminated work clothes" to pursue negligence claims against an employer.[130]

As demonstrated by these cases, the outcome can vary under the Second Restatement approach. The courts in Delaware found that an employer's failure to warn its employees of take-home exposure to asbestos constitutes nonfeasance,[131] and the employer was not liable unless a "special relationship" existed between the parties.[132] The Tennessee court, however, called such action

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own misfeasance . . . .").

125. *Id.*

126. *See id.* at 364–65 (stating that determining the existence and scope of the defendant's duty must also include an analysis of the "relevant public policy considerations").

127. *See id.* at 370 (acknowledging the "asbestos products liability litigation crisis").

128. *See id.* at 374 (recognizing the defendant's policy-based argument that the duty should be limited to avoid claims from "babysitters, housekeepers, home repair contractors, and next-door neighbors").

129. *See id.* at 375 (considering fairness and public policy and concluding that imposing a duty of reasonable care on employers is "neither limitless nor impractical").

130. *Id.* at 374.

131. *See* Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162, 168 (Del. 2011) (holding that the facts underlying the plaintiff's claim constitute nonfeasance rather than misfeasance).

132. *See id.* at 169 ("Having alleged only nonfeasance, to recover against

misfeasance and required no showing of a relationship between the parties to hold the employer liable.[133]

III. The Third Restatement's Proposed Analysis for Duty Determination

Part II of this Note illustrates that courts diverge on the issue of whether or not premises owners or employers should be liable in cases of take-home asbestos exposure.[134] In fact, judges within a single court have vigorously disagreed.[135] A court that has not yet addressed this problem does not have a clear path to follow—it can implement one of the many modes of analysis already established or develop its own approach to take-home asbestos lawsuits based on the common law of its state.[136] The lack of consistency among the courts has resulted in confusion and unpredictability.[137]

DuPont, Price must allege that a 'special relationship' existed between her and DuPont in order for DuPont to owe her a duty of care.").

133. *See* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 364 (Tenn. 2008) (finding that the case involves "a risk created through misfeasance" and that "liability for misfeasance is not cabined within the confines of boxes created by particular relationships").

134. *See supra* Part II (describing courts' differing approaches to take-home asbestos cases).

135. *Compare In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 219 (Mich. 2007) ("[T]he law should not be driven by emotion or mere foreseeability . . . . [The court must consider] the very real possibility that imposition of an expansive new duty on premises owners for offsite exposures would exacerbate the current 'asbestos-litigation crisis.'"), *with id.* at 229 (Cavanagh, J., dissenting)

> But the majority is strangely silent with respect to the toll that asbestos exposure has taken on human life. By focusing solely on the losses suffered by businesses, the majority fails to account for the social benefits that would ensue from ensuring that people who are exposed to detrimental substances and who, consequently, suffer ruined health, life-altering and life-ending diseases, and the loss of family members, are compensated.

136. *See, e.g.*, Matt Kendall, *Settling the Dust: Trends in Bystander Asbestos Exposure Litigation*, 1 CHARLESTON L. REV. 207, 215–16 (2007) (predicting that the South Carolina Supreme Court would likely hold employers liable for bystander exposure because South Carolina "views foreseeability as an important element to the establishment of a duty").

137. *See* Yelena Kotlarsky, *The "Peripheral Plaintiff": Duty Determinations in Take-Home Asbestos Cases*, 81 FORDHAM L. REV. 451, 488 (2012) ("In courts'

Some legal commentators suggest that courts should address this issue by applying Section 7 of the Restatement (Third) of Torts.[138] With the Third Restatement, the American Law Institute endeavored to "clarify the meaning of such basic concepts of tort law as intention, recklessness, and negligence."[139] Section 7, which sets forth the Third Restatement's proposal for duty analysis, states the following:

> (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.[140]

Section 7(a) establishes a presumption of duty when the defendant's conduct caused the plaintiff's physical harm.[141] Professor W. Jonathan Cardi describes Section 7(a) as "revolutionary" because it "restates this general principle [on duty] as black letter law."[142] He says that the provision urges

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efforts either to impose a duty or deny a duty in take-home asbestos cases, they have engaged in unclear analysis and set bad precedents for future cases.").

138. *See id.* at 485–88 (arguing that the Third Restatement provides the best approach to determining take-home asbestos cases); *see also* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 378 (Tenn. 2008) (Holder, J., concurring and dissenting) ("Adopting the Restatement (Third) of Torts would increase judicial transparency and clarity by requiring that judges frankly and openly discuss the policy considerations that underlie any no-duty determination."); Jackson, *supra* note 20, at 1181 (arguing that Section 7 of the Third Restatement provides a uniform model for courts considering duty in take-home asbestos cases).

139. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM at xi (Discussion Draft Apr. 5, 1999). The Restatements are meant to codify the "judge-made doctrines that develop gradually overtime." *American Law Institute*, HEINONLINE (Jan. 2013), http://heinonline.org/HeinDocs/ali2.pdf. Though not binding authority, the courts consider the Restatements "highly persuasive because they are formulated over several years with extensive input from law professors, practicing attorneys, and judges." *Id.*

140. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010).

141. *See* Kotlarsky, *supra* note 137, at 460 (describing Section 7(a) as a "default duty of reasonable care when the defendant's conduct was a cause-in-fact of the plaintiff's injury").

142. W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 770 (2005).

courts to treat it "not merely as a default inclination, but as a substantive rule from which courts should depart only in exceptional circumstances."[143] Section 7(b) provides for such circumstances,[144] allowing courts to refuse to find a duty for public policy reasons.[145]

The comments following Section 7 provide examples of factors relevant to a no-duty determination pursuant to Section 7(b).[146] Foreseeability, however, "has no role" in determining whether a duty exists under Section 7.[147] When a court determines that the defendant did not owe a duty in a particular case, it should not support that determination by referencing foreseeability.[148] Rather, because foreseeability is a fact-specific determination, the *jury* should decide whether the defendant could have foreseen the harm.[149] Only policy concerns, such as those listed in the comments of Section 7,[150] should drive a court to reach a finding of no duty.[151] Three states' highest courts have

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143. *Id.*

144. *See id.* ("[N]o-duty cases are narrow categorical exceptions to the general duty rule.").

145. *See* § 7(b) (stating that a court may find lack of duty only for "articulated" policy reasons).

146. *See, e.g.*, *id.* § 7 cmt. c (suggesting that courts make a no-duty determination when the creation of a duty would conflict with social norms); *id.* § 7 cmt. d (suggesting that courts make a no-duty determination when a finding of liability might "interfere with important principles reflected in another area of law"); *id.* § 7 cmt. g (suggesting that courts make a no-duty determination when the decision would be better resolved by officials from another branch of government).

147. *Id.* § 7 reporters' note; *see also* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1248–49 (2009) (describing the goals of the Restatement's drafters, known as Reporters, with regards to the decreased role of foreseeability in the Third Restatement). The Reporters "undercut" the role of foreseeability in duty analysis to bring "conceptual integrity" to negligence law. *Id.* at 1249.

148. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(b) cmt. j (2010) (stating that a court must justify a "no-duty" ruling "without obscuring references to foreseeability").

149. *See id.* ("These determinations are based on the specific facts of the case, are applicable only to that case, and are appropriately cognizant of the role of the jury in factual determinations."); *see also* Zipursky, *supra* note 147, at 1251 (stating the Third Restatement proposes that the jury rather than the judge must weigh the degree of foreseeability in determining liability).

150. *See supra* note 146 (listing examples of valid policy concerns).

151. *See* § 7(b) (allowing a court to find no duty when warranted by "an

praised the analytical framework of Section 7 of the Third Restatement and have expressly begun to apply it to negligence cases.[152]

A. Support for Section 7

Courts and legal researchers who favor the application of the Third Restatement to cases that require the determination of a duty—such as take-home asbestos cases—support their position with several rationales.[153]

1. The Elimination of Foreseeability from Duty Analysis

Advocates argue that because Section 7 eliminates foreseeability as a factor in duty analysis, Section 7 structurally surpasses the current approaches of most courts.[154] The question of duty is a matter of law, and when a court considers foreseeability of harm, it brings "fact-specific inquiries" into its duty analysis.[155] Section 7 punts the consideration of foreseeability to the jury where such factual concerns belong.[156]

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articulated countervailing principle or policy").

