

Asbestos

A Reply To James K. Toohey:

'A Response To Alani Golanski And Jerry Kristal's Reply'

by
Alani Golanski, Esq.
and
Jerry Kristal, Esq.

Weitz & Luxenberg, P.C.
New York, NY

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Commentary

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Alani Golanski
and
Jerry Kristal

[Editor's Note: Alani Golanski is appellate counsel in environmental torts and products liability law at Weitz & Luxenberg, P.C., New York, New York. Jerry Kristal is trial counsel in asbestos litigation and environmental torts at Weitz & Luxenberg, P.C., New York, New York. Copyright © 2011 by Alani Golanski and Jerry Kristal Responses are welcome.]

The Wave Theory — Receding?

In the December 1, 2010 issue of this Report, Mr. Toohey, along with his colleague Rebecca L. Matthews, published an interpretative, albeit specious, commentary titled, *Liability for the Post-Sale Installation of Asbestos-Containing Replacements Parts or Insulation*.¹ In that piece, Toohey and Matthews purported to identify a "fourth wave" of asbestos personal injury 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 in contemplation of having such components installed, but in either case without safety warnings.²

In our Reply published in the January 19, 2011 issue of this Report,³ we showed that the so-called fourth wave claims have been with us from the start, and have always

been deemed fair and legally sound. Just as an example, by 2002, about the time that Toohey and Matthews claimed the fourth wave was barely beginning, over 400,000 such asbestos-related claims had *already* been filed during the prior few decades against one turbine manufacturer alone, General Electric.⁴ Thus, Toohey and Matthews' foundational claim was spurious and, in his present piece, Mr. Toohey says not a single word in further defense of the "fourth wave" myth.

Instead, Mr. Toohey now expends energy claiming that he and his colleague simply endeavored to give an "objective" account of things, whereas we, in our Reply, engaged in some sort of "an *ad hominem* attack on the messengers rather than the message."⁵ No serious reader of our piece would so conclude.⁶

The Chrysotile Defense — Serious?

On the issue of the chrysotile defense, Mr. Toohey now seeks to marginalize Dr. Selikoff's conclusion that "[t]here is ample evidence that all types of asbestos [expressly including chrysotile] are associated with the risk of fatal lung scarring (asbestosis), lung cancer, pleural and peritoneal mesothelioma and gastrointestinal cancer."⁷ For Toohey, that was 1972; "it is now 2010" [*sic*].⁹ Now there are "serious scientists," such as D. Wayne Berman and Kenny Crump, who minimize the dangers of exposure to chrysotile asbestos. And now we finally know from such serious

scientists, according to Mr. Toohey, that “it was folly” and “poor public health policy” to have banned uses of asbestos, especially chrysotile, in various products.¹⁰

Mr. Toohey attempts a lengthy interpretation of a number of technical works in support of the chrysotile defense.¹¹ His goal is to challenge our statement that this particular myth (the chrysotile defense), like others in the original Toohey and Matthews article, has been “hissed off the stage by courts, researchers, scientists and government agencies charged with safeguarding occupational health and safety.”¹² Yet in all of that discussion, and in his accompanying endnotes 6 through 37, Toohey is unwilling or unable to marshal more than a single legal citation, that being the Texas intermediate appellate decision in *Smith v. Kelly-Moore Paint Co.*¹³ If this is Toohey’s sole legal authority in support of the chrysotile defense, it must be a potent one.

Yet *Smith* is a causation decision affirming summary judgment in defendant’s favor based on the Texas Supreme Court decision in *Borg-Warner v. Flores*,¹⁴ on the ground that plaintiffs did not produce sufficient evidence, under the *Flores* standard, to establish that plaintiff was exposed to chrysotile asbestos from defendant’s product “at an exposure level or dose sufficient to have been a substantial factor in his developing mesothelioma.”¹⁵ The issue in *Smith*, in other words, centered on the *Borg-Warner* approach to the substantial factor analysis. Yet the *Smith* Court took pains to point out that defendant “did not challenge the evidence as to general causation, *i.e.*, that Kelly-Moore’s [chrysotile] asbestos-containing joint compound is capable of causing mesothelioma in the general population.”¹⁶ The *Smith* Court further acknowledged, for instance, “a study by [Yuriko] Iwatsubo showing a four-fold increase of mesothelioma at an exposure level of .5 fibers/cc, and a study by [Klaus] Rödelsperger showing a 7.9 odds ratio of an increased risk of mesothelioma at cumulative exposures between 0.0 and .15 fibers/cc year”¹⁷

