The Rise of Neo-Scientists Advocating for Polluters and the Laws That Deter Them

Amy Leonard*

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* Associate, D. David Altman Co. LPA, Cincinnati, Ohio. Ms. Leonard has been practicing environmental law on behalf of citizens, community groups, environmental groups and local governments since graduating from Tulane Law School in 1988 where she was the founding editor in chief of the *Tulane Environmental Law Journal*. This Article was written in the author's personal capacity and not as a representative of her firm. The author would like to thank her fellow associates Justin Newman and Amy Hartford for their assistance in the creation of this Article.

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I. INTRODUCTION

As funds for independent research continue to dwindle, as massive federal and state deficits require budget cuts by governmental regulatory agencies, and as regulatory agencies (including the United States Environmental Protection Agency (EPA)) shift their missions to focus on prevention of the next terrorist attack on our homeland, decisions that affect the health and welfare of millions of Americans are too often based on the work of consultants hired by the regulated entities. As a result of these changes in government, public oversight on health and safety issues—particularly environmental issues—is often weak or nonexistent. When scientific services are provided on behalf of industries with millions of dollars to lose depending on the outcome of the "scientific" investigation, the threat that the "scientific" process will be rigged is ever present. Scientists who participate in the effort to manipulate science are merely public relations pawns dressed up as scientists. They will be referred to as "neo-scientists" to reflect the fact they are not advocating unbiased science, but the outcome their client desires.[1]

The legal tools available to hold neo-scientists accountable for their words, acts, and omissions include the torts of negligent or conscious misrepresentation involving risk of harm[2] or pecuniary loss,[3] as well as civil conspiracy. These tools need to be understood and used in appropriate cases to prevent irreparable harm to health and the environment.

Many true scientific professionals, of course, seek to advance legitimate findings in their field of study. This certainly includes findings favorable to polluters. Most scientific professionals will never cross the line from an honest debate over difficult issues, such as whether a chemical is "safe" or "unsafe," what the vertical or horizontal extent of contamination is, or what technology is best for addressing a certain type of pollution or contamination. Neo-scientists, however, either negligently or intentionally circumvent the usual safeguards by broad scale use of deceptive science to advocate on behalf of their industrial clients.

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1. "Neo-scientists" can be found in a wide variety of disciplines such as toxicology, hydrogeology, medicine, and engineering.
2. *See* RESTATEMENT (SECOND) OF TORTS §§ 310-311 (1965).
3. *Id.* § 552.

While the potential abuse for neo-scientists is present in a wide variety of circumstances, this Article will focus on a common scenario in which polluters, manufacturers, or other owners/operators of contaminated sites, and their neo-scientists, negligently or intentionally misrepresent the adverse effects that a chemical, an area of contamination, or acts or omissions will have on public health, welfare or the environment. The offending conduct can include misrepresenting some salient fact about: (1) the nature and extent of contamination, (2) the threat to health or environment posed by the contamination, or (3) the capability of the investigation or remediation to protect health and the environment. One example of this scenario involves a situation where a neo-scientist declares he has identified the extent of contamination emanating from an industrial facility into a community even though he has failed to look for contamination in the expected areas using reliable methods. Under this scenario, the contamination (e.g., migration of contaminants in groundwater, surface water, or soil gas) is much more widespread and could have been discovered if reasonable investigatory steps had been taken.

In such circumstances, a misrepresentation about the extent of contamination is likely to affect the decision-making of the regulatory body charged with protecting the local environment. Misrepresentations about the extent of contamination in a given community are also likely to cause individuals, local organizations, and local businesses to continue to use their private water supply, to continue to live at their property, or even to develop or lease that property. Under the tort claims discussed in this Article, the neo-scientists may be held liable for physical harm[4] or pecuniary loss[5] suffered by those who reasonably relied on the mischaracterization of the extent of contamination.[6]

The concern about neo-scientists is not abstract, as illustrated by the services actually being offered by some scientific professionals. Exhibit A is the April 29, 2003, letter from the Weinberg Group, Inc.[7] to the Vice-

4. *See id.* §§ 310-311.
5. *See id.* § 552.
6. *Id.* § 552(2)(b).
7. Letter from P. Terrence Gaffney, Esq., Vice President, Product Defense, The Weinberg Group, Inc., to Jane Brooks, Vice President, Special Initiatives, DuPont de Nemours & Co. (Apr. 29, 2003), *available at* http://www.fluroideaction.org/pesticides/2006/Weinberg.proposal.pdf [hereinafter Weinberg Letter]. The Weinberg Group is an "international scientific and regulatory consulting firm that helps companies protect their product at every stage of its life." The Weinberg Group helps its clients "improve manufacturing processes, clear regulatory hurdles, and defend products in the courts and the media." The Weinberg Group, http://www.weinberggroup.com (last visited Mar. 27, 2007).

