

## **Feature Article**

*By: Donald Patrick Eckler and Paul A. Ruscheinski  
Pretzel & Stouffer, Chartered*

# **A Bad Moon on the Rise? The Development of Liability for Secondary Exposure To Asbestos**

In *Simpkins v. CSX*, 2012 IL 110662, the Illinois Supreme Court waded into the debate over liability for secondary asbestos exposure that may significantly increase the potential liability for defendants in asbestos cases. The *Simpkins* court upheld the Illinois Appellate Court, Fifth District's decision to reverse the trial court's dismissal of the plaintiff's complaint premised on secondary asbestos exposure. Speaking for a majority of a split court, Justice Garman wrote that while it was possible for the plaintiff to seek recovery for secondary exposure to asbestos, her complaint had failed to sufficiently plead facts to establish the requisite knowledge on the part of the defendants to establish a duty. 2012 IL 110662, ¶ 27. The majority ordered on remand that the plaintiff be given an opportunity to replead to determine whether facts can be pled to state a cause of action. *Id.* at ¶ 28. Accordingly, the deeper issue regarding liability for secondary exposure to asbestos remains unresolved. This article will analyze the *Simpkins* majority and dissent, discuss the likely reaction of the plaintiff's bar, and suggest appropriate defense strategy in response.

## **Basics of Asbestos Litigation**

Numerous claims based on alleged exposure to asbestos have been filed for decades. Attorneys need not practice regularly in asbestos litigation to understand the basic facts of most cases: An individual is exposed to asbestos while working with or around a product that contains asbestos and as a result, the individual may be harmed. Plaintiffs often allege that the manipulation of an asbestos-containing product caused asbestos fibers to become airborne and ingested. Frequently, following a long latency period, plaintiffs allege that the asbestos fibers have caused an aggressive type of cancer known as mesothelioma. These types of direct exposure asbestos cases are the most commonly litigated.

There is, however, another type of asbestos case that is lesser known. These cases involve secondary exposure and are commonly referred to as take home or bystander exposure cases. The plaintiff in a secondary exposure case does not personally work with or around an asbestos-containing product. The most common plaintiff in a secondary exposure case is a family member who washes the clothes of the laborer who is in contact with asbestos-containing products. The theory is that the asbestos fibers attached to the clothing become airborne and are ingested by the family member; thus, he or she experiences secondary exposure to asbestos. Secondary exposure cases are regularly filed in Illinois but the recent decision in *Simpkins v. CSX* is likely the first step in solidifying secondary exposure liability in Illinois.

## Factual and Procedural History

In *Simpkins*, the plaintiff claimed that her mother died from injuries caused by secondary exposure to asbestos through contact with work clothing of her father. The plaintiff sued a number of defendants, including her father's former employer. *Id.* at ¶ 3. The decedent lived with her husband between 1958 and 1964. *Id.* The plaintiff's complaint alleged that her father's employer, among others, knew or should have known of the dangers of secondhand asbestos exposure during the time that the decedent was exposed. *Id.*

The defendant employer filed a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure arguing that because it did not have a relationship with the deceased, no duty was owed to her. *Id.* at ¶ 5. In response to the motion, the plaintiff filed multiple affidavits and supporting documentation. The trial court granted the defendant's motion to dismiss, severed the claims from those against the other defendants, and entered an order allowing an interlocutory appeal of the order of dismissal. *Id.* at ¶ 7.

The Illinois Appellate Court, Fifth District, reversed the judgment of the trial court finding that the plaintiff had sufficiently alleged that the potential injury to the decedent was foreseeable and that accordingly, the plaintiff had sufficiently alleged that the defendant owed a duty to the deceased. *Id.* at ¶ 8.

The Illinois Supreme Court upheld the appellate court's decision in a split opinion. Speaking for the majority, Justice Garman found that while it may be possible for a plaintiff to seek recovery for secondary exposure to asbestos, the plaintiff's complaint had failed to sufficiently plead facts, which, if proved, would give rise to the existence of a duty of care by the employer to an employee's family member. *Id.* at ¶ 28. Because the dismissal was on a motion brought under section 2-615, the court ordered that the plaintiff be given an opportunity to replead.

## The Majority's Analysis

The court focused on whether the defendant owed a duty to the decedent and, in particular, whether the risk of injury was foreseeable at the time of the exposure. *Id.* at ¶¶ 24-27. The court recognized that the concept of duty is "involved, complex, and nebulous." *Id.* at ¶ 17. Initially, the court examined the relationship between the defendant and the decedent. Although, the parties argued whether there was or was not an employment relationship between the defendant and the decedent, the court instead focused on whether the defendant had an obligation to the decedent. *Id.* at ¶ 18.