152. *See, e.g.*, Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007) (citing to Section 7 of the Restatement (Third) of Torts in its decision that "foreseeability is not a factor to be considered by courts when making determinations of duty"); Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 696 (Iowa 2009) (applying the Restatement (Third) of Torts § 7 framework, which the Supreme Court of Iowa adopted in *Thompson v. Kaczinski*, to a secondhand asbestos case (citing Thompson v. Kaczinski, 774 N.W.2d 829, 834 (Iowa 2009))); A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 918 (Neb. 2010) (agreeing with the Third Restatement that juries should determine questions of foreseeability).

153. *See, e.g.*, Kotlarsky, *supra* note 137, at 483–88 (arguing that the Third Restatement provides a better analytical framework for duty determinations than the approaches applied by most courts).

154. *See* Cardi, *supra* note 142, at 742 ("Should courts take Section 7 of the proposed Restatement seriously, they will find that duty has been purged of many of the problems caused by its current reliance on foreseeability.").

155. Kotlarsky, *supra* note 137, at 484.

156. *See id.* at 486 ("The Third Restatement results in clearer duty determinations . . . because . . . it leaves fact-specific inquiries like foreseeability to the jury."); *cf.* DOBBS, *supra* note 23, at 336 ("[T]he question of what is or is not foreseeable to a reasonable person in the position of the defendant is normally a jury question, part of its overall evaluation of the defendant's

Supporters of Section 7 contend that removing foreseeability analysis from the court will also result in clearer precedents.[157] Because foreseeability is "malleab[le]," courts' examination of it often "opens the way for like cases to be treated differently and different cases to be treated alike."[158] By presuming that a duty of reasonable care exists, Section 7 eliminates "murky legal analysis" that results when courts struggle with foreseeability in the process of determining the existence of duty.[159] Instead, Section 7 allows fact-finders to evaluate the specific facts of the case and decide foreseeability in the context of breach.[160]

In *A.W. v. Lancaster County School District*,[161] the Supreme Court of Nebraska expressed these problems with using foreseeability in duty analysis and decided to adopt the Restatement (Third) of Torts, Section 7.[162] The court stated that foreseeability is a factual question, and "small changes in facts may make a dramatic change in how much risk is foreseeable."[163] As such, the fact finder, not the court, must assess the foreseeability of the risk at the time of the alleged negligence.[164]

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conduct.").

157. *See* Kotlarsky, *supra* 137, at 486 ("The Third Restatement makes courts' inquiries much simpler when they determine that a duty existed, which results in clearer legal precedent."); *see also* Cardi, *supra* note 142, at 794 ("By imposing a duty whenever a defendant has created a risk of harm, the standard for duty could not be more simple, clear, and predictable.").

158. Cardi, *supra* note 142, at 792.

159. Kotlarsky, *supra* note 137, at 486.

160. *See id.* (arguing for a shift of foreseeability determinations from the judge to the jury); *see also* Cardi, *supra* note 142, at 799 (reasoning that foreseeability decisions should be left to the jury). Professor Cardi argues that foreseeability determinations call for "common sense, common experience, and application of the standards and behavioral norms of the community." *Id.* The judge's understanding of community is often "frozen as precedent" and unable to evolve as the community naturally changes. *Id.* at 800. On the other hand, because current community members form a jury, a jury's decision can "evolve with changing cultural mores." *Id.* at 801. As such, the citizens of that community should make foreseeability judgments rather than the judge. *Id.*

161. 784 N.W.2d 907 (Neb. 2010).

162. *See id.* at 918 (adopting the duty analysis of the Restatement (Third) of Torts § 7).

163. *Id.* at 917.

164. *See id.* at 918 (adopting the Third Restatement's approach). By reaching this conclusion, the court rejected the duty analysis it used in previous cases. *Id.* at 916. For example, in *Sharkey v. Board of Regents*, the court relied upon foreseeability in its determination that a university had a legal duty to

The court did not think that adopting the Third Restatement's analysis would change the law of Nebraska.[165] Rather, the court said, the application of the Third Restatement simply "rearrang[es] the basic questions that are posed by any negligence case and mak[es] sure that each question has been put in its proper place."[166]

2. The Creation of Transparency in Court Opinions

A second benefit of resorting to Section 7 in duty determination is greater transparency in a court's decision-making process.[167] Courts currently "couch" their policy considerations in unnecessary legal doctrines like foreseeability.[168] In *In re New York City Asbestos Litigation*,[169] for example, the New York Court of Appeals based its holding on lack of relationship between the employer and the employee's wife.[170] The court, however, spoke primarily about avoiding the "specter of limitless liability" that could be invoked by establishing a duty in the case.[171] The court's attachment to using relationship analysis for determining duty disguised the policy concerns that seemed to truly motivate the court's decision.[172]

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protect on-campus students from criminal activity. *Id.* (citing Sharkey v. Bd. of Regents, 615 N.W.2d 889 (Neb. 2000)). In its *A.W.* opinion, the court asserted that its reasoning in *Sharkey*—"that because the attack at issue . . . was foreseeable, the defendant had a duty to protect against foreseeable acts of violence"—was "tautological." *Id.*

165. *See id.* at 917–18 ("We do not view our endorsement of the Restatement (Third) as a fundamental change in our law.").

166. *Id.* at 918.

167. *See* Kotlarsky, *supra* note 137, at 485 (arguing that the Third Restatement will result in greater transparency in take-home asbestos cases).

168. *Id.*; *see also* Cardi, *supra* note 142, at 766 (arguing that the doctrine of foreseeability allows a court to "skirt[ ] the policy decisions inherent in certain types of negligence cases").

169. 840 N.E.2d 115 (N.Y. 2005).

170. *See id.* at 122 ("Here, there is no relationship between the Port Authority and Elizabeth Holdampf.").

171. *Id.* (citation omitted).

172. *See* Kotlarsky, *supra* note 137, at 485 ("These doctrines [of nonfeasance, lack of a relationship between the parties, and lack of foreseeability of harm to the plaintiff] obfuscate the policy decisions that truly inform courts' determinations.").

Supporters of the Third Restatement maintain that because Section 7(b) requires courts to expressly state their policy reasons for not imposing a duty on the defendant,[173] it is superior to the application of foreseeability and other negligence doctrines.[174] Foreseeability "masks" the resolution of policy issues,[175] resulting in confusion and lack of transparency.[176] Section 7, however, "encourages judges to be transparent in their reasons for declining to impose a duty, rather than to rely on the screen of foreseeability."[177]

In *Gipson v. Kasey*,[178] the Supreme Court of Arizona noted the conflict between using foreseeability and maintaining transparency in duty analysis.[179] The court worried that relying on notions like foreseeability could "obscure the factors that actually guide courts in recognizing duties," such as public policy considerations.[180] Realizing the "confusion and lack of clarity" existing in its own case law, the court decided that it should not consider foreseeability when making determinations of duty and rejected its prior opinions suggesting the contrary.[181]

B. Criticisms of Section 7

The *Gipson* and *A.W.* decisions, along with several legal scholars, favor the analysis delineated in Section 7.[182] Not all

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173. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(b) (2010) (requiring a court to "articulate[ ]" its policy reasons for not finding a duty of care in a specific case).

174. *See, e.g.*, Cardi, *supra* note 142, at 767 (arguing that the use of foreseeability in determining duty "distracts from" the "resolution of important policy concerns" and "endangers courts' legitimacy").

175. *Id.*

176. *See* Kotlarsy, *supra* note 137, at 485 ("When courts expressly state their policy reasons instead of engaging in multi-factored tests, they contribute to greater transparency in take-home asbestos cases.").

177. Cardi, *supra* note 142, at 794.

178. 150 P.3d 228 (Ariz. 2007).

179. *See id.* at 231 (discounting the use of foreseeability in duty analysis).

180. *Id.*

181. *Id.*

182. *See supra* Part IV.A (discussing the benefits of Section 7).

courts and legal commentators, however, support the Third Restatement's approach to duty determination.[183]

1. Failure to Reflect the Predominant Judicial Approach

By eliminating foreseeability from courts' determinations of whether a duty exists, Professor Benjamin C. Zipursky argues that the Reporters have countered the predominant judicial approach.[184] A Restatement should summarize the law in a general area, describe the ways in which it is evolving, and propose the authors' opinions on how it should change.[185] In Section 7 of the Third Restatement, however, the Reporters have not adhered to these objectives.[186]

Almost every jurisdiction—Professor Zipursky's article from 2009 found forty-seven jurisdictions, but since then, the number has decreased to forty-five—considers foreseeability in its determination of the existence of duty in a negligence claim.[187]

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183. *See* Tesar v. Anderson, 789 N.W.2d 351, 358 n.13 (Wis. Ct. App. 2010) (referring to the Third Restatement's approach for determining duty as a "nightmare").

