

Commentary

A Reply To James K. Toohey And Rebecca L. Matthews' Commentary: 'Liability For The Post-Sale Installation Of Asbestos-Containing Replacement Parts Or Insulation'¹

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Introduction

In their Commentary, Mr. Toohey and Ms. Matthews recycle myths about the asbestos litigation that have long been hissed off the stage by courts, researchers, scientists and government agencies charged with safeguarding occupational health and safety. This Reply shows why the claims made by Toohey and Matthews are generally discredited.

The Myth Of The 'Fourth Wave'

Toohey and Matthews first purport to describe four "waves" of asbestos litigation that have occurred over the past several decades, the fourth being a wave of suits "starting in the early 2000's," brought by "plaintiff's attorneys [who] have become too addicted to common law recoveries in their 'home courts' to walk away," and filed against manufacturers of products such as boilers, pumps, turbines, generators, valves and automobiles either originally marketed with asbestos-containing components, or to which such components would

certainly, and hence foreseeably, be added.² Toohey and Matthews' Commentary is dedicated to assaulting the integrity of the so-called fourth wave.

For Toohey and Matthews, plaintiffs' attorneys' fourth-wave addiction represented some sort of concerted effort to "expand" liability beyond all reasonable bounds by holding the manufacturer of a product accountable for harm when that defendant:

- knew or should have known that its product would be used with an insulation or other necessary component;
- knew or had reason to know that this insulation or other component would likely be comprised of asbestos-containing materials;
- knew or had reason to know of the hazards associated with exposure to asbestos; and
- nevertheless failed to issue any warning to end product users grievously harmed by virtue of their unknowing exposure to the ultrahazardous fibers released from such products.

Yet, under those circumstances, American products liability law nationwide has traditionally and responsibly

imposed a duty to warn upon the product seller. Continuing to do so represents no expansion of liability. To the contrary, proponents of a new no-duty rule argue, in effect, for a dramatic *restriction* in the compensatory rights and remedies afforded to the innocent victims of product distributors who elected to turn ostrich but should have known better.

One need only review certain reported cases, often in the insurance coverage context, to see that so-called fourth wave claims have been with us fairly from the start, and well before those serving the industry's and the insurers' interests conjured a "bare metal" defense. Liability under such circumstances was assumed correct and just. For instance, in its relatively recent insurance coverage decision in *Appalachian Ins. Co. v. General Electric Co.*,³ the New York Court of Appeals recited, just as a matter of fact, that defendant GE had experienced "an escalation in the number of asbestos-related personal injury claims . . . in the early 1990's" as a result of exposures to its custom turbines. The Court explained that, "[a]lthough GE did not produce the asbestos-related products, for decades it designed, manufactured and, in some cases, installed custom turbines that were insulated with asbestos-containing products manufactured by others."⁴

By 2002, about the time that Toohey and Matthews claim the fourth wave was just beginning, "over 400,000 asbestos-related claims had been filed against GE."⁵ These claims reflected plaintiffs' efforts at securing compensatory remedies in cases Toohey and Matthews would label "fourth wave," yet wherein the underlying duty-to-warn product liability theories were regarded as noncontroversial.⁶ Indeed, although dismissed from the case on grounds not relevant here prior to review by the Washington Supreme Court, GE was one of the defendants in *Braaten*, now in 2007, raising the tort-reform no-duty claim with regard to its turbines.⁷

More generally, the type of defendants Toohey and Matthews label "fourth wave" — sellers of products such as boilers, pumps, turbines, generators, valves and automobiles — have traditionally, and certainly pre-2000, been implicated in the litigation, and sometimes were even brought into the cases by *other defendants* as third party defendants.⁸

Although this Reply will show why the yes-duty rule in these dangerous component part cases inheres in

traditional products liability law, as authoritatively articulated in the Restatement (Second) of Torts § 402A (1965), it is well to acknowledge that Toohey and Matthew's fourth wave analysis does contain a kernel of truth. The most conspicuous culprits have been the direct manufacturers and suppliers of asbestos-containing materials. But other sellers who knew that their products' functionality would depend upon the probable addition of ultrahazardous components, were also legally and morally wrong in not warning. In all such cases, when the industry had access to, or outright possession of, abundant evidence establishing that exposure to asbestos fiber dusts was ultrahazardous and would often end in excruciating and fatal disease after a latency period, products law required that they issue warnings.