The court referenced its four factor test used to determine whether a relationship exists between a defendant and a plaintiff, giving rise to a duty. Those factors are (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Id.* at ¶ 21. The court rejected the defendant's contention that a "direct relationship" between the parties must be found, in addition to these four factors. *Id.* at ¶ 19. Instead, the court held "[a]n independent 'direct relationship' between parties may help to establish the foreseeability of the injury to that plaintiff (as either an individual or as a member of a class of individuals) but is not an additional requirement to establishing a duty in this context." *Id.*

Although the court mentioned the four factors, it never progressed past the first: foreseeability. The court reasoned "[i]n a situation such as this, what is considered reasonably foreseeable depends on what information about the nature of asbestos was known at the time of plaintiff's alleged exposure and, therefore, what information defendant could reasonably be held accountable for knowing." *Id.* at ¶ 25. This question turned on what the defendant could have known between the period of alleged exposure between 1958 and 1964. *Id.* The plaintiff alleged in the complaint that the defendant "knew or should have known" of the alleged risks of asbestos. *Id.* at ¶ 26. The court found the allegations insufficient and conclusory under Illinois law. *Id.* at ¶ 27. However, because the defendant did not raise the insufficiency of the plaintiff's allegations of foreseeability until the matter was on appeal, the plaintiff did not have an opportunity to plead additional facts before the trial

court. *Id.* at ¶ 28 The court ordered that on remand the plaintiff be allowed to file an amended complaint to test whether the plaintiff could plead sufficient facts to state a cause of action. *Id.*

## **The Dissent Rejects the Entire Concept of Secondary Exposure**

In a vigorous dissent, Justice Freeman, who was joined by Justice Burke, argued for refusing to recognize secondary asbestos liability altogether. Justice Freeman cited to courts from Michigan and New York which have so held. *Id.* at ¶ 38. Justice Freeman also stated that the danger of asbestos was not recognized until 1965. *Id.* at ¶ 36. Whether Justice Freeman's opinion that knowledge of the danger of asbestos was limited to the period only after 1965 is accepted by other courts, or by a later panel of the Illinois Supreme Court, will likely determine whether secondary asbestos liability ever grows roots in Illinois. If the 1965 date is accepted as the date of knowledge of the danger of asbestos, then claims like those of the plaintiff in this case could eventually be dismissed, because the exposure in this case was indisputably prior to 1965. However, the dissent's statement indicates that it may be willing to recognize secondary exposure claims for exposure that occurred after 1965.

## **Impact of *Simpkins* on Plaintiffs**

The *Simpkins* court held that foreseeability was a key when determining whether the defendant owed the plaintiff a duty. In determining foreseeability, the critical question turns on what a defendant actually knew regarding the nature and potential harms of asbestos during the alleged exposures. Going forward, *Simpkins* can be interpreted to require plaintiffs to plead facts showing that defendant knew that asbestos inhalation caused harm at the time of the alleged exposures. To satisfy this requirement, plaintiffs will undoubtedly seek to generalize harm as the three most common asbestos health hazards: asbestosis, lung cancer, and mesothelioma. Plaintiffs will likely cite to the studies concerning asbestos health hazards in Britain in the early 1900s. Once a defendant possesses knowledge of a harm caused by asbestos inhalation, a defendant could potentially be liable for any subsequent exposure.

To comply with the pleading requirement set forth in *Simpkins*, plaintiffs will likely point to the earliest studies and publications that illustrate any harm associated with asbestos inhalation. In 1924, pathologist Dr. W.E. Cooke examined the lungs of a deceased asbestos textile worker. W.E. Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, British Medical Journal, July 26, 1924 at 147. He believed it was the first British case to establish someone dying from a fibrosis of the lung caused by exposure to asbestos. *Id.* However, the weight of this report is lessened by the fact that the worker's lung not only showed a fibrosis but also a tuberculosis infection. *Id.*

It is widely believed that the seminal study relating to the knowledge that asbestos causes a serious health hazard is the Merewether and Price Report of 1930. Also in England, Dr. E.R.A. Merewether was employed as a medical inspector of factories while Mr. C.W. Price worked as an inspector of factories. E.R.A. Merewether and C.W. Price, *Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry*, London (1930). The inquiry performed by Merewether and Price was started by the British Factory Department of the Home Office. The inquiry was based on Dr. Cooke's report and one other documented death relating to fibrosis of the lungs and asbestos. *Id.* at 5-6. The main conclusion of the Merewether report was that "inhalation of asbestos dust over a period of years results in the development of a serious type of fibrosis in the lungs." *Id.* at 4. There are two reasons why plaintiffs will likely cite to Merewether to satisfy the *Simpkins* foreseeability requirement. First, the ultimate conclusion is that inhalation of asbestos causes harm. Second, there were over 360 workers considered in the study, which is a much larger sample than in Cooke's report. Given the age of asbestos plaintiffs today, the majority of asbestos exposure occurred following Merewether's report.