184. *See* Zipursky, *supra* note 147, at 1257 (noting that the Third Restatement fails to concede that its rejection of foreseeability is contrary to most states' negligence law).

185. *See Tesar*, 789 N.W.2d at 358 n.13 (explaining the goal of the Restatement (citing BLACK'S LAW DICTIONARY 1314–15 (7th ed. 1999))).

186. *See id.* (questioning the Third Restatement's disapproval of the widespread use of foreseeability in duty determination).

187. *See* Zipursky, *supra* note 147, at 1260 ("The reality . . . is that forty-seven states plainly do give foreseeability a significant role in duty analysis."). In 2009, only New York, Arizona, and Washington seemed to reject foreseeability as a component of duty analysis. *Id.* The New York Court of Appeals refused to consider foreseeability of injury in a secondhand asbestos case. *See In re* N.Y.C. Abestos Litig., 840 N.E.2d 115, 119 (N.Y. 2005) ("[F]oreseeability bears on the scope of a duty, not whether a duty exists in the first place."). In *Gipson v. Kasey*, the Supreme Court of Arizona expressly held that courts should not consider foreseeability when making duty determinations. Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007). Finally, in *Simonetta v. Viad Corp.*, the Supreme Court of Washington stated that foreseeability of harm does not imply the existence of duty. Simonetta v. Viad Corp., 197 P.3d 127, 131 n.4 (Wash. 2008). Now, it seems that Iowa has joined this group of jurisdictions expelling foreseeability from duty determinations. *See* Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009) (removing foreseeability from determination of duty). Nebraska has conformed to this reasoning as well. *See* A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 918

American courts have "overwhelmingly embraced [foreseeability] as a vitally important part of duty."[188] In fact, many courts view foreseeability as the *most* important factor.[189] The Third Restatement, however, ignores the near unanimous judicial use of foreseeability in duty analysis.[190] Additionally, the American Law Institute drafted the Restatement (Third) of Torts: Liability for Physical and Emotional Harm over a dozen years ago[191] and published the first volume in 2005.[192] Yet between 1998 and the date of this Note's submission, only five states have employed the analysis on duty proposed in Section 7.[193] Two states, Delaware[194]

(Neb. 2010) ("We expressly hold that foreseeability is not a factor to be considered by courts when making determinations of duty.").

Dobbs suggests that courts' practice of deciding factual issues such as foreseeability conflicts with "traditional" negligence analysis. *See* DOBBS, *supra* note 23, at 584–85. This is because of the inconsistent use of terminology in reference to proximate cause. *Id.* at 484. While foreseeability "traditional[ly]" falls within proximate cause analysis and is a factual determination for the jury, courts often choose to phrase proximate cause questions in the language of duty. *Id.* As such, the court reserves the negligence decision for its own determination rather than the jury's. *Id.* at 484–85. In other words, when courts phrase the negligence question as one of duty, as many courts do, "the judge, not the jury, will be the decision maker, even on such quintessential jury issues as foreseeability." *Id.* at 583.

188. *See* Zipursky, *supra* note 147, at 1263.

189. *See, e.g.*, Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 183 (La. Ct. App. 2006) (relying "heavily" upon foreseeability when finding a duty); Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1148 (N.J. 2006) ("Because the focus here is on the determination of a duty, foreseeability of harm weighs in that analysis as a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate." (citations omitted)); Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 460 (Tex. Ct. App. 2007) (reciting foreseeability as the "foremost consideration" in determining whether a defendant is under a legal duty); Marcus v. Staubs, No. 11-0994, 2012 WL 5834579, at *9 (W. Va. Nov. 15, 2012) ("The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised." (citation omitted)).

190. *See* Zipursky, *supra* note 147, at 1259 (highlighting that the Third Restatement "neglects the predominance" of foreseeability in the law of the states).

191. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM (BASIC PRINCIPLES) (Preliminary Draft No. 1, 1998).

192. *See generally* 1 RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM (2005).

193. *See supra* note 187 and accompanying text (listing the state cases in which the court applied the duty analysis suggested by Section 7 of the Third Restatement).

194. *See* Riedel v. ICI Ams. Inc., 968 A.2d 17, 20 (Del. 2009) ("At this time,

and Wisconsin,[195] have explicitly rejected the adoption of the Third Restatement's concept of duty. Therefore, considering the overwhelming application of foreseeability in duty analysis[196] and some courts' strong rejection of the Third Restatement, the possibility of jurisdictions shifting to the Third Restatement's approach to duty in negligence cases is unrealistic.

2. Failure to Acknowledge the Link Between Foreseeability and Public Policy Considerations

While the Third Restatement suggests that courts turn away from foreseeability and toward policy considerations,[197] Professor Zipursky argues that examining policy requires awareness of foreseeability in itself.[198] He presents *Tarasoff v. Regents of*

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we decline to adopt any sections of the Restatement (Third) of Torts."). In *Riedel*, the Supreme Court of Delaware refused to adopt the Third Restatement because its drafters "redefined the concept of duty in a way that is inconsistent with [the Supreme Court of Delaware's] precedents and traditions." *Id.* The court criticized the Third Restatement's creation of duty in circumstances when it is the court's practice to defer to the legislature for duty decisions. *Id.* Recognizing the "primacy of the legislative branch" in resolving social policy issues, the court decided to continue following the Restatement (Second) of Torts. *Id.* at 21.

195. *See* Tesar v. Anderson, 789 N.W.2d 351, 358 n.13 (Wis. Ct. App. 2010) (stating that under Wisconsin jurisprudence, "duty and foreseeability are inexorably intertwined" (citing Hocking v. City of Dodgeville, 768 N.W.2d 552, 556 (Wis. 2009))). Wisconsin finds a lack of duty only "where no reasonable jury could find foreseeability." *Id.* The Court of Appeals of Wisconsin criticized the Third Restatement because its "excision of foreseeability" essentially "eliminates duty in Wisconsin's negligence methodology." *Id.* The court stated that Wisconsin has been using foreseeability in its duty analysis for seventy-five years, and the approach has proved successful. *Id.* Section 7(a) of the Third Restatement creates a "duty to the world" without consideration of the facts of the case or the attenuated allegations of the plaintiff. *Id.* The court rejected this ideology, affirming the place of duty in Wisconsin's negligence analysis and finding that the consideration of foreseeability in a specific case is necessary to determine whether a defendant had a duty. *Id.*

196. *See* Cardi, *supra* note 142, at 804 ("[F]or most jurisdictions the Restatement Third's proposal will represent a significant doctrinal change.").

197. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (2010) (disapproving of the use of foreseeability in duty determinations and requiring courts to explain no-duty rulings using policy or principle concerns).

198. *See* Zipursky, *supra* note 147, at 1263 (describing the interaction between considerations of policy and foreseeability).

University of California[199] to illustrate this aspect of the Third Restatement.[200] In *Tarasoff*, the Supreme Court of California held that a psychotherapist has a duty to warn a potential victim of a patient's threats when such disclosure is essential for the welfare of the victim.[201] The court reasoned that averting harm to others outweighs the public policy of protecting confidentiality between a psychotherapist and his patient.[202] Professor Zipursky argues that to arrive at this policy decision, the court had to engage in questions of foreseeability.[203] A duty arises only when the psychotherapist can foresee the injury to a third-party victim.[204] Consequently, despite the express elimination of foreseeability in Section 7 of the Third Restatement, courts applying Section 7 will still have to consider the foreseeability of harm when evaluating possible policy considerations.[205]

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199. 551 P.2d 334 (Cal. 1976).

200. *See* Zipursky, *supra* note 147, at 1263 (using *Tarasoff* to illustrate that courts consider foreseeability to support policy decisions).

201. *See Tarasoff*, 551 P.2d at 347 (holding that a psychotherapist must disclose communications with his patient if it is essential to avoid danger to others).

202. *See id.* at 442 ("We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.").