Put differently, the products liability rule which has long been in place nationwide, and against which defendants have only recently begun to campaign, says that a product seller owes a duty to design or warn against the risks presented by component parts to be installed after sale or distribution, when the seller has a reason to foresee both that the component part is needed to permit its product to function as intended, and that the component part will likely cause the final product to present an unreasonable danger to end product users. Entities in breach of this duty have traditionally been deemed tortfeasors, sharing in the responsibility for making whole those who have thereby been harmed. Tort law's corrective goal is to afford citizens aggrieved in this way the opportunity to be made whole⁹; this is the outcome to which their counsel have been "addicted."

In sum, there is no "expansion of liability," fueled by an "addiction to suing," in the "fourth wave" of the asbestos litigation. Rather, spokespersons such as Toohey and Matthews now seek to exploit the unfortunate possibility, in some jurisdictions, of *dramatically decreasing*, essentially to zero, the plaintiffs' likelihood of prevailing in any such action.

The Myth Of The 'Chrysotile Defense'

Toohey and Matthew plunge headlong into the next prong of their attack upon the so-called fourth wave litigation by rehashing the "chrysotile defense," namely, that "[e]xposures to these products generally are to chrysotile asbestos only and at doses that were the tiniest fraction of exposure standards accepted at the time

the products were sold and used."¹⁰ Toohey and Matthews thereby revisit the time-worn claim that exposure to the chrysotile asbestos in such boilers, turbines, generators, pumps, valves, and so forth, was not, in any event, very dangerous.

Although Toohey and Matthews make no mention of this, the "chrysotile defense" — also called the "amphibole hypothesis" — has been generally discredited. In *In re Eighth Judicial District Asbestos Litigation: St. John v. Georgia Pacific Corp.*,¹¹ for instance, the court credited the analysis of Joan Gil, M.D., a pathologist and professor of pathology at the Mount Sinai School of Medicine, that:

it is generally accepted by the medical community that malignant pleural mesothelioma is caused by exposure to all known types of asbestos fibers, including chrysotile asbestos, which accounts for upward of 95% of all asbestos previously used in the United States. Conversely, the so-called "chrysotile defense" is not generally accepted and not supported by the medical and scientific research.¹²

Accordingly, the court in *St. John* denied defendant's motion to preclude plaintiff from proffering testimony that chrysotile asbestos causes mesothelioma, and granted plaintiff's cross-motion precluding the chrysotile defense.¹³

Indeed, from the 1960's to the present, the overwhelming scientific consensus has been that *all* types of asbestos fibers cause mesothelioma. Most of the epidemiological studies from which this scientific consensus grew involved mixed dust exposure, *i.e.*, persons exposed to two or more of the major asbestos fiber types. It is mostly on this wholly dubious basis, however, that proponents of the chrysotile defense, such as the Canadian mining industry, as well as Toohey and Matthews here,¹⁴ have attempted to exonerate chrysotile asbestos as a cause of mesothelioma. The response by the New York State Asbestos Advisory Board, in the non-litigation context, is compelling:

[T]he claim that various types of asbestos differ in their hazard is particularly insidious. It is put forth by the manufacturers of Canadian asbestos (chrysotile asbestos), the type of asbestos most widely used in New York and throughout the United States. The central claim here is

that the Canadian product, termed "chrysotile asbestos" is relatively harmless. However, *that claim is not based on fact, and it is not supported by the results of epidemiological and toxicological studies conducted in the United States and overseas.* These studies show that all types of asbestos, including Canadian asbestos, are fully capable of producing the full spectrum of asbestos-related diseases including asbestosis, mesothelioma, lung cancer, laryngeal cancer, cancer of the pharynx and cancer of the gastrointestinal tract.¹⁵