Since *Smith* should afford the proponents of the chrysotile defense small comfort, perhaps it will be well to see what some other courts have done. In our prior Reply we noted, among the works demonstrating the feebleness of the defense, the ruling in *In re Eighth Judicial District Asbestos Litigation: St. John v. Georgia Pacific Corp.*,¹⁸ crediting 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.¹⁹

But what about Mr. Toohey’s serious scientists? How have they and their “meta-analyses” generally fared? The court in *Gracy v. Georgia Pacific Corp.*²⁰ precluded the defendants from any reliance upon the studies of Berman and Crump, and others similarly promoting the chrysotile defense, as “unreliable and unduly speculative.”²¹ In *Kulzer v. Pittsburgh-Corning Corp.*,²² the Honorable Michael A. Telesca excluded Dr. Crump’s chrysotile defense testimony as “speculative and factually flawed,” stressed that Dr. Crump has “absolutely no background or qualification” to proffer the opinions advocated by the defendants retaining him, and noted that preclusion of this testimony was “particularly compelled by Dr. Crump’s lack of clarity and confidence concerning the data which underlies his testimony [about] exposures to pure chrysotile asbestos”²³ The court in *Sanders v. Owens-Illinois, Inc.*,²⁴ deemed “the quantitative asbestos fiber type potency ratios contained in the Berman & Crump 2003 and 2008 documents and the Hodgson & Darn-ton 2000 document . . . to be speculative and based upon assumptions that have no basis in fact.”²⁵

Proponents of the chrysotile defense do not fare much better when it comes to researchers and scientists. In 1997, the Helsinki panel — comprised of pathologists, radiologists, occupational and pulmonary physicians, epidemiologists, toxicologists, industrial hygienists, and clinical and laboratory scientists²⁶ — concluded, *inter alia*, that chrysotile asbestos causes mesothelioma, although “the amphiboles show[] *greater* carcinogenic potency than chrysotile.”²⁷ Defendants attempt to transform this view of relative carcinogenic potencies into a fiction of absolutes. The inference they press is akin to saying that, because the yield point on a Volvo’s constituent materials may tend to be higher than those on a Kia, it remains up to debate whether a pedestrian’s

being struck by a Kia going 50 miles per hour will be harmful.

In all events, one year after Helsinki, in 1998, the International Programme on Chemical Safety (IPCS), under the joint sponsorship of the United Nations Environment Program, the International Labor Organization and the World Health Organization, published a monograph devoted exclusively to chrysotile asbestos. The IPCS independently found that “commercial grades of chrysotile have been associated with an increased risk of pneumoconiosis, lung cancer and mesothelioma in numerous epidemiological studies of exposed workers,” and concluded that “exposure to chrysotile asbestos poses increased risks for asbestosis, lung cancer and mesothelioma in a dose-dependent manner.”²⁸

Another panel organized in 2000 by the World Trade Organization in response to Canada’s objection to a French decree banning the use of chrysotile asbestos, found that:

the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies. This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres.²⁹

When it comes to the findings and attitudes of government agencies with respect to the hazards of chrysotile exposures, Toohey conveniently ignores, *inter alia*, OSHA’s strict and protective regulations concerning asbestos-containing gaskets, requiring that several measures be undertaken in the vital interests of worker health and safety. During the removal of asbestos-containing gaskets, for example, the employer must supply single-use “glovebags” constructed to precise specifications with which to handle the materials, and must additionally conform to wetting and disposal procedures.³⁰ Similarly, “[d]uring automotive brake and

clutch inspection, disassembly, repair and assembly operations,” for which Toohey claims that it was equally “folly” to have banned the use of asbestos,³¹ OSHA prescribes that “the employer shall institute engineering controls and work practices to reduce employee exposure to materials containing asbestos using a negative pressure enclosure/HEPA vacuum system method or low pressure/wet cleaning method, which meets the detailed requirements set out in Appendix F to this section.”³²