203. *See* Zipursky, *supra* note 147, at 1263 ("[T]he capacity of psychotherapists to foresee injury to third-party victims is part of the policy decision.").

204. *See Tarasoff*, 551 P.2d at 345

> [O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger . . . . [T]he discharge of this duty of due care will necessarily vary with the facts of each case . . . .

205. *See* Zipursky, *supra* note 147, at 1263 (arguing that the court will have to determine whether or not the defendant foresaw the harm to the plaintiff, even under Section 7 of the Third Restatement).

C. The Problems with Applying Section 7 to Take-Home Asbestos Exposure Cases

Applying Professor Zipursky's concerns in the context of take-home asbestos exposure demonstrates that the Third Restatement's approach to duty is not satisfactory. Section 7 interferes with the purpose of motions for summary judgment, and it places public policy decisions in the wrong hands.

1. Section 7's Interference with Motions for Summary Judgment

In nearly every take-home asbestos case, the defendant initially moves for summary judgment, arguing that it owes no duty to the plaintiff, an individual with whom it has no legal relationship and whose exposure occurred off of the defendant's premises.[206] If the trial court grants a motion for summary judgment, finding that the defendant owed no duty to the plaintiff, then, unless the plaintiff appeals, the case closes.[207] Thus, the motion for summary judgment allows the court to

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206. *See, e.g.*, Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439, 443 (6th Cir. 2009) (reviewing the district court's grant of summary judgment for the defendant); Catania v. Anco Insulations, Inc., No. 05-1418-JJB, 2009 WL 3855468, at *1 (M.D. La. Nov. 17, 2009) (ruling on defendant's motion for summary judgment on the theory that defendant owed no duty of care to plaintiff); Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 933 (Ill. App. Ct. 2009) (reviewing the trial court's grant of summary judgment in favor of the defendant who argued that it owed no duty to the wife of an employee); Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 692 (Iowa 2009) (reviewing the trial court's grant of summary judgment in favor of the defendants who argued that they owed no duty to the plaintiff); Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1146–47 (N.J. 2006) (reviewing the defendant's motion for summary judgment in which it argued that it owed no duty to an employee's wife); *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 117–18 (N.Y. 2005) (hearing an appeal on the defendant's motion for summary judgment in which it argued it owed no duty to the plaintiff); Hudson v. Bethlehem Steel Corp., No. 1991-C-2078, 1995 WL 17778064, at *1 (Pa. Ct. C.P. Dec. 12, 1995) (determining the validity of the defendant's motion for summary judgment based on lack of duty); Rochon v. Saberhagen Holdings, Inc., 140 Wash. App. 1008, at *1 (2007) (reconsidering the trial court's grant of the defendant's motion for summary judgment).

207. *See* Kyle M. Robertson, *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C. L. REV. 747, 747 (1987) ("Where the defendant is the moving party, the grant of a summary judgment motion relieves the defendant from the burden of trial.").

"eliminat[e] unnecessary litigation."[208] Factually deficient claims can be "isolated and prevented from going to trial," avoiding the "unwarranted consumption of public and private resources."[209] The courts should embrace this purpose of summary judgment in asbestos cases, given the tens of billions of dollars already spent in asbestos litigation.[210]

Viewing take-home asbestos cases in their usual procedural posture illustrates the flaws of the Third Restatement. On a motion for summary judgment based on lack of duty, Section 7, which presumes the existence of duty, requires the court to dismiss the motion unless it is willing to wrestle with policy determinations.[211] As such, a motion for summary judgment centered on the absence of duty will succeed only in exceptional cases.[212] In fact, each court that has applied Section 7 to review motions for summary judgment has denied the motion, finding that the defendant owed a duty to the plaintiff and that the jury should hear the case.[213]

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208. *Id.* at 747–48.

209. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); *see also* Witter v. Abell-Howe Co., 765 F. Supp. 1144, 1147 (W.D.N.Y. 1991) (directing courts to not be "reluctant to grant summary judgment in appropriate cases" because "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims" (citing *Celotex*, 477 U.S. at 323–24)). Summary judgment permits courts "to avoid 'protracted, expensive and harassing trials.'" *Id.* (quoting Meiri v. Dacon, 749 F.2d 989, 998 (2d Cir. 1985), *cert. denied*, 474 U.S. 829 (1985)).

210. *See* CARROLL, ET AL., *supra* note 4 and accompanying text (stating that over $70 billion has been spent on asbestos litigation).

211. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010) (assuming the existence of a duty and allowing the court to find against duty only when warranted by "countervailing principle or policy").

212. *See id.* (suggesting courts to make "no duty" decisions based on policy concerns only in "exceptional cases"); Kotlarsky, *supra* note 137, at 487 ("The Third Restatement . . . will likely lead to fewer 'no duty' holdings.").

213. *See* Sage v. Blagg Appraisal Co., 209 P.3d 169, 176 (Ariz. Ct. App. 2009) (reversing the judgment of the lower court and holding that an "appraiser retained by a lender in connection with a purchase-money mortgage transaction owes a duty of care to the borrower who is the prospective buyer of the home to be appraised"). Though the court did not apply Section 7 in its analysis, the court noted that it would reach the same conclusion under the Third Restatement, seeing no countervailing public policy reasons to reject the duty. *Id.* at 175 n.9; *see also* Gipson v. Casey, 150 P.3d 228, 232–34 (Ariz. 2007) (reversing the trial court's grant of summary judgment and using Section 7 to conclude that a duty is created when a person who has been prescribed drugs

Courts should utilize summary judgment motions to "assess the proof in order to see whether there is a genuine need for trial."[214] The assumption of duty required under Section 7(a), however, bars courts from reviewing the record for a "genuine issue of material fact"[215] on the existence of duty and limits courts to policy considerations.[216] As a result, Section 7 undermines the purpose of summary judgment: justice and efficiency.[217] Given the emphasis placed on motion practice in civil litigation,[218] the Third Restatement's shortcomings in this regard are significant.

If courts can use foreseeability in their review of motions for summary judgment, however, they can better identify the cases that require a jury's consideration. In *Tesar v. Anderson*,[219] the Court of Appeals of Wisconsin alluded to this point. The court stated that it can maintain the proper roles of the judge and the jury without entirely eliminating foreseeability as the Third Restatement does.[220] Wisconsin's practice allows the court to find a lack of duty only where "no reasonable jury could find

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improperly distributes the drugs to others); Thompson v. Kaczinski, 774 N.W.2d 829, 840 (Iowa 2009) (finding that the lower court erred in concluding that the defendants owed no duty to the plaintiff to avoid the placement of obstructions on a roadway). Finding no policy justifying a departure from this duty, as required by Section 7 for no-duty determinations, the court reversed the lower court's grant of summary judgment. *Id.* at 835; *see also* A.W. v. Lancaster Cnty. Sch. Dist., 784 N.W.2d 907, 918–19 (Neb. 2010) (adopting Section 7 and determining that the public school system owed a duty protect the students from sexual assault in the school building and no countervailing principle or policy warrants modification of that duty). Thus, the Supreme Court of Nebraska held that summary judgment was improper. *Id.* at 920.

214. JUDICIAL CONFERENCE OF THE U.S., REPORT OF PROPOSED AMENDMENTS TO CERTAIN RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, 31 F.R.D. 621, 648 (1962).

215. FED. R. CIV. P. 56; *see also, e.g.*, DEL. CT. C.P.R. 56 (granting a motion for summary judgment if there is "no genuine issue as to any material fact"); 735 ILL. COMP. STAT. ANN. 5 / 2-1005(c) (West 1985) (same); N.J. STAT ANN. § 4:46-2 (West 1998) (same).

216. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(b) (2010) (allowing a court to find the absence of a duty only for policy reasons).

217. *See supra* notes 207–09 and accompanying text (defining the purpose of summary judgment).

218. *See* Morton Denlow, *Justice Should Emphasize People, Not Paper*, 83 JUDICATURE 50, 90 (1999) (discussing the growth of motion practice).

219. 789 N.W.2d 351 (Wis. Ct. App. 2010).

220. *See id.* at 358 n.13 (disagreeing with the Third Restatement's establishment of "categories of duty" with "exceptions to those categories").

foreseeability."[221] To make this determination, the court must conduct at least a cursory examination of the facts and circumstances of the case before it.[222] If the court can review the facts on a summary judgment motion to determine the foreseeability of the injury, then judicial economy—the drive of the summary judgment rule[223]—can be better served.