Consistently, the United States government, including OSHA and the Environmental Protection Agency, as well as the World Trade Organization, have never been convinced by the proponents of the chrysotile defense to adopt a different regulatory standard for different types of asbestos. Moreover, Dr. Irving Selikoff, the great pioneer of asbestos disease research and Director of the Division of Environmental and Occupational Medicine Mount Sinai School of Medicine, 1966 to 1985, stated in no uncertain terms that, "There is no convincing evidence that chrysotile is more, or less, hazardous than any other asbestos fibres. There is ample evidence that all types of asbestos are associated with the risk of fatal lung scarring (asbestosis), lung cancer, pleural and peritoneal mesothelioma and gastro-intestinal cancer."¹⁶ Among numerous additional organizations and researchers finding that chrysotile is an ultrahazardous fibrous asbestos mineral, the National Institute for Occupational Safety and Health ("NIOSH") concluded that all of the following types pose extraordinary dangers to the lives of exposed workers: "chrysotile, crocidolite, amosite, tremolite, actinolite, and anthophyllite."¹⁶

In their related move, Toohey and Matthews say that chrysotile is also not dangerous in the fourth wave context because exposures to these products are only at "minute levels."¹⁷ They say that, "[i]n a clever twist of law and science, plaintiffs use the absence of scientific evidence as their proof of causation."¹⁸ This rhetorical claim is transparently fallacious, because the scientific evidence *is* that there is no threshold level below which exposure is "safe."

The Occupational Safety and Health Administration ("OSHA") and the Mine Safety and Health Administration ("MHSa"), agencies of the United States Government responsible for workers' health, have regulated asbestos exposures in the workplace for decades.

The current compliance level for a working day established by OSHA and MSHA is 0.1 f/cc (one tenth of one asbestos fiber per cubic centimeter of air). Even at this minute level of exposure, however, OSHA and MSHA both agree that such exposure is *not* a safe level. Rather, as OSHA has stated, "there is a remaining significant risk of material impairment of health or functional capacity at the 0.1 f/cc limit. . ."¹⁹

It is important to note that the "0.1 f/cc" compliance level was chosen solely because, as OSHA has found, it is "the practical lower limit of feasibility for measuring asbestos levels reliably," and not because it is a safe level.²⁰ In addition to OSHA's and MSHA's conclusions that the "0.1 f/cc" compliance level still leaves a significant health risk, OSHA has actually conducted a mesothelioma "risk assessment" at various low levels of exposure. Based on OSHA's risk assessment, 6.9 mesothelioma deaths are expected annually per 100,000 workers exposed even at the 0.1 f/cc level.²¹

In the litigation context, courts have astutely and fairly drawn the line at visible dusts emanating from asbestos-containing products. This accords with routine pronouncements by OSHA and other federal agencies.²² The Appellate Division in New York similarly deems visible dusts to signify substantial exposure, and has credited expert testimony as establishing "that such dust from asbestos-containing products contained enough asbestos to cause mesothelioma."²³ Additionally, courts nationwide presiding over asbestos cases have continually recognized that testimony regarding exposure to visible dusts, coupled with expert testimony about asbestos fiber drift and the cumulative effects of exposure to asbestos, proves proximate cause.²⁴

The Myth Of The 'Expansion of Liability' Allegedly Engendered By Yes-Duty Rulings

Reaching their main claim, Toohey and Matthews assert that a manufacturer should not be deemed to have any duty to consumers or end users for dangers inherent in "products it did not sell."²⁵ They allow that, in these fourth-wave cases, the manufacturers "may have" installed asbestos-containing components, such as gaskets, packing or insulation, in the original products, but that, by the time of plaintiffs' injurious exposures, these original components would have been replaced by other asbestos-containing components supplied by third parties. So the plaintiff was,

in point of fact, exposed to the asbestos products of another, however identical these may have been to the original. Toohey and Matthews recite that, in other cases, the manufacturers of products such as industrial boilers or pumps, intended for "very high temperature" use, would have shipped those as "bare metal" and without asbestos-containing insulation, which insulation would be applied in the field.²⁶

Except perhaps under very limited circumstances — such as where the original product seller "required" the use of asbestos, gained a "direct financial benefit" from such use, or "had control" over the production or distribution of the particular asbestos-containing materials to which plaintiff was exposed — the "simple maxim" to which defendants adhere, as articulated by Toohey and Matthews, is that "a manufacturer is not liable for the defective products of another."²⁷