Ultimately, Mr. Toohey’s “objective” scientific analysis devolves into statements — framed as incontestable facts — such as the following:

In most litigated cases, the alleged exposures to asbestos released from gaskets or friction materials of the individual defendant will be a fraction of the person’s lifetime ambient air dose of asbestos. Even in the most extreme case, if a person’s asbestos exposure was from replacing gaskets every day for 40 years, his total lifetime exposure dose would be only 20% that permitted by OSHA. If he changed a set of brakes every day for 40 years, his lifetime dose would be 30% to 40% of the dose allowed by OSHA.³³

Toohey doesn’t substantiate his claim, and one thinks it might be important for him to do so. His language implies that it may be safer to scrape out, remove or install asbestos-containing gaskets, and to breathe in the visible dusts, than to walk in a city park, at least over the long haul. Nor does Toohey pause to acknowledge that defense-sponsored gasket studies fail to account for the real world settings in which multiple workers may be scraping gaskets side by side, in unventilated areas, or that such studies were undertaken, for the most part, with the full panoply of protective measures in place, such as wetting down, local exhaust ventilation, and so forth. The lack of warnings deprived product users of the opportunity to take similar air contaminant abatement measures. Further, OSHA states that its permissible exposure levels are not intended to represent “safe” levels; rather, these levels are set where they are because of the technological limitations of reliable measurement procedures.³⁴

The Duty Issue: A ‘New York State Of Mind’?

Like his prior talk about a “fourth wave” of asbestos litigation, Mr. Toohey’s renewed focus on the

chrysotile defense and on the “folly” of banning “low-dose, low-risk” products³⁵ aims at setting up his core claim: that sellers 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 be added, should have no duty to warn about the hazards. He takes heart from one Delaware trial court’s recent assessment that “it appears that the majority of courts to address the issue have refused to impose liability” in such circumstances.³⁶ However, just a few months earlier, another Delaware court, in *Urian v. Ford Motor Co.*,³⁷ determined that there existed “a genuine issue of material fact as to whether Ford knew of the dangers of asbestos, whether Ford knew that an asbestos product was necessary to operate its vehicle safely, and whether Ford knew that an asbestos-containing product would have to be used in the repair and replacement of its brake linings.”³⁸

Playing a suspect numbers game, Toohey fails to address any of our analysis in our January 19, 2011 Reply. In his “objective” way, Toohey simultaneously accuses us of approaching the issue with a “New York state of mind,”³⁹ and continues to rely primarily upon the New York Court of Appeals decision in *Rastelli v. Goodyear Tire & Rubber Co.*⁴⁰ Although Toohey claims that our analysis rests solely on *Rastelli’s* language stating that its holding was limited to “the circumstances of the case,”⁴¹ our article explained in detail why reliance upon *Rastelli* in this asbestos component context involves a critical analytic mistake.

More specifically, Toohey’s no-duty claim is fatally impaired by 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 a 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 the many yes-duty cases, such as *Urian* and *Berkowitz v. A.C. & S., Inc.*,⁴² 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].”⁴³ In other words, such a 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.

Nor does Toohey say one word about the longstanding products liability jurisprudence that underlies the yes-duty decisions, and that has evolved nationally on the basis of comment *h* to Section 402A of the Restatement (Second) of Torts.⁴⁴ Comment *h* 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.⁴⁵ When this line of decisions is included in the *Urian* and *Berkowitz* column, the tally is not even close, and it becomes plain that product sellers such as the ones Toohey champions have traditionally been held accountable for unreasonable hazards resulting from foreseeable product uses.