This is especially true for take-home asbestos cases, in which the existence of duty frequently depends on the date on which the plaintiff's asbestos exposure occurred.[224] If the exposure occurred prior to the date on which the asbestos industry knew of the dangers of non-occupational exposure, then it is reasonable to conclude that the defendant could not have foreseen that one of its employee's family members would suffer an asbestos-related injury.[225] If a judge can reach this conclusion based on the facts

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221. *Id.* Section 7 of the Third Restatement contains similar language. *See* § 7 cmt. j (2010) ("[C]ourts should leave [foreseeability] determinations to juries unless no reasonable person could differ on the matter."). Yet the Wisconsin court still discounts the presumption of duty in Section 7(a), stating that a duty does not always exist "in any case where negligence is asserted . . . no matter what the facts of the case reveal or how fanciful are the plaintiff's allegations." *Tesar*, 789 N.W.2d at 358 n.13. Wisconsin's approach is not as presumptive as the Third Restatement's, finding duty only if it is foreseeable that the defendant's act "might cause injury or damage to someone." *Id.* at 363.

222. *See Tesar*, 789 N.W.2d at 358 n.13 (reaffirming duty as an element in Wisconsin's negligence methodology and stating that duty must be determined according to the "facts and circumstances pled or proven").

223. *See* Exxon Corp. v. Nat'l Foodline Corp., 579 F.2d 1244, 1246 (C.C.P.A. 1978) (verifying that the "basic" purpose of summary judgment is "judicial economy to save the time and expense of a full trial when it is unnecessary because the essential facts necessary to decision of the issue can be adequately developed by less costly procedures . . . with a net benefit to society").

224. *See supra* notes 40–56 and accompanying text (illustrating the cases in which the court compared the date on which the plaintiff's asbestos-injury occurred with the industry's understanding of asbestos at that time).

225. *See, e.g.*, Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 460–61 (Tex. Ct. App. 2007) (considering whether an "ordinary employer that used, but did not manufacture, asbestos" could have foreseen the risk for illness posed by non-occupational exposure to asbestos in the 1950s when the plaintiff's exposure occurred). The court concluded, based on the evidence presented on the matter, that "non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonable foreseeable" to the defendant at that time. *Id.* at 462. Because foreseeability is the "foremost and dominant consideration in a legal duty analysis," the court held, as a matter of law, that the defendant did not owe a duty to the wife of an employee when the asbestos exposure occurred in the 1950s. *Id.* (citation omitted).

entered with a motion for summary judgment, then the judge should be able to grant the motion—assuming the only disputed issue is duty—without considering policy.[226] In this way, a court can quickly eliminate "factually unsupported claims."[227]

2. The Stalemate of Competing Public Policies in Take-Home Asbestos Exposure

Requiring courts to engage in public policy considerations before making a "no duty" decision raises an additional problem with the application of Section 7 to take-home asbestos exposure cases, namely that these cases often involve competing social policies.[228] On the one hand, extending an employer's duty to the family members of his employees "saddles the defendant employer with a burden of uncertain but potentially very large scope."[229] If courts hold employers liable for harm resulting from asbestos fibers spreading from a worker's clothing, the number of potential plaintiffs becomes boundless, encompassing all who

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226. *See* DOBBS, *supra* note 23, at 335–36 (acknowledging that in some cases, the reasonable foreseeability of harm "is a call that is easy to make and so clear that courts will brook no argument"). Note that experts have not yet unanimously verified the date on which the asbestos industry became aware of the danger of asbestos and the risk of take-home exposure. *See supra* notes 57–63 and accompanying text (illustrating courts' various accounts of when the risks of asbestos became widely known). *Compare* Condon v. Union Oil Co., No. A102069, 2004 WL 1932847, at *4 (Cal. Ct. App. Aug. 31, 2004) (reviewing expert testimony that explained that the danger of take-home asbestos was not known until the 1970s), *with* Catania v. Anco Insulations, Inc., No. 05-1418-JJB, 2009 WL 3855468, at *2 (M.D. La. Nov. 17, 2009) (concluding that in 1951, when the Walsh–Healey Act was passed, "the risks of asbestos, including risks from employees carrying it home on clothing, were foreseeable").

At summary judgment, if the evidence admitted by the parties suggests a disputed timeline, then the judge should not grant the motion for summary judgment because a "genuine issue of material fact" exists. FED. R. CIV. P. 56; *see also supra* note 215 (listing statutes that conform to the language of the federal rule on summary judgment motions). For a current description on when and how the risks of take-home asbestos came to be understood, see Donovan et al., *supra* note 60, at 703–31.

227. Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986).

228. *See supra* note 135 (comparing the pertinent social policies involved with secondhand asbestos).

229. Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 403 (Ct. App. 2012).

come into contact with the employee while he is wearing his work clothes outside of the workplace.[230]

On the other hand, society would benefit from ensuring that "corporations are held accountable for the consequences [of] their processes."[231] Research demonstrates the extreme toxicity of asbestos and the detrimental effects it has on the health of humans.[232] In fact, asbestos has caused what is considered "the worst occupational health disaster in U.S. history."[233] The dangerous nature of asbestos has led to calls for imposing a duty on employers to protect employees, as well as their families, from its fatal effects.[234]

Arguably, courts are not the most competent body to decide which of these strong policy considerations should prevail.[235] Indeed, courts might not *want* to delve into public policy when

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230. *See* CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 209 (Ga. 2005) (declining to expand recovery "beyond manageable bounds and create an almost indefinite universe of potential plaintiffs" (citation omitted)); *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005) (worrying about the "specter of limitless liability" (citation omitted)).

231. *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 229 (Mich. 2007) (Cavanagh, J., dissenting).

232. *See* DEBORAH R. HENSLER, WILLIAM L.F. FELSTINER, MOLLY SELVIN & PATRICIA A. EBENER, RAND INST. FOR CIVIL JUSTICE, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 1 (1985) (estimating the range of deaths due to asbestos exposure through the year 2000 to range from between 200,000 and 450,000). For more information on the health effects of asbestos, see AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TOXICOLOGICAL PROFILE FOR ASBESTOS (Sept. 2001), http://www.atsdr.cdc.gov/ToxProfiles/tp61.pdf.

233. CARROLL ET AL., *supra* note 18, at 16 (citation omitted).

234. *See In re Certified Question*, 740 N.W.2d at 233–34 ("The severely dangerous character of asbestos should factor much more heavily in the analysis of whether defendant had a duty to mitigate the risk involved."); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 374 (Tenn. 2008)

> [I]n 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 carpool members, babysitters, or the domestic help from pursuing negligence claims against an employer should they develop mesothelioma after being repeatedly and regularly in close contact with an employee's asbestos-contaminated work clothes over an extended period of time.

235. 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) (arguing that courts may not be "especially competent" to make "large-scale policy judgments").

determining the existence of a duty.[236] Because Section 7(b) insists that courts support their no-duty decisions with public policy rationales, it is not the best approach to take-home asbestos exposure cases.

IV. Suggested Approaches to Handling Take-Home Asbestos Exposure Cases

With regard to cases alleging secondhand exposure to asbestos, and perhaps cases involving the existence of duty in general, courts are inundated with a plethora of relevant considerations, each leading them toward different conclusions. Essentially, the holdings on the existence of duty in these cases turn on courts' precedential common law of torts.[237] Some states principally focus on foreseeability,[238] while other states consider the relationship between the parties as most important.[239] Still others base their holdings primarily on public policy concerns.[240] Section 7 of the Third Restatement fails to take into account the reality that states do not weigh factors in the same manner.[241] This Part argues that a multi-factor test, such as that used by the

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236. *See supra* note 194 (describing the Supreme Court of Delaware's hesitancy to engage in policy analysis); Cardi, *supra* note 142, at 763 ("Many courts feel squeamish about deciding tort cases on the basis of reasoning that is arguably proper only for the legislative branch.").

237. *See supra* Part II (presenting state courts' various approaches to duty analysis in the context of take-home asbestos exposure).

238. *See supra* Part II.A (naming the courts that use foreseeability of harm in their duty analysis); *see, e.g.*, Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1148 (N.J. 2006) (considering foreseeability of harm as a "crucial element" in determining whether a duty should be imposed on the defendant).