President of Special Initiatives at a leading chemical company.[8] The Weinberg Letter "describe(s) the services the Weinberg Group Inc. can provide regarding issues related to perfluorochemicals generally and perfluorooctanoic acid (PFOA) in particular."[9] In its offer of services, the Weinberg Group offered to

> implement a strategy at the outset which discourages governmental agencies, the plaintiff's bar and misguided environmental groups from pursuing this matter any further than the risk assessment contemplated by the Environmental Protection Agency (EPA) and the matter pending in West Virginia.[10]

The Weinberg Group described the services it has to offer as follows: "Specifically, during the initial phase of our engagement by a client, we will harness, focus, and involve the scientific and intellectual capital of our company with one goal in mind—creating the outcome our client desires."[11] Specifically, the Weinberg Group offered:

> The outcome of this process will result in the preparation of a multifaceted plan to take control of the ongoing risk assessment by the EPA, looming regulatory challenges, likely litigation, and almost certain medical monitoring hurdles. The primary focus of this endeavor is to strive to create the climate and conditions that will obviate, or at least, minimize ongoing litigation and contemplated regulation relating to PFOA. This would include facilitating the publication of papers and articles dispelling the alleged nexus between PFOA and teratogenticity as well as other claimed harm. *We would also lay the foundation for creating Daubert precedent to discourage additional lawsuits.*[12]

In further attempting to sell its services, the Weinberg Group described itself as follows:

> Ours is a task-oriented organization in which clients make specific assignments under carefully planned, client-controlled budgets. Our experience in environmental exposure matters has repeatedly illustrated our client's need to control as many variables of liability exposure as possible. In addition, some preliminary suggestions of tasks for managing issues related to PFOA include:

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8. The public record does not disclose whether that chemical company, DuPont de Nemours & Company, ever hired the Weinberg Group for the project outlined in the letter.

9. Plaintiff's Motion To Clarify June 26, 2003, Order Denying DuPont's Motion for a Protective Order To Prevent Disclosure of Three Documents, Exhibit C at 212-16, Leach v. E.I. DuPont de Nemours, No. 01-C-608, 2002 WL 1270121 (W. Va. Cir. Ct., Apr. 10, 2002).

10. *Id.*

11. *Id.* (emphasis added).

12. *Id.* (emphasis added).

> —begin to identify and retain leading scientists to consult on the range of issues involving PFOA so as to develop a premium expert panel and concurrently conflict out experts from consulting with plaintiffs.
> —reshape the debate by identifying the likely known health benefits of PFOA exposure by analyzing existing data, and/or *constructing a study to establish not only that PFOA is safe over a range of serum concentrations levels, but that it offers real health benefits* (oxygen carrying capacity and prevention of CAD).
> —*begin to shape the Daubert standards in ways most beneficial to manufacturers*.[13]

This type of marketing of science provides a context for understanding seemingly isolated events.

The news is replete with examples of scientific professionals allegedly misstating the state of scientific knowledge in order to advance the cause of their clients. For example, the Environmental Working Group (EWG) has recently alleged that "scientists-for-hire" involved in Chromium VI litigation in California's PG&E site(s) misrepresented the causal link between chromium VI and cancer when it "distorted data" from a Chinese study.[14] EWG claims that these "scientists-for-hire" then published a new "study" in a peer-reviewed scientific journal[15] that reversed the Chinese study's original conclusion linking chromium VI exposure to stomach cancer.[16] According to the EWG's investigation, the new study misrepresents the scientific knowledge in numerous respects; yet, it has not only been used in litigation regarding specific chromium VI contaminated sites,[17] but it has also been consulted by government regulators, including the EPA, in setting safety standards.[18] Some of the alleged "ethical or scientific breaches" associated with the "new study" and resulting article allegedly include:

- Failure to disclose who wrote the manuscript.
- Failure to disclose that the study was funded by PG&E.