Understanding this, 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*.⁴⁶ 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.”⁴⁷

In our original piece we looked especially at New York law because a line of cases emerged there tracing the doctrinal underpinnings of this issue in a step-by-step manner. As far back as *MacPherson v. Buick Motor Company*,⁴⁸ Judge Cardozo rejected the position that manufacturers have no duty to warn about others’ products, noting that the injurious component in that case “was not made by the defendant; it was bought from

another manufacturer.⁴⁹ New York's Court of Appeals subsequently made clear that a product seller would not be immunized from accountability depending merely upon whether the particular, injurious third-party component was installed pre- or post-sale by third parties. In *Sage v. Fairchild-Swearingen Corporation*,⁵⁰ the plaintiff was injured on a replacement hanger or hook installed in defendant's aircraft. As the *Sage* Court emphasized, "[t]hat the hanger actually involved in the accident was a replacement and not the original is not dispositive because in fabricating and installing a new part Commuter's employees, as the jury found, did no more than perpetuate defendant's bad design as defendant's representatives foresaw they might."⁵¹

*Liriano v. Hobart Corporation*⁵² followed, explaining that "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."⁵³ In *Liriano*, New York's high court relied on its 1984 decision in *Cover v. Cohen*,⁵⁴ which cites a wealth of national precedents and hornbook instruction for the principle that, "[a]lthough a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn."⁵⁵ This continuing duty to warn doctrine has largely been adopted in jurisdictions nationwide,⁵⁶ and in harmony with comment *b* creates a firm theoretical foundation for the duty rule Toohey protests.

Relying on *Liriano*, the New York Appellate Division ruled in *Rogers v. Sears, Roebuck & Co.*,⁵⁷ that, "even assuming the accident was caused by a defect in a valve incorporated into a propane tank neither of which [defendant] manufactured," the defendant had a "duty to warn of the dangers presented by such a defect . . ."⁵⁸ Citing *Rogers*, the Appellate Division followed with *Berkowitz*, discussed above. Importantly, the *Berkowitz* Court itself explicitly compared *Rogers* with *Rastelli*, and applied the rule in *Rogers*, not *Rastelli*.⁵⁹

Nevertheless, the "New York state of mind" is Toohey's to share. For he relies not only upon *Rastelli* as his primary authority, but also on the New York decision

in *Holdampf v. A.C. & S., Inc.*⁶⁰ *Holdampf* is not a products liability case, and expressly advises that its holding does not pertain with respect to "the manufacturer or supplier of an asbestos-containing product."⁶¹ But *Holdampf* says that, under New York law — and in express contrast to the law of many other jurisdictions,⁶² such non-New York law wholly ignored by Toohey! — duty is a matter of policy not foreseeability.⁶³ Even under New York law, however, the question of relational duty (duty to whom) is not in dispute in the product seller context because here, unlike in *Holdampf*, plaintiff is within the class to which the product seller already owes a duty to warn.

The debate on this duty issue reduces to the question of whether the product seller has a duty to warn end users about its product's foreseeably hazardous component parts, or whether this involves nothing more than a "rescue" situation. Courts have traditionally been reluctant to impose a duty to "rescue" those one chooses not to rescue. In a no-duty-to-rescue circumstance, the potential rescuer is a stranger to the victim, and his knowledge of the danger does not matter.

For law's purposes, however, the rescue concept is a legal theoretical construct, and therefore only those potential rescuers falling within the theoretical parameters qualify for the no-duty defense. By defining the product seller's obligations to ultimate product users exposed to dangerous post-sale components in the terms of the rescue doctrine, Toohey begs the question of whether this is a rescue situation at all. Because the seller of a final product that will foreseeably — from the seller's point of view — be modified post-sale by the addition of the hazardous component does not fall within the class of would-be rescuers as defined under the theoretical or juridical construct, Toohey's approach would distort and indefensibly expand that construct.

More directly, the classic non-rescuer, a stranger to the victim, gains no benefit from his or her inaction, and any rescue effort would pose no risk to the would-be-rescuer independent of the costs of the rescue itself.⁶⁴ Things are different when it comes to industrial pumps, for instance. The purchaser is a commercial or institutional buyer operating in a competitive market, with at least some range of choices when selecting pumps. The purchaser may also stand in the shoes of an employer of individuals who will directly work with the pump in the

field, or it may be a middleman expecting to resell the pump to such an employer or contracting venture.⁶⁵ Moreover, for the purchaser, the pump is typically just one of the many items it must buy to carry on its enterprise.⁶⁶ So the seller can be expected to have a greater degree of knowledge than the purchaser about the pump, its necessary components, and the health and safety implications of those materials.⁶⁷