239. *See supra* Part II.B (naming the courts that consider the relationship between the defendant and the plaintiff in their duty analysis); *see, e.g.*, *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 119 (N.Y. 2005) (stating that the defendant's relationship with the plaintiff is the "key" consideration to the existence of duty).

240. *See, e.g.*, *In re* Certified Question from the Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 211 (Mich. 2007) (stating that the "ultimate inquiry" in duty analysis involves the balance of policy considerations).

241. *See supra* Part III.B (recognizing that the Third Restatement's focus on public policy and elimination of foreseeability conflicts with the current practice of most states).

Delaware court in *In re Asbestos Litigation*,[242] most appropriately handles take-home asbestos exposure cases because it allows states to weigh factors in accordance with their body of common law while maintaining sufficient uniformity in outcome across the country.[243] Though offering a judicial approach, this section ultimately asserts that the problem of take-home asbestos exposure is best suited for the legislature.[244]

A. Judicial Solution: The Multi-Factored Test

In determining whether a premise owner or employer owes a duty in the context of take-home asbestos exposure, many states apply some form of a factored test, though one state might weigh a factor more heavily than another state.[245] While the relevant considerations vary among the states, the courts commonly hold four specific factors as important in duty analysis: the foreseeability of harm, the relationship between the parties, the burden that creating a duty will place on the defendant, and public policy considerations.[246] None of these factors alone suffices to establish a duty.[247] Considering them together in the

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242. *See supra* notes 82–92 and accompanying text (discussing the factored analysis applied by the Delaware Court in *In re Asbestos Litigation*).

243. *See infra* Part IV.A (proposing a multi-factored test for determining duty in secondhand asbestos cases).

244. *See infra* Part IV.B (suggesting that state legislatures should take responsibility for handling this issue).

245. *See supra* notes 79–80 (listing some cases that have handled duty using balancing tests).

246. *See, e.g.*, Campbell v. Ford Motor Co., 141 Cal. Rptr. 3d 390, 398 (Ct. App. 2012) (considering each of these factors as part of its duty analysis); *In re* Asbestos Litig., C.A. No. N10C-04-203 ASB, 2012 WL 1413887, at *2 (Del. Super. Ct. Feb. 21, 2012) (same); Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092, 1097 (Ill. 2012) (same); Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 181–83 (La. Ct. App. 2006) (same); *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 216–20 (Mich. 2007) (same); Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1147–49 (N.J. 2006) (same); *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 119–22 (N.Y. 2005); Satterfield v. Breeding Insulation Co. 266 S.W.3d 347, 366 (Tenn. 2008) (same); Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 460 (Tex. Ct. App. 2007) (same).

247. *See* Satterfield v. Breeding Insulation Co. 266 S.W.3d 347, 366 (Tenn. 2008) ("[F]orseeability alone is insufficient to create a duty."); *In re* Certified Question from Fourteenth Dist. Ct. App. of Tex., 740 N.W.2d 206, 212 (Mich. 2007) ("[E]ven when there is a relationship between the parties, a legal duty

context of take-home asbestos exposure, however, addresses the issues that the Third Restatement overlooks while furthering the interests that the Third Restatement views as important.

First, maintaining foreseeability of harm as a factor in duty analysis conforms to the practice of most states, while the approach of Section 7 diverges from this consensus.[248] Placing the foreseeability factor within a balancing test allows each state to assess it according to its tort law rather than eliminating foreseeability as a factor altogether.[249] Louisiana, for example, "relie[s] heavily upon foreseeability when finding a duty."[250] As such, if it were to apply a factor-balancing test, a Louisiana court would predominantly consider whether or not the defendant could have foreseen the asbestos-related injuries caused through secondhand exposure based on the information available to it at the time.[251] In Michigan, however, the relationship between the parties controls the finding of a duty.[252] Thus, in approaching a take-home asbestos exposure case using a factor-balancing test, a Michigan court would not look to the foreseeability factor unless it first found a legally significant relationship between the defendant and the plaintiff.[253]

Second, even if a court does not heavily weigh the foreseeability of harm, preserving it as a factor in duty analysis will allow courts to quickly eliminate factually deficient cases at summary judgment.[254] As discussed *supra*, the date on which the

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does not necessarily exist . . . . [T]he other enumerated factors must also be considered.").

248. *See supra* notes 187–89 and accompanying text (discussing the overwhelming use among the states of foreseeability of harm in duty analysis).

249. *See supra* note 147 and accompanying test (explaining the Third Restatement's omission of foreseeability).

250. Chaisson v. Avondale Indus., Inc., 947 So. 2d 171, 183 (La. Ct. App. 2006).

251. *See id.* (considering what a reasonable company would have known regarding the hazards of household exposure to asbestos at the time of the plaintiff's injury).

252. *See In re Certified Question*, 740 N.W.2d at 216 (stating that relationship between the parties is the "most important prong in this state" for duty determination).

253. *See id.* at 222 ("Because any relationship between Miller and the defendant was highly tenuous, the harm was, in all likelihood, not foreseeable . . . , [so] we conclude that a legal duty should not be imposed.").

254. *See supra* notes 211–17 and accompanying text (evaluating the

secondhand exposure occurred is relevant in determining whether the employer owed a duty to prevent that exposure.[255] According to a recent evaluation of secondhand asbestos exposure, the first case reports on the possible risk of asbestos-related disease caused by household contacts emerged in the 1960s.[256] Using this evidence, a court could rule in favor of the defendant on the issue of duty without resorting to a jury when both parties agree that the plaintiff's take-home exposure to asbestos occurred in the early 1950s, before the risk of non-occupational exposure was realized.[257]

In *Hudson v. Bethlehem Steel Corp.*,[258] for example, a trial court in Pennsylvania decided a motion for summary judgment on this basis.[259] In its decision, the court relied on a report entered by the plaintiff as an exhibit in her response to the motion for summary judgment.[260] The report included only one source, published in 1965, which addressed non-occupational exposure to asbestos.[261] As such, nothing in the record demonstrated that the defendant was "on notice, prior to 1960," that an employee's wife was at risk of contracting mesothelioma.[262] Because the plaintiff's exposure began in 1930, the court ruled in favor of the defendant on the motion for summary judgment.[263]

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importance of foreseeability in determining take-home asbestos cases at summary judgment).

255. *See supra* notes 40–56 (discussing cases in which the court analyzed the date of exposure in its duty analysis).

256. *See* Donovan et al., *supra* note 60, at 707 (discussing the existing research on disease in household contacts of persons who worked with asbestos occupationally).

257. *See supra* notes 57–62 and accompanying text (referring to *Alcoa, Inc. v. Behringer*, a case in which the court applied this reasoning).

258. No. 1991-C-2078, 1995 WL 17778064 (Pa. Ct. C.P. Dec. 12, 1995).

259. *See id.* at *1 (reviewing a motion for summary judgment filed by the employer based on the theory that it owed no duty to the plaintiff, the wife of the defendant's employee).

260. *See id.* at *4 n.6 (noting that the report on which the court relied was attached to the plaintiff's response to summary judgment as an exhibit).

261. *See id.* at *4 (describing the report prepared for the plaintiff by Dr. David Parkinson).

262. *Id.*

263. *See id.* (granting Bethlehem Steel Corporation's motion for summary judgment on the negligence theory because the plaintiff was not a "foreseeable

Hudson demonstrates a court's ability to fairly decide a take-home asbestos exposure case at summary judgment when the parties have entered this type of chronological evidence. Without contemplation of foreseeability, the court could not have made this call.[264] Under the Third Restatement, the court would have been forced to presumptively find that a duty existed, despite the clear factual evidence submitted by the parties proving that, at the time, the defendant could not have known of any exposure risks to nonemployees.[265] Requiring a court to engage in at least limited foreseeability analysis under a multi-factor balancing test will result in the elimination of "easy" cases at summary judgment, leaving the more difficult cases for the jury.[266] This approach, therefore, addresses the concerns of the Third Restatement Reporters[267] as well as the goals of summary judgment[268]: it preserves the roles of the jury and judge, leaving the factually ambiguous cases to the fact finders, while ensuring that the tool of summary judgment is available to wisely manage judicial resources.

Finally, the multi-factored test preserves the Third Restatement's public policy evaluation in duty analysis.[269]

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victim of the asbestos-containing products utilized by Bethlehem Steel at the time periods in issue").

264. *See id.* at *3 (finding for the defendant because the evidence failed to demonstrate that the defendant should have foreseen that a "passive recipient" like the plaintiff could experience the hazards associated with asbestos products).

265. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 cmt. j (2010) (stating that a court must justify a "no-duty" ruling "without obscuring references to foreseeability"); Kotlarsky, *supra* note 137, at 460 (describing the presumptive nature of Section 7(a) of the Third Restatement).

266. *See* DOBBS, *supra* note 23, at 335–36 (noting that in some cases, the reasonable foreseeability of harm "is a call that is easy to make and so clear that courts will brook no argument"). Dobbs states that "aside from the easy cases, the question of what is or is not foreseeable to a reasonable person in the position of the defendant is normally a jury question, part of its overall evaluation of the defendant's conduct." *Id.* at 336.

267. *See supra* note 160 and accompanying text (describing the Third Restatement's concern that using foreseeability in duty analysis blurs the line between the role of the judge and the jury).

268. *See supra* notes 207–09 and accompanying text (highlighting the purpose of summary judgment).

269. *See* § 7(b) (allowing a no-duty determination only for reasons based on policy); *id.* (Reporters' Note) ("Avoiding reliance on unforeseeability as a ground

Making public policy an explicit prong in a factored test addresses the Third Restatement's concern with lack of transparency.[270] A test that examines four specific factors—foreseeability, relationship, burden, and public policy—provides the court with sufficient opportunity to fully and plainly explain its decision for the benefit of both future litigants and other courts.[271] But unlike Section 7, which focuses solely on public policy, the multi-factored test gives each court the flexibility to implement its state's common law on torts and to adhere to its precedent.[272]

Fans of the Third Restatement argue that factored tests lead to "murky" analysis and judicial manipulation.[273] Such arguments, however, forget that courts cannot abandon their precedent on negligence in the application of the test.[274] Courts must weigh the factors according to their common law on duty.[275]

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for a no-duty determination and instead articulating the policy or principle at stake will contribute to transparency, clarity, and better understanding of tort law.").

270. *See supra* notes 173–77 and accompanying text (discussing the opinion that Section 7 brings more clarity and transparency to duty analysis because it requires courts to explicitly state their policy reasons for not finding a duty rather than hiding behind other negligence doctrines).

271. *See supra* note 246 (listing the many cases in which courts performed duty analysis using a formulation of these factors, rather than relying on public policy alone).

272. *Compare* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010) (requiring every court to automatically find a duty unless public policy considerations suggest a no-duty determination), *with* Rochon v. Saberhagen Holdings, Inc., 140 Wash. App. 1008, at *2 (2007) (finding a duty by using "[s]tate supreme court precedent," which requires an analysis of foreseeability in defining duty).

273. Kotlarsky, *supra* note 137, at 486.

274. *See* Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989) (describing stare decisis as "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion'" (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888))).

275. *See, e.g.*, CSX Transp., Inc. v. Williams, 608 S.E.2d 208, 209 (Ga. 2005) (deciding the case under Georgia's common law on duty); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 362 (Tenn. 2008) (considering how Tennessee tort law "has developed over the years" in its determination of duty in take-home asbestos exposure cases); Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 460 (Tex. Ct. App. 2007) (applying the test that the Texas Supreme Court uses in determining the existence of a legal duty); *Rochon*, 140 Wash. App. at *2

Thus, using this proposed framework, each state court's analysis will be homogenous. Allowing for flexibility within the structure of a four-prong test ensures that a state can conform to its negligence jurisprudence while bringing an element of uniformity to duty analysis nationwide.

B. Calling for a Legislative Response

Part IV.A of this Note proposes a method by which the judiciary can address the legal problem of duty in take-home asbestos exposure cases.[276] While the multi-factor test can help courts handle lawsuits arising under this theory for now, the only way a state can ensure complete consistency in this area is through legislative action. Because these cases implicate competing public policies,[277] elected government representatives, rather than judicial bodies, should decide which policy prevails.[278]

Prior to the emergence of take-home asbestos exposure cases, the Supreme Court urged Congress to act in response to the "elephantine mass of asbestos cases" brought about by workers' occupational exposure to asbestos, stating that asbestos litigation "defies customary judicial administration and calls for national legislation."[279] Congress has tried on several occasions to pass the requested legislation.[280] The Asbestos Health Hazards

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(stating that the existence of a legal duty depends on "[s]tate supreme court precedent").

276. *See supra* Part IV.A (proposing a four-prong test to determine duty in secondhand asbestos exposure cases).

277. *See supra* notes 228–34 and accompanying text (considering the competing social policies involved in take-home asbestos cases).

278. *See supra* notes 235–36 and accompanying text (suggesting that legislators, rather than courts, should determine matters of public policy).

279. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999); s*ee also* GRIFFIN B. BELL, NAT'L LEGAL CTR. FOR THE PUB. INTEREST, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS 3 (2002) (describing the Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist in 1991, that reported on the state of the asbestos crisis). The Committee stated that the asbestos problem "is becoming a disaster of major proportions . . . which the courts are ill-equipped to meet effectively." *Id.* Additionally, the Committee warned that "the worst is yet to come" and pleaded for Congress to "formulate a national solution." *Id.*

280. *See* CARROLL ET AL., *supra* note 4, at 130 ("Since the inception of asbestos litigation in the 1970s, more than 15 bills have been introduced in the

Compensation Act of 1981,[281] an unsuccessful Senate bill, would have established an exclusive remedy to employees injured by occupational exposure to asbestos in the form of workers' compensation.[282] The Occupational Disease Compensation Act of 1983,[283] also unsuccessful, would have established a compulsory compensation program for employees for "death or disability resulting from work-related exposure to toxic substances," including asbestos.[284] A type of compensation structure that would use arbitration, negotiation, and mini trials to address compensation for injuries caused by asbestos exposure was also in the works in the 1980s, but it never became operational.[285]

Just as Congress has been unable to launch proposed solutions to occupational asbestos exposure, likewise, federal legislative responses to non-occupational exposure have failed to mature. In 1995, responding to "continued reports of contamination in workers' homes for a number of dust particles,"[286] Congress considered the Workers' Family Protection Act.[287] The Act directed the National Institute for Occupational Safety and Health (NIOSH) to conduct a study on worker home contamination, including that caused by asbestos.[288] NIOSH reported an increased risk for certain lung diseases, such as mesothelioma, lung cancer, and asbestosis, among the families of

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U.S. Congress proposing to change the nation's approach to resolving asbestos claims.").

281. Asbestos Health Hazards Compensation Act of 1981, S.1643, 97th Cong. (1981).

282. *See* HENSLER ET AL., *supra* note 232, at 29 (describing the Asbestos Health Hazards Compensation Act).

283. Occupational Disease Compensation Act of 1983, H.R. 3175, 98th Cong. (1983).

284. *Bill Summary and Status H.R. 3175*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/D?d098:1:./temp/~bdgyFE:@@@L&summ2=m&|/home/LegislativeData.php?n=BSS;c=98| (last visited Jan. 28, 2014) (on file with the Washington and Lee Law Review).

285. *See* HENSLER ET AL., *supra* note 232, at 31 (describing the Asbestos Claims Facility, a concept developed by asbestos producers and insurers that would resolve asbestos-related claims filed by workers).

286. Donovan, *supra* note 60, at 705.

287. Workers' Family Protection Act, S. 353, 102d Cong. (1991).

288. *See* Donovan, *supra* note 60, at 705 (presenting two bills that Congress considered in the early 1990s to study the issue of home contamination).

asbestos-exposed workers.[289] No further congressional action was taken based on these results.[290]

Additionally, in 2005, Congress considered but did not pass the Fairness in Asbestos Injury Resolution Act.[291] This legislation sought to "relieve the Federal and State courts of the burden of the asbestos litigation" by creating a fund to "provide the necessary resources for a fair and efficient system to resolve asbestos injury claims" such that victims could be compensated for their injuries.[292] "Any exposed person" could access the fund.[293] Thus, those injured by take-home asbestos exposure could make a claim under this Act rather than resorting to the court system.[294] The proposal died in the Senate.[295]

Seeing the failure of federal initiatives, a number of states have statutorily responded to the issue of liability for injuries caused by take-home exposure to asbestos. Kansas and Ohio have eliminated by statute any cause of action that a victim of secondhand asbestos exposure might have against a premises owner.[296] In *Boley v. Goodyear Tire & Rubber*

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289. *See id.* (stating the results of the study).