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13. *Id.*
14. RENEE SHARP & SIMONA CARINI, CHROME-PLATED FRAUD: HOW PG&E'S SCIENTISTS-FOR-HIRE REVERSED FINDINGS OF A CANCER STUDY pt. 1, http://www.ewg.org/reports/chromium (last visited Sept. 4, 2006).
15. *Id.* The new, allegedly fraudulent study was published in the *Journal of Occupational and Environmental Medicine*, a "peer-reviewed publication of the American College of Occupational and Environmental Medicine." Zhan JinDong & ShuKun Li, *Cancer Mortality in a Chinese Population Exposed to Hexavalent Chromium in Water*, 39(4) J. OCCUPATIONAL & ENVTL. MED. 315 (1997).
16. Sharp & Carini, *supra* note 14, pt. 1.
17. *Id.*
18. *Id.*

- Basing the analysis on the level of contamination detected in the wells in 1965, knowing that by the end of that year the picture of contamination in the wells had dramatically changed.
- Ignoring useful data that were readily available.
- Misrepresenting the study design in several ways to make it seem stronger.
- Failing to disclose key facts about the data presented.[19]

The controversy surrounding the setting of a drinking water standard for perchlorate further illustrates the concerns many have about how regulated industries using questionable practices can influence science-based health and safety decisions that affect millions of Americans. In 2002, the EPA, in its third draft statement on perchlorate, recommended a drinking water standard of no greater than 1 part per billion (ppb).[20] Before that time, the Department of Defense contended that a level of 200 ppb was safe.[21] Shortly thereafter, in March 2003, the EPA, the Department of Defense, the Department of Energy, and the National Aeronautics and Space Administration charged the National Academy of Sciences (NAS)[22] to conduct a review of the science on the health impacts of perchlorate.[23]

The process that resulted in the NAS report, which is entitled *Health Implications of Perchlorate Ingestion*, was criticized as being pro-industry by national environmental groups.[24] The criticism specifically pointed to the fact that the NAS panel included defense contractors, including one that formerly worked for the aerospace industry, and Dr. James Lamb of the Weinberg Group.[25] Beyond having pro-industry panelists, both the EWG and the Natural Resources Defense Counsel contend that industry and the Department of Defense inappropriately

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19. *Id.* pt. 5.
20. The original recommendation can no longer be viewed on the EPA's Web site. Only a "cleaned" version, without the earlier 1 ppb recommendation now appears on the EPA's web site. The original version is available at Natural Res. Def. Council, U.S. EPA Perchlorate Environmental Contamination, http://www.nrdc.org/media/docs/050110webpage.pdf (last visited Sept. 4, 2006).
21. Jeff Shaw, *White House Science Phobia, Spin Taint News of Chemical Dangers*, THE NEW STANDARD, Jan. 19, 2005, http://newstandardnews.net/content/index.cfm/items/1396.
22. The NAS holds itself out as a nonprofit research organization, which acts as "Advisor[] to the Nation on Science, Engineering, and Medicine." The National Academies, http://www.nationalacademies.org (last visited Sept. 10, 2006).
23. Letter from Paul Gilman, Sci. Advisor, EPA, to Dr. Bruce M. Alberts, President, Nat'l Acad. of Sci. (Mar. 19, 2003), *available at* http://www.epa.gov/fedfac/pdf/Brief_Perchlorate_NAS.pdf (on file with the EPA).
24. NAT'L ACAD. OF SCI., HEALTH IMPLICATIONS OF PERCHLORATE INGESTION: REPORT IN BRIEF (2005), *available at* http://www.epa.gov/fedfac/pdf/nasrprt0305.pdf.
25. *Id.*; Shaw, *supra* note 21.

colored the findings of the NAS report.[26] For example, the Natural Resources Defense Council contends that the Department of Defense handpicked the experts on the NAS panel and set the scope of the inquiry by the NAS panel.[27]