Toohey and Matthews attribute to plaintiffs an equally simplistic counter-maxim: that defendants should be deemed responsible for any *foreseeable uses* involving their products, including the replacement or installation of asbestos-containing component parts. Toohey and Matthews counter this attempted "expansion of liability beyond that reasonably connected to the sale of the products,"²⁸ by saying that there is "an insufficient nexus" between defendants' products and the "harm-producing product" added by others, and that, in all events, "duty is not co-extensive with foreseeability because, in retrospect, everything is foreseeable."²⁹

Finally, Toohey and Matthews discuss the main cases which, they claim, reveal the "current trend" in which "most courts are resistant to expanding liability" under the asbestos litigation's fourth wave. Their core precedent is the New York Court of Appeals' 1992 decision in *Rastelli v. Goodyear Tire & Rubber Co.*,³⁰ wherein a third party had installed a defective rim on one of defendant Goodyear's tires, that rim representing one of "24 different models of multipiece rims, out of the approximately 200 types of multipiece rims sold in the United States."³¹ The New York Court concluded that, under the "circumstances of this case," Goodyear did not have a duty to warn about the other manufacturer's product.³²

In *Rastelli's* wake, the Washington Supreme Court launched the "current trend," by Toohey and Matthews'

analysis, when it issued its companion no-duty decisions in *Simonetta v. Viad Corp.*,³⁴ and *Braaten v. Saberhagen Holdings*.³⁵ California's intermediate appellate no-duty decision in *Taylor v. Elliott Turbomachinery Co.*³⁶ followed, and the subsequent similar (*Merrill, Hall*) or contrary (*O'Neil*) rulings are now slated to be resolved by the California Supreme Court.³⁷

Toohey and Matthews dramatically miss the mark, wholly misapply *Rastelli*, and fail to comprehend the well-established basis for product sellers' liability in the dangerous component part cases. When a product seller distributes a product that it knows will likely be used with a hazardous component part, where the component is necessary for the product's intended use, and yet the seller buries its head in the sand and fails to warn, it has acted wrongfully. The threshold question is whether the seller owed a duty to issue such a warning.

The analytic fulcrum on which this debate hangs is the substantial product modification principle embedded within strict products liability doctrine as articulated in Section 402A of the Restatement (Second) of Torts. The general rule is that the seller has a defense when a product is substantially modified post-sale, and this modification brings about the dangerous feature.³⁸ Comment *h* to Section 402A, however, counsels that the seller has a duty to warn end users when it has reason to anticipate that an unreasonable danger may result from a particular product use.³⁹

Nor has this key aspect of product liability law been significantly modified in the intervening years. In comment *p* to Section 2 of the Restatement (Third) of Torts: Products Liability, finalized in 1998, the reporters emphasize that:

[p]roduct misuse, modification, and alteration are forms of *post-sale conduct by product users or others* that can be relevant to the determination of the issues of defect, causation, or comparative responsibility. Whether such conduct affects one or more of the issues depends on the nature of the conduct and whether the manufacturer should have adopted a reasonable alternative design or provided a reasonable warning to protect against such conduct.⁴⁰

Under New York law, for example, it is not necessary that the original product, when it leaves the seller's

hands, already include the unreasonably dangerous component part, so long as the seller has reason to know both that its product will necessarily incorporate such a component in order to function as intended, and that such component will be defective and/or unreasonably dangerous. For it is well settled that manufacturers have a duty to warn about latent dangers resulting from foreseeable uses of their product of which they knew or should have known. So the New York Court of Appeals explained in *Liriano v. Hobart Corporation*⁴¹:

although it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury. Furthermore, this Court has held that a manufacturer may be liable for failing to warn against the dangers of foreseeable misuse of its product. . . . This Court has also recognized that, in certain circumstances, a manufacturer may have a duty to warn of dangers associated with the use of its product even after it has been sold. Such a duty will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer . . . This Court therefore concludes that manufacturer liability can exist under a failure-to-warn theory . . .⁴²