290. *See id.* (stating that the purpose of the Act was simply to "review past home contamination incidents as reported in the published or in governmental records" and to evaluate the "regulatory, statutory, and industrial hygiene measures being used by employers to prevent or remediate home contamination").

291. Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005).

292. *Id.*

293. *Id.*

294. *See id.* (defining the Act's application to take-home exposure). The provision states the following:

> A claimant may alternatively satisfy the medical criteria requirements of this section where a claim is filed by a person who alleges their exposure to asbestos was the result of living with a person who, if the claim had been filed by that person, would have met the exposure criteria for the given disease level, and the claimant lived with such person for the time period necessary to satisfy the exposure requirement, for the claimed disease level.

Id.

295. *See S. 852 (109th): FAIR Act of 2005*, GOVTRACK.US, http://www.govtrack.us/congress/bills/109/s852 (last visited Jan. 28, 2013) (summarizing the life of the Act) (on file with the Washington and Lee Law Review).

296. *See* KAN. STAT. ANN. § 60-4905 (2006) ("No premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure

Co.,[297] the Supreme Court of Ohio interpreted and applied Ohio's statute to a case in which the plaintiff contracted mesothelioma allegedly from inhaling asbestos dust from her husband's work clothes.[298]

To determine whether the Ohio statute applied, the court looked to the intent of the Ohio General Assembly.[299] The legislation targeted the enhancement of the judicial system's ability to "supervise and control litigation and asbestos-related bankruptcy proceedings," as well as the conservation of the "scarce resources of the defendants."[300] Accordingly, the court held that the statute bars a premises owner's liability in tort "unless the exposure occurred at the owner's property."[301] The court held in favor of the defendant premises owner, ruling that the statute "unambiguously prohibits take-home-asbestos claimants" from recovering from premises owners.[302]

The Ohio statute, along with the subsequent judicial decision, provides an example of a state's frustration with the "explosion in asbestos litigation."[303] While only Ohio and Kansas have passed statutes that entirely prohibit claims against premises owners by those who never entered the premises, other state legislatures have also acted to slow the growth of asbestos litigation.[304] Several states have adopted "objective minimum medical criteria standards for plaintiffs filing asbestos exposure

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unless such individual's alleged exposure occurred *while the individual was at or near the premises owner's property*." (emphasis added)); OHIO REV. CODE ANN. § 2307.941 (West 2004) ("A premises owner is not liable 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*." (emphasis added)).

297. 929 N.E.2d 448 (Ohio 2010).

298. *See id.* at 450 (considering whether the Ohio law prohibited liability of the defendant premises owner when the exposure to asbestos did not occur at his property).

299. *See id.* at 451 (stating that statutory construction requires considering the legislative intent of the statute).

300. *Id.* at 453 (O'Connor, J., concurring).

301. *Id.* (majority opinion).

302. *Id.* (O'Connor J., concurring).

303. Michael D. Kelley, Boley v. Goodyear Tire & Rubber Co., 37 OHIO N.U. L. REV. 901, 912 (2011).

304. *See id.* at 913–14 (describing asbestos litigation reform in the states).

claims."[305] In addition, states have reformed their rules of civil procedure in an attempt to limit claims for damages caused by asbestos injuries.[306]

Given states' varying public interests[307] and the uneven distribution of asbestos claims throughout the nation,[308] the most appropriate response to take-home asbestos exposure differs for each state. Therefore, individual state statutory responses most effectively address the problem of take-home asbestos exposure. All states have an interest in furthering the purposes of the tort system by compensating those who are injured by the acts of others.[309] State legislatures should be mindful of this purpose when considering the issue of take-home asbestos.[310] Some states, however, bear a large concentration of the nation's asbestos litigation.[311] These states, therefore, have an interest in reducing

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305. *See id.* at 914 (stating that the state legislatures in Florida, Georgia, Kansas, South Carolina, and Texas have enacted minimum medical criteria requirements that have significantly reduced the number of asbestos-related case filings). Such laws require "non-malignant plaintiffs" to demonstrate injury via a diagnosis by a proper medical authority prior to filing an active claim. *Id.*; *see also* FLA. STAT. § 774.201 (2007), *repealed as unconstitutional by* Am. Optical Corp. v. Spiewak, 73 So. 3d 120, 133 (Fla. 2011) (holding that retroactive application of § 774.204 violated the plaintiffs' due process rights under the Florida Constitution and that the rest of § 774 was unconstitutional as not severable); GA. CODE ANN. § 51-14-4 (2012) (requiring "prima-facie" evidence of physical impairment for asbestos claims); KAN. STAT. ANN. § 60-4902 (2012) (requiring physical impairment as an "essential element" in an asbestos claim); S.C. CODE ANN. § 44-135-50 (2012) (requiring medical reports for plaintiffs claiming an asbestos-related injury); TEX. CIV. PRAC. & REM. CODE ANN. § 90.003 (West 2009) (same).

306. *See* Kelley, *supra* note 303, at 915 (discussing successful procedural reforms states have initiated, such as proscribing asbestos claim consolidations and strictly enforcing venue rules).

307. *See supra* Part III.C.2 (demonstrating the differing public interests associated with take-home asbestos cases).

308. *See infra* note 311 and accompanying text (illustrating the distribution of asbestos litigation at the state level).

309. *See* DOBBS, *supra* note 23, at 17 ("Compensation of injured persons is one of the generally accepted aims of tort law . . . . If a person has been wronged by a defendant, it is just that the defendant make compensation.").

310. *See, e.g.*, Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448, 453 (Ohio 2010) (O'Connor, J., concurring) (stating that one purpose behind the General Assembly's enactment of legislation for exposure to asbestos off of the landowner's premises was to "fully preserve the rights of claimants who were exposed to asbestos").

311. *See* CARROLL ET AL., *supra* note 4, at 62 tbl.3.3 (illustrating that Ohio,

asbestos lawsuits and purging the "specter of limitless liability"[312] associated with take-home asbestos. As such, they might want to consider adopting a statutory response similar to Ohio's by barring the liability of premises owners for asbestos injuries contracted by those who never entered the premises.[313]

Alternatively, in states where asbestos litigation does not greatly burden the courts, the legislators can draft statutes that recognize the rarity of secondhand exposure cases. The legislature should review literature on the history of asbestos and determine the date on which the asbestos industry should have been aware of the risks of take-home asbestos exposure.[314] Then, the statute should allow compensation for exposures occurring after this date and bar compensation if the plaintiff's exposure took place prior to the date. As discussed *supra*, many courts conduct this type of analysis when hearing take-home asbestos exposure cases.[315]

V. Conclusion

Though some feel that the asbestos crisis is reaching its end,[316] it seems that the litigation will continue for the next few decades.[317] Asbestos affects people beyond the employer and employee, resulting in lawsuits originating in the household.

Texas, New York, Mississippi, and West Virginia received sixty-six percent of the country's filings of asbestos claims).

312. *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115, 122 (N.Y. 2005).

313. *See* OHIO REV. CODE ANN. § 2307.941 (West 2004) (limiting the liability of premises owners for injuries allegedly caused by asbestos on their property).

314. The legislature should review sources such as those discussed *supra* note 60.

315. *See supra* notes 40–56 and accompanying text (illustrating the cases in which the court compared the date on which the plaintiff's asbestos-injury occurred with the industry's understanding of asbestos at that time).

316. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477, 503 (2006) (arguing that reforms in the area of asbestos litigation have lowered the number of asbestos claims filed).

317. *See* Cooper, *supra* note 2 (stating the opinion that asbestos litigation will "continue for the next few decades"); Schwartz, *supra* note 12, at 4 (recognizing that trial judges have made "major accomplishments" in the asbestos litigation but emphasizing that problems in this area still exist).

Courts must reflect on their state's policies and law on the existence of duty to determine how to react to secondhand exposure cases, perhaps considering the factored test described in Part IV.A. But more importantly, legislatures must get involved in this conflict. Rather than allowing asbestos litigation to continue to occupy a large share of court dockets for years to come,[318] state legislatures should evaluate the history of asbestos litigation to reach a statutory solution that will further the public policies of their respective states. By tackling this segment of asbestos litigation, the nation gets one step closer to ending this legal nightmare.

318. *See* Cooper, *supra* note 2 (analyzing the progress of asbestos litigation as it enters its sixth decade).