The seller's direct cost in stamping or tagging a warning is low. The transaction costs to the purchaser associated with the seller's warning, however, might be relatively high. The purchaser, for example, might be compelled to expend resources finding an alternate component part supplier, one marketing a non-asbestos insulation. Or the purchaser may need to supply respirators, install special ventilation systems, or take other abatement measures.⁶⁸ Also from the purchaser's point of view, a frighteningly informative warning would foreseeably engender labor discipline issues.⁶⁹

All of this enters into the product seller's calculus when deciding not to warn of the known dangers of hazardous component parts likely to be applied to the product. The seller will lose business if it warns, and gain business if it fails to do so. Choosing not to warn, the seller directly benefits from saddling end users with the social costs of the risky activities associated with its product. *This is not a rescue situation.* Here, the traditional duty rule satisfies principles of corrective justice, because it shifts the social costs of risky activities from the innocent victims of those activities to those who directly benefit from them.

Conclusion — In Which Direction Should We Go?

The seller's knowledge that its product will be modified post-sale in ultrahazardous ways, its deliberate decision not to warn of the risk, and the benefit it receives from not warning, means that we are not dealing with a rescue situation. Mr. Toohey skews his argument by presupposing that we are, and by thereby ignoring marketplace realities pertinent to the industrial pump, turbine, boiler, and to products generally upon which dangerous components will likely be installed. Nor is the no-duty rule proposed by Toohey fair or efficient. Rather, it represents a departure from decades of sound products liability jurisprudence developed in this country nationwide.