Relying on *Liriano*, the New York Appellate Division ruled in *Rogers v. Sears, Roebuck & Co.*,⁴³ a case arising from an explosion that occurred when plaintiff attempted to replace an empty propane gas tank with a filled one, that, "even assuming the accident was caused by a defect in a valve incorporated into a propane tank neither of which [defendant] manufactured, we are unpersuaded by [defendant]'s argument that it was under no duty to warn of the dangers presented by such a defect, where [*inter alia*] its grill could not be used without the tank . . ."⁴⁴ Citing *Rogers*, the Appellate Division followed with *Berkowitz v. A.C. & S., Inc.*,⁴⁵ holding that, where the defendant has manufactured a product to which an asbestos-containing insulation component is later added, and where that defendant:

- knew or should have known that its product would be used with an insulation component;

- knew or had reason to know that this insulation would likely be comprised of asbestos-containing materials; and
- knew or had reason to know of the hazards associated with exposure to asbestos,
- then defendant is charged with a "duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its [equipment]."⁴⁶

The decisions in cases such as *Liriano*, *Rogers* and *Berkowitz* flow from the principle articulated in comment *h* to Section 402A. Toohey and Matthews, however, believe that these rulings conflict with the New York Court of Appeals decision in *Rastelli*, and that *Rastelli* requires a no-duty outcome in all such cases. Like defendants arguing this line, Toohey and Matthews make a critical analytic mistake.

More specifically, in *Rastelli* it could not be said that defendant Goodyear, which had manufactured the truck tire, knew or had reason to know that its product would likely be combined with a dangerously defective tire rim — the second prong of the *Berkowitz* analysis recited above. In *Rastelli*, the truck tire was merely "compatible" with such a defective multipiece rim,⁴⁷ and there was nothing about Goodyear's conduct to suggest that it had actual knowledge that its tire would routinely be used with a defective rim, or that it promoted or expected the use of such a rim.

More pointedly, the analytic mistake underlying the no-duty claim is the failure to distinguish between two very different situations. In one, such as *Rastelli*, the product seller can arguably foresee that at least *some* one or more of its tires released in the stream of commerce may *somewhere* be combined with the dangerous component rim, yet it is not likely that this would be the case for any particular tire. The same might be said for the seller of orange juice, who should foresee that some of the juice will somewhere be combined with vodka. Certainly such sellers have no duty to warn. The other, very different scenario, is the one represented by cases such as *Berkowitz*, where the product seller knows or should know that, *for any one of its pumps, that very pump* will likely be used with ultrahazardous asbestos-containing materials. When Toohey and Matthews object that, "in retrospect, everything is foreseeable,"⁴⁸ they conflate foreseeability after the fact (*ex poste*), as

in *Rastelli*, with actual foreseeability before the fact (*ex ante*), as in *Berkowitz*.

Accordingly, the *Berkowitz* Court itself explicitly compared *Rogers* with *Rastelli*, and applied the rule in *Rogers*, not *Rastelli*.⁴⁹ And for this reason, too, for instance, one federal jurist has recently issued two rulings in asbestos-related valve and pump cases explicitly rejecting the applicability of *Rastelli*, and applying the principle of *Berkowitz*.⁵⁰ In each case, the Honorable James S. Gwin emphasized that defendant Crane Co. "characterizes *Rastelli* and *Berkowitz* as directly opposed, and *Rastelli* as necessitating a dismissal of claims against Crane. However, the court views these divergent holdings as resting on consistent application of the same foreseeability principle."⁵¹

Courts in most jurisdictions adhere to Section 402A's products liability articulation, including the foreseeable product modification principle recited in comment *h*.⁵² Significantly, yet lost on commentators such as Toohey and Matthews, the Washington Supreme Court, motivating the no-duty offensive with its decisions in *Simonetta* and *Braaten*, expressly and anomalously rejected the applicability of comment *h*'s foreseeability exception to that state's products liability law. Thus, Washington's products liability doctrine is directly at odds with the law of New York as set forth in *Liriano*, and with that of comment *h* jurisdictions — being most jurisdictions — nationwide. And, unfortunately, Toohey and Matthews' state-by-state recitation of the "current state of the law" makes no distinction between the *Berkowitz*/comment *h* type cases and the *Rastelli*/orange juice-with-vodka type cases, speciously assuming that the latter category counts against duty in the asbestos litigation.⁵³