In 1953, Dr. Richard Doll was hired to study the mortality data for an asbestos company. Dr. Doll was able to demonstrate a significant presence of lung cancer in workers heavily exposed over long periods to asbestos. Richard Doll, *British J. Industrial Medicine*, 12, 81 (1955).

Finally, the key study relating to mesothelioma occurred in 1965. Dr. Irving Selikoff's extensive work in establishing the connection between asbestos exposure and hazards, including mesothelioma, culminated into an international conference dubbed the "Biological Effects of Asbestos." Irving Selikoff, *Annals of the New York Academy of Sciences*, 647-673, (December 1965).

## Potential Responses by Defendants

There are several areas where defendants can attack studies likely to be cited by plaintiffs to satisfy the *Simpkins* foreseeability requirement. The first area relates to access to information. Should American companies be responsible for tracking British health publications? American companies working with asbestos products had limited, if any, access to the early studies in Britain. It could be difficult for plaintiffs to establish that hundreds of defendants knew of the Merewether report.

The second area relates to timing. Even if courts hold that defendants had knowledge of these early British studies, when are they presumed to have had knowledge? Given how slow information was disseminated in the early 20<sup>th</sup> century compared to today, defendants cannot be presumed to have knowledge of a report at the publication date. It is not easy to establish a concrete date when defendants should have known about the Merewether report.

Finally, the Illinois Supreme Court in *Simpkins* fails to define harm. As mentioned above, there are three most common health hazards attributable to asbestos: asbestosis, lung cancer, and mesothelioma. The early Cooke and Merewether studies clearly focus on fibrosis of the lungs, which we commonly refer to today as asbestosis. Defendants could advance an argument in a lung cancer or mesothelioma case that the British studies do not satisfy the *Simpkins* foreseeability requirement because they focus only on asbestosis. How could defendants be presumed to have knowledge of a harm that is different from what is contained in the study? There is no guarantee that these ideas will help to successfully contest the sufficiency of a plaintiff's allegations designed to meet the *Simpkins* foreseeability requirement. However, these ideas may serve as a launching point for a discussion of how defendants can strive to push the date of foreseeability later in time to limit the total amount of exposures.

## Conclusion

The *Simpkins* decision is the end of the beginning of determining whether claims for secondary exposure to asbestos will exist in Illinois. The majority did not confirm the existence of a duty. The majority merely held that the plaintiff did not plead the existence of a duty, under the unique circumstances of this case because the alleged exposure ended in 1964—the year before it is agreed the danger of asbestos was known. If the court were to definitively confirm that there is liability for secondary exposure to asbestos, a large number of claims could be filed, making this issue one that can potentially ripple across the landscape of toxic tort claims. The fact that the court did not agree with Justice Freeman's position signals that there are at least some members of the court who may believe that a duty exists, but that the plaintiff had not yet succeeded in pleading one. When this case, or another similar one, winds its way back to the court we will likely get our answer. Until then, plaintiffs and defendants will argue over the sufficiency of the pleading and the existence of liability for secondary exposure of asbestos.

## About the Authors

**Donald Patrick Eckler** is an associate at *Pretzel & Stouffer, Chartered*. He practices in both Illinois and Indiana in the areas of commercial litigation, professional malpractice defense, tort defense, and insurance coverage. He earned his undergraduate degree from the University of Chicago and his law degree from the University of Florida. He is a member of the Illinois Association Defense Trial Counsel, the Risk Management Association, and the Chicago Bar Association. He is the co-chair of the CBA YLS Tort Litigation Committee.

**Paul A. Ruschinski** is an attorney with *Pretzel & Stouffer, Chartered* who represents defendants in asbestos cases, and a variety of other civil matters, throughout Illinois. Paul is a 1999 graduate of the University of Illinois at Urbana-Champaign and a 2003 graduate of Chicago Kent.

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Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 800-232-0169, [idc@iadtc.org](mailto:idc@iadtc.org)