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. Alani Golanski and Jerry Kristal, *A Reply to James K. Toohey and Rebecca L. Matthews' Commentary: Liability for the Post-Sale Installation of Asbestos-Containing Replacements Parts or Insulation*, 25 Mealey's Litigation Report: Asbestos 24 (Jan. 19, 2011), at 18.
4. *Appalachian Ins. Co. v. General Electric Co.*, 863 N.E.2d 994, 966 (N.Y. 2007).
5. Toohey, *supra* note 1, at 45.
6. We did not, for instance, attempt to discredit defendants' positions as reflecting the "addictions" of their counsel. *Cf.* Toohey & Matthews, *supra* note 2, at 40-41. For Mr. Toohey, Golanski and Kristal have engaged in an *ad hominem* attack simply because, as part of our writing style, we referred to Toohey and Matthews "by name" on several occasions. So Mr. Toohey is objective, not *ad hominem*, because he refers to us as "respondents." "*Ad hominem*," however, means a logical fallacy whereby characteristics of the speaker are attacked rather than the speaker's arguments. We have in no way attacked the writers in order to denigrate their analysis. Nor does the present Reply even suggest, for instance, that Mr. Toohey's arguments may be a bit skewed, not purely "objective," simply because he is co-chair of the toxic tort defense group at Johnson & Bell. Nevertheless, for Mr. Toohey, mention of the Canadian asbestos mining industry's sponsorship of a particular epidemiological study on chrysotile, heavily relied upon by defendants, amounts to an *ad hominem* maneuver, and disregards what Toohey — who is not an epidemiologist — ventures to call the study's "objective accuracy." Toohey, *supra* note 1, at endnote 11.
7. 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).
8. Toohey, *supra* note 1, at 45.
 9. *Id.*, at 46.
 10. *Id.*, at 47.
 11. *Id.*, at 45-48.
 12. Golanski & Kristal, *supra* note 4, at 18.
 13. 307 S.W.3d 829 (Tex. Ct. App. 2010); Toohey, *supra* note 1, at 48.
 14. 232 S.W.3d 765 (Tex. 2007). On the peculiar rigors of the *Borg-Warner* causation standard, see, for example, *In re Asbestos*, Cause § 2004-3,964, at 5 (11th Dist. Ct., Tex., July 18, 2007) (Hon. Mark Davidson) (“Since I am aware of no one other than Dr. Josef Mengele who might have exposed human beings to measured amounts of asbestos for the purpose of determining how much they would inhale and cause illness, I am going to take the [*Flores*] Court at its literal word of ‘exposure’ rather than ‘inhalation’”).
 15. 307 S.W.3d 829, 832, 839.
 16. *Id.*, at 831 n.2.
 17. *Id.*, at 838-39.
 18. Slip op., Index § 2001-9946 (Sup. Ct., Erie County, June 8, 2004).
 19. *Id.*, at 7.
 20. § 2008-SU-CV-622 (Super. Ct. Georgia, Feb. 12, 2010).
 21. *Id.*; accord *Hurst v. Owens-Corning Fiberglas Corp.*, § 90-1859-N (E.D. Va., May 3, 1991) (quashing Kenny Crump’s report and deposition testimony).
 22. § CIV-87-0386T (W.D.N.Y. Apr. 25, 1990).
 23. *Id.*
 24. § CL0800724T-01 (Cir. Ct. Va., Feb. 15, 2010) (order).
 25. *Id.*, at 4.
 26. On the *ad hominem* front, Toohey dismissively states that this expansive panel “included scientists who regularly testify for plaintiffs in the asbestos litigation”; Toohey, *supra* note 1, at 47 (emphasis added); but is mute about the vast majority of consensus authors not so included. See generally D.W. Henderson *et al.*, *After Helsinki: a multidisciplinary review of the relationship between asbestos exposure and lung cancer, with emphasis on studies published during 1997-2004*, 36 PATHOLOGY 517 (2004); *In re Asbestos Litig.*, 900 A.2d 120, 131-32 (Del. Super. Ct. 2006) (“Based on his consideration of each of the factors mentioned above, Dr. Hammar has concluded that exposure to automotive friction products can increase the risk of contracting asbestos-related diseases. This conclusion is shared by others in his scientific community and reported in the peer-reviewed literature. It is also supported by Dr. Henderson’s analysis of the Australian data as submitted in his report to the World Trade Organization entitled ‘European Communities – Measures Affecting Asbestos and Asbestos-Containing Products.’ In that report, Dr. Henderson states: ‘automotive mechanics constitute a large population of workers potentially exposed to chrysotile derived from brake linings.’ He goes on to state that the Australian data reported several cases of ‘mesotheliomas among brake mechanics with no other exposures to asbestos,’ and that the rate of exposure among such individuals was ‘substantially above the upper limit of the estimated background rate. . .’”).
 27. Consensus Report, *Asbestos, asbestosis, and cancer: the Helsinki criteria for diagnosis and attribution*, 23 SCAN. J. WORK ENVIRON. HEALTH 311 (1997).
 28. IPCS Environmental Health Criteria 203 – Chrysotile Asbestos, World Health Organization (1998) pp. 7, 168.
 29. World Trade Organization, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Panel, paragraph 8.188 (Sept. 18, 2000).