Conclusion

In the final analysis, the sellers of boilers, turbines, generators and other so-called fourth wave defendants have always been around, although perhaps Toohey and Matthews choose not to see them. Sellers' failure to warn placed individuals occupationally exposed to such products at grave risk, whatever the chrysotile versus amphibole content; it is unlikely that any one of us would today feel at ease lining our own boilers with purely chrysotile asbestos insulation, or breathing just "minute" levels of the dust. Manufacturers were well aware that asbestos-containing components likely awaited their industrial or high heat-generating

products, and have always been deemed to have a duty to warn, under the principles articulated at Section 402A and in the new Restatement (Third) of Torts: Products Liability.

Endnotes

1. James K. Toohey & Rebecca L. Matthews, Commentary, *Liability for the Post-Sale Installation of Asbestos-Containing Replacements Parts or Insulation*, 25 Mealey's Litigation Report: Asbestos 21 (Dec. 1, 2010), at 40.
2. *Id.*, at 40-41.
3. 863 N.E.2d 994 (N.Y. 2007).
4. *Id.*, at 995.
5. *Id.*, at 996.
6. *Cf.*, *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124 (3d Cir. 1997) (wherein plaintiff "alleged that, while working aboard the U.S.S. Enterprise at the Newport News Ship Building and Dry Dock Company, he was exposed to asbestos products including insulation on turbines manufactured by Westinghouse"); *Olson v. A. C. & S., Inc.*, _95-721-PA, 1995 U.S. LEXIS 22494, at *3 (D. Or. Aug. 28, 1995) ("Defendant Westinghouse states that its liability must be based on plaintiff's alleged exposure to asbestos-containing insulation for turbines on the United States Navy vessel HASSAYAMPA").
7. *See Braaten v. Saberhagen Holdings*, 151 P.3d 1010, 1013-14 (Wash. Ct. App. 2007).
8. *See, e.g., Vaughn v. Farrell Lines, Inc.*, 937 F.2d 953, 955 (4th Cir. 1991) ("The shipowners brought in as third-party defendants the manufacturers of the asbestos products involved and the boilers (containing asbestos insulation) that had been used on their ships"); *Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co.*, 867 F. Supp. 573, 575 (N.D. Ohio 1992) ("The present action involves a dispute over liability insurance coverage for asbestos-related claims arising from B&W's design, manufacture, sale, and service of boilers.... Claims against B&W for exposure to asbestos during the relevant time period of 1979-80 were likewise filed throughout the United States and the world"); *Iida v. Allied Signal (In re Hawaii Fed. Asbestos Cases)*, 854 F. Supp. 702, 704 (D. Hawaii 1994) (in actions alleging injury from asbestos in automotive friction products, naming defendants such as Chrysler Corporation and General Motors Corporation); *Bramell v. Raymark Industries, Inc.*, _85-4554, 1986 U.S. Dist. LEXIS 21911, at *2-3 (E.D. Pa., Aug. 4, 1986) (defendant Goulds Pumps conceded "that defendant Sepco was an approved supplier of asbestos gaskets for its pumps," and plaintiffs alleged that Sepco "manufactured, produced and sold, either directly or indirectly ... to contractors on jobsites on which plaintiff worked" on such pumps).
9. *See Wright v. Willamette Indus.*, 91 F.3d 1105, 1108 (8th Cir. 1996) ("the reason that we compensate people (that is, transfer money from defendants to plaintiffs) is because rights that are grounded in considerations of humanity have been violated. We believe that it is humane to monetize welfare losses associated with grief, pain and suffering, humiliation, mental anguish, and other intangible injuries so that we can make plaintiffs whole").
10. Toohey & Matthews, *supra* note 1, at 41.
11. Slip op., Index 2001-9946 (Sup. Ct., Erie County, June 8, 2004).
12. *Id.*, at 7.
13. *Id.*
14. Toohey & Matthews, *supra* note 1, at 41 ("debate remains as to whether a *pure* chrysotile exposure at high levels can be causative") (emphasis added).
15. Second Annual Report, State of New York, Asbestos Advisory Board (Feb. 1990) (emphasis added). New York's Asbestos Advisory Board was established in 1987 under Article 30 of the Labor Law of the State of New York, to monitor the status of the asbestos hazard in New York and to advise about how to minimize this hazard.
16. Letter from Irving Selikoff to Paul C. Formby (Dec. 18, 1972), *quoted in* JOCK McCULLOCH & GEOFFREY TWEEDALE, DEFENDING THE INDEFENSIBLE:

- THE GLOBAL ASBESTOS INDUSTRY AND ITS FIGHT FOR SURVIVAL 119 (Oxford Univ. Press 1008).
17. NIOSH-OSHA Asbestos Work Group, Workplace Exposure to Asbestos, Review and Recommendations 10-11 (1980); *see also* Daily Labor Report (BNA), *NIOSH Asserts No Evidence Shows that Risks Vary With Asbestos Type*, at A-2 (Jan. 30, 1991).
 18. Toohey & Matthews, *supra* note 1, at 41.
 19. *Id.*
 20. *See* FEDERAL REGISTER, Vol. 73 No. 41, Feb. 29, 2008, at *11284; *see also* World Health Organization, International Agency for Research on Cancer, Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Man, Vol. 14, p. 81 (1976) ("it is not possible to assess whether there is a level of exposure in humans [to asbestos] below which an increased risk of cancer would not occur"); World Health Organization, International Programme on Chemical Safety, 203 Environmental Health Criteria - Chrysotile Asbestos, at 144 (1998) ("[N]o threshold has been identified for carcinogenic risks" with regard to chrysotile asbestos").
 21. FEDERAL REGISTER, Vol. 73 No. 41, Feb. 29, 2008, at *11284.
 22. *Id.* at *11289, Table IV-I.
 23. *E.g.*, OSHA, Safety and Health Information Bulletin: *Asbestos-Automotive Brake and Clutch Repair Work* (July 26, 2006).
 24. *In re New York Asbestos Litig.—Marshall v. John Crane, Inc.*, 812 N.Y.S.2d 514, 516 (N.Y. App. Div. 2006); *Lustenring v. AC&S, Inc.*, 786 N.Y.S.2d 20 (N.Y. App. Div. 2004) ("the evidence showed that both plaintiffs worked all day for long periods in clouds of dust raised specifically by the manipulation and crushing of defendant's packing and gaskets, which were made with asbestos. Valid expert testimony indicated that such dust, raised from asbestos products and not just from industrial air in general, necessarily contains enough asbestos to cause mesothelioma").
 25. *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 406 (8th Cir. 2004); *Menne v. Celotex Corp.*, 861 F.2d 1453, 1467 (10th Cir. 1988) (noting rulings that "since exposure has cumulative effect in contributing to asbestosis, evidence of exposure to a defendant's asbestos dust established *prima facie* case of causation, *i.e.*, in effect, exposure even at unknown levels is a substantial factor"); *Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997) ("In cases involving exposure to asbestos, a reasonable inference of exposure to a defendant's asbestos-containing product, coupled with expert testimony regarding asbestos fiber drift and the cumulative effects of exposure to asbestos, is enough to prove proximate cause"); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 761 (N.J. App. Div. 1997) ("the uncontradicted medical testimony indicating that far less exposure to asbestos can cause mesothelioma than is required for other asbestos related diseases and that cumulative exposures increase the probability that a person will develop this fatal cancer").
 26. Toohey & Matthews, *supra* note 1, at 41.
 27. *Id.*, at 41-42.
 28. *Id.*, at 43.
 29. *Id.*, at 44.
 30. *Id.*, at 43.
 31. 591 N.E.2d 222 (N.Y. 1992).
 32. *Id.*, at 223 n.1.
 33. *Id.* at 225.
 34. 197 P.3d 127 (Wash. 2008).
 35. 198 P.3d 493 (Wash. 2008).
 36. 171 Cal. App. 4th 564 (Cal. Ct. App. 2009).
 37. *Hall v. Warren Pumps LLC*, B208275, 2010 WL 528489 (Cal. Ct. App., Feb. 16, 2010); *O'Neil v. Crane Co.*, 177 Cal. App. 4th 1019 (Cal. Ct. App. 2009); *Merrill v. Leslie Controls, Inc.*, 179 Cal. App. 4th 262 (Cal. Ct. App. 2009).
 38. RESTATEMENT (SECOND) OF TORTS § 402A, § 1(b).
 39. *Id.*, at comment *b* (explaining that where the seller "has reason to anticipate that danger may result from

