



## Alerts

### Delaware Joins Trend of States Rejecting "Take Home" Asbestos Claims

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Toxic Tort Alert

In a victory for toxic tort defendants, the Delaware Supreme Court recently rejected a "take home" asbestos claim because no "special relationship" existed between the subject worker's spouse and the worker's employer. *Price v. E.I. DuPont De Nemours & Co.*, 2011 WL 2682822 (Del. 2011). The Court considered whether defendant manufacturer owed a duty of care to plaintiff, the wife of a maintenance technician at one of the manufacturer's facilities. The wife developed bilateral interstitial fibrosis and bilateral pleural thickening of the lungs after years of washing her spouse's clothing, which had been covered in asbestos fibers from the manufacturer's facility.

The wife's original complaint alleged nonfeasance, but she later sought to amend her complaint to allege misfeasance. To allege nonfeasance, a party must include facts demonstrating that the defendant has a "special relationship" to plaintiff and failed to protect him or her from an unreasonable risk. To allege misfeasance, the party must include facts demonstrating that the defendant has a general duty to others and committed "an affirmative act" which exposed another to an unreasonable risk of harm. The manufacturer argued that an amendment was futile because the underlying facts in both versions of the complaint still made out only a partial claim for nonfeasance, not misfeasance, and the wife could not show the "special relationship" as required for nonfeasance. In both versions, the wife alleged that the manufacturer had failed to prevent the wife's spouse from bringing the asbestos fibers home and to warn her about the effect of exposure to the fibers. The trial court denied the motion to amend. The Supreme Court affirmed, holding that the facts alleged—failure to prevent harm and failure to warn—constituted nonfeasance. Furthermore, because the complaint did not include facts showing a "special relationship," as required for a claim of nonfeasance, the amendment would have been futile.

The Supreme Court considered its previous ruling in *Riedel v. ICI Americas, Inc.* *Riedel*, 968 A.2d 17, 20 (Del. 2009), which featured nearly identical facts—plaintiff was the wife of a worker who allegedly brought home dust from a work facility which led her to develop asbestosis. In *Riedel*, the wife initially pled nonfeasance and lost at the summary judgment stage because she had failed to show facts constituting a "special relationship." On appeal, she sought to recharacterize her nonfeasance claim as a misfeasance claim. The Supreme Court rejected this attempt to raise a new theory on appeal and affirmed the

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lower court's summary judgment ruling. The Court in *Riedel* did not decide whether the facts made out a claim for misfeasance, but did determine that the facts clearly stated a claim for nonfeasance, albeit without satisfying the "special relationship" element. The Court in *Price* relied on *Riedel* in holding that failure to prevent harm and failure to warn claims typify nonfeasance. Further, the Court found that there was no "special relationship" shown between the parties. In so deciding, the Court squarely rejected the wife's claims that receiving health benefits from the company and having a long-term relationship to the company through one's spouse creates a "special relationship." Because the facts alleged did not show a "special relationship" between the manufacturer and the wife, the Court upheld the trial court's denial of the motion to amend.

The dissent in *Price* argued that *Riedel* had no precedential value for *Price* because *Riedel* did not address which claim—nonfeasance or misfeasance—was appropriate. Rather, the Court in *Riedel* merely affirmed the lower court because new theories may not be raised on appeal. The dissent contended that the actions alleged in the *Price* complaint were properly construed as misfeasance and that the real question in a "take home" asbestos case is the foreseeability of the harm, not whether a duty was owed. The dissent pointed to decisions in other jurisdictions that held that the affirmative act of releasing asbestos into the air can constitute misfeasance. The dissent claimed that no court had previously denied a "take home" asbestos claim by characterizing it as nonfeasance.

The Delaware Supreme Court's rejection of a "special relationship" between a worker's employer and his or her spouse is significant because it prevents "take home" asbestos claims from being argued as nonfeasance claims.

For more information, please contact [Craig T. Liljestrand](#) or your regular [Hinshaw attorney](#).

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