30. 29 C.F.R. § 1926.1101.
31. Toohey, *supra* note 1, at 47.
32. 29 C.R.F. § 1910.1001(f)(3)(i).
33. Toohey, *supra* note 1, at 47.
34. NIOSH-OSHA Asbestos Work Group, Workplace Exposure to Asbestos: Review and Recommendations DHHS (NIOSH) Pub. § 81-103 3 (1980) (“Evaluation of all available human data provides no evidence for a threshold or for a ‘safe’ level of asbestos exposure”); 59 Fed. Reg. 40964-01, 40967 (Aug. 10, 1994) (stating OSHA believes that the regulatory limit of .1 fiber per cubic centimeter of air as an eight-hour time-weighted average is ‘the practical lower limit of feasibility for measuring asbestos levels reliably”), available at 1994 WL 413576 (F.R.); *see* David Michaels & Celeste Monforton, Symposium: *Science for Judges VIII: Regulating Pharmaceuticals and Scientific Issues Regarding Asbestos: How Litigation Shapes the Scientific Literature: Asbestos and Disease Among Auto Mechanics*, 15 J.L. & POL’Y 1137, 1157-58 (2007) (“since extremely low levels of asbestos exposure have been associated with increased risk of disease, the default assumption is that there is no safe level of asbestos exposure. These studies have served as the basis for public health protections imposed by OSHA, EPA and other regulatory agencies”).
35. Toohey, *supra* note 1, at 47.
36. *Id.*, at 45.
37. C.A. § 06C-09-246 ASB, 2010 Del. Super. LEXIS 323 (July 30, 2010) (Pennsylvania law).
38. *Id.*, 2010 Del Super. LEXIS 323, at *6-7.
39. Toohey, *supra* note 1, at 48.
40. 591 N.E.2d 222 (N.Y. 1992); *see* Toohey, *supra* note 1, at 48-49.
41. 591 N.E.2d at 225; Toohey, *supra* note 1, at 48.
42. 733 N.Y.S.2d 410 (N.Y. App. Div. 2001).
43. *Id.*, at 411-12.
44. RESTATEMENT (SECOND) OF TORTS § 402A, comment *b*.
45. *Id.* (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”).
46. *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).
47. *Curry*, slip op., at 2; *Gitto*, slip op., at 2-3.
48. 111 N.E. 1050 (N.Y. 1916).
49. *Id.*, at 1051.
50. 517 N.E.2d 1304 (N.Y. 1987).
51. *Id.*, at 1308.
52. 700 N.E.2d 303 (N.Y. 1998).
53. *Id.*, at 307 (relying upon *Cover v. Cohen*, 461 N.E.2d 864, 871 (1984) (“[a]lthough a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn”).
54. 461 N.E.2d 864 (N.Y. 1984).
55. *Id.*, at 871.
56. *E.g.*, *Mandile v. Clark Material Handling Co.*, 131 Fed. Appx. 836, 838 (3d Cir. 2005) (N.J. law); *Jordan v. Massey-Ferguson, Inc.*, § 95-5861, 1996 U.S. App. LEXIS 29703, at *13 n.2 (6th Cir. Nov. 12, 1996) (Kentucky law); *T.H.S. Northstar Assocs. v. W.R. Grace & Co.*, 66 F.3d 173, 177 (8th Cir. 1995) (Minnesota law); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 748-49

- (1993); *Smith v. Selco Products, Inc.*, 385 S.E.2d 173, 176-77 (N.C. Ct. App. 1989).
57. 701 N.Y.S.2d 359 (N.Y. App. Div. 2000).
58. *Id.*, at 359-60.
59. *Berkowitz*, 733 N.Y.S.2d at 412.
60. 840 N.E.2d 115 (N.Y. 2005); Toohey, *supra* note 1, at 48.
61. *Holdampf*, 840 N.E.2d at 118 n.4.
62. *E.g.*, *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (foreseeability of harm informs the determination of whether a duty exists); *Olivio v. Exxon Mobil Corp.*, 895 A.2d 1143, 1148 (N.J. 2006) (“foreseeability is significant in the assessment of a duty of care to another”).
63. *Holdampf*, 840 N.E.2d at 121.
64. *See generally* Eric H. Gush, Comment, *The Inefficiency of the No-Duty-to-Rescue Rule and a Proposed Similar Risk Alternative*, 146 U. PA. L. REV. 881, 895 (1998).
65. *E.g.*, *Graco, Inc. v. Binks Mfg. Co.*, 60 F.3d 785, 788 (Fed. Cir. 1995).
66. *E.g.*, *Ill. Power Co. v. Comm’r*, 83 T.C. 842, 858 (1984); *In re Peterson Constr. Corp.*, 128 N.L.R.B. 969, 991 (1960).
67. *E.g.*, *McAlpin v. Leeds & Northrup Co.*, 912 F. Supp. 207, 211 (W.D. Va. 1996) (“A post-sale duty to warn promotes a continuous flow of information from the more knowledgeable manufacturer to the industrial purchaser and all foreseeable users”); *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 281 (Minn. 2004) (“If the manufacturer has superior knowledge, it has a duty to relay that information to the intermediate purchaser”).
68. *E.g.*, N.Y. Comp. Codes R. & Regs. tit. 12, § 12-1.6(a) (2009).
69. *See* OSHA Regulations, 29 C.F.R. § 1977.12(b)(2) (2008) (“Occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace”). ■

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Telephone: (610) 205-1000 1-800-MEALEYS (1-800-632-5397)

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