- a particular use, . . . he may be required to give adequate warning of the danger . . . , and a product sold without such warning is in a defective condition”).
40. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. *p* (1998) (emphasis added).
 41. 700 N.E.2d 303 (N.Y. 1998).
 42. *Id.*, at 307.
 43. 701 N.Y.S.2d 359 (N.Y. App. Div. 2000).
 44. *Id.*, at 359-60.
 45. 733 N.Y.S.2d 410 (N.Y. App. Div. 2001).
 46. *Id.*, at 411-12.
 47. *Rastelli*, 591 N.E.2d at 223.
 48. Toohey & Matthews, *supra* note 1, at 43.
 49. *Berkowitz*, 733 N.Y.S.2d at 412.
 50. *Curry v. American Standard*, slip op., _7:08-cv-10228 (S.D.N.Y. Dec. 6, 2010); *Gitto v. A.W. Chesterton*, slip op., _7:07-cv-04771 (S.D.N.Y. Dec. 7, 2010).
 51. *Curry*, slip op., at 2; *Gitto*, slip op., at 2-3.
 52. *E.g., Stapleton v. Kawasaki Heavy Industries, Ltd.*, 608 F.2d 571 (5th Cir. 1979) (holding that, while defendant's the motorcycle itself was not dangerous, its required use of a third-party-supplied hazardous substance required the defendant to warn); *DeLeon v. Commercial Manufacturing & Supply Co.*, 148 Cal. App. 3d 336 (Ct. App. 1983) (holding that manufacturer has duty to warn of hazards arising from the foreseeable uses of its product even if the hazards arise from the addition of a product which is manufactured by another, and then used in the normal operation of the defendant's product); *Soler v. Castmaster, Division of H.P.M. Corp.*, 484 A.2d 1225, 1232 (N.J. 1984) (where injurious aspect of product was third-party's trip wire installed post-sale, applying the *Liriano* rule, holding that “[w]hen it is foreseeable that a substantial change will create a risk of injury, the manufacturer can be held liable”); *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzer Co.*, 28 Cal. App. 4th 577 (Ct. App. 2004) (manufacturer is liable for the danger of injury caused by products of another when it is foreseeable that such products will be used in connection with the sole intended purpose of the defendant's product); *see also Hannah v. Gregg, Bland & Berry, Inc.*, 840 So. 2d 839 (Ala. 2002) (holding that a manufacturer or seller remains liable “if the alteration or modification was reasonably foreseeable to the manufacturer or seller”); *Davis v. Pak-Mor Manufacturing Co.*, 672 N.E.2d 771, 773 (Ill. App. Ct. 1996) (if a product is capable of easily being modified by its operator, and if the operator has a known incentive to effect the modification, then it is objectively reasonable for a manufacturer to anticipate the modification); *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 528-29 (Iowa 1999) (plaintiff attempted to install a newly retreaded tire, using a device that forces a rush of air between the tire and rim, causing the tire to expand and explode, holding that the misuse of a tire by running it flat or underinflated was reasonably foreseeable); *Small v. Pioneer Machinery, Inc.*, 494 S.E.2d 835, 844 (S.C. Ct. App. 1997) (holding that, in a products liability case, a manufacturer or seller may still be liable, notwithstanding subsequent alteration of the product, when the alteration could have been anticipated); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 349 (Tex. 1977) (“The foreseeability of that deviation in the manufacturer's intended use of the product is relevant to the basic question of whether the product was unreasonably dangerous when and as it was marketed. . . . It is because of cases in these areas that the draftsmen of the Restatement wrote [comment *h* to Section 402A]”); *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1202 (D.N.M. 2008) (under New Mexico law, pursuant to comment *h* to § 402A of the Restatement (Second) of Torts, where the seller ‘has reason to anticipate the danger that may result from a particular use . . . he may be required to give adequate warning of the danger . . . and a product sold without such warning is in a defective condition’”).
 53. Toohey & Matthews, *supra* note 1, at 45-49. ■