Although the NAS did not recommend a drinking water standard in its January 2005 report, it did recommend a reference dose of 0.0007 mg/kg per day for perchlorate.[28] The EPA adopted the same reference dose one month after the NAS released its report, noting that the EPA's level was "consistent with the recommended reference dose included in the National Academy of Science's [sic] January 2005 report."[29] According to the Department of Defense and the EPA, this reference dose is the Drinking Water Equivalent Level (DWEL) of 24.5 ppb,[30] which would allow for more perchlorate levels in water than the 1 ppb standard that the EPA recommended before the NAS released its report. The debate, however, is not over yet as the EPA continues to work toward setting the actual drinking water standard for perchlorate.[31]

It is important that attorneys representing those participating on the public interest side of any health or safety debate explore whether a given fact or conclusion being offered by a purported scientific professional is accurate, within the realm of honest debate, or whether it rises to the level of a negligent or even conscious misrepresentation. If it is a negligent or conscious misrepresentation, then those making the misrepresentations could be subject to liability. The liability is laid out in three specific sections in the *Restatement (Second) of Torts* (*Restatement*): section 310, Conscious Misrepresentation Involving Risk of Physical Harm; section 311, Negligent Misrepresentation Involving

26. Shaw, *supra* note 21.
27. *Id.*
28. U.S. EPA, Ground Water & Drinking Water: Perchlorate, http://www.epa.gov/safewater/ccl/perchlorate/perchlorate.html (last visited Sept. 4, 2006). The EPA defines a reference dose as a "scientific estimate of a daily exposure level that is not expected to cause adverse health effects in humans." A reference dose is not an enforceable standard but is used to set a federally enforceable standard. *Id.*
29. U.S. EPA, Federal Facilities Restoration and Reuse, Perchlorate Links, http://www.epa.gov/fedfac/documents/perchlorate_links.htm#nas (last visited Sept. 4, 2006).
30. *See* Memorandum from the Office of the Under Secretary of Defense to the Assistant Secretary of the Army, Assistant Secretary of the Navy, Assistant Secretary of the Air Force, Defense Logistics Agency (Jan. 26, 2006), *available at* http://www.denix.osd.mil/denix/Public/Library/Merit/Perchlorate/newsroom/announcements/2006/documents/Policy-DoD-Req-Actions-Perchlorate.pdf; *see also* Memorandum from Susan Parker Bodine, Assistant Administrator, EPA, to Regional Administrators (Jan. 26, 2006), *available at* http://www.epa.gov/fedfac/pdf/perchlorate_guidance.pdf.
31. Council on Water Quality, Questions and Answers: The Facts on Perchlorate in Drinking Water, http://www.councilonwaterquality.org/know/qa_nas.html (last visited Sept. 23, 2006).

Risk of Physical Harm; and section 552, Information Negligently Supplied for the Guidance of Others. In many states, the tort of civil conspiracy also gives rise to liability. Other related sections of the *Restatement* may also be applicable to a given situation, but they will not be discussed in this Article.[32]

II. *RESTATEMENT (SECOND) OF TORTS* SECTION 311: NEGLIGENT MISREPRESENTATION INVOLVING RISK OF PHYSICAL HARM

Section 311 of the *Restatement* regards liability for negligent misrepresentation involving the risk of physical harm. According to section 311 of the *Restatement*, liability is imposed on anyone who "negligently gives false information to another" for any physical harm "caused by action taken by the other in reasonable reliance upon such information."[33] This includes liability to the person who took that action directly or "to such third persons as the actor should expect to be put in peril by the action taken."[34]

Under section 311 of the *Restatement*, negligence can occur either by failing to take reasonable care either: (1) in ascertaining the accuracy of the information or (2) in the manner in which it is communicated.[35]

At the onset, it must be noted that not all states have adopted all sections of the *Restatement*; and even if they have adopted a given section, those sections are not uniformly interpreted or applied from state to state. Minnesota, for example, only recognizes the tort of negligent misrepresentation on a claim of pecuniary loss and not on a claim for physical harm.[36] Ohio, on the other hand, does recognize the tort of negligent misrepresentation involving the risk of physical harm as described in the *Restatement*.[37] Other states accepting section 311 of the

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32. Where actual fraud is suspected, section 525 of the *Restatement* sets forth the elements of fraudulent misrepresentation. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

33. *Id.* § 311(1) (1965).

34. As the comments to this section make clear, because section 311 involves physical harm, it is broader in scope than section 552, which relates to liability for only pecuniary loss resulting from negligent misrepresentation. *Id.* § 311 cmt. a.

35. *Id.* § 311.

36. *See* Flynn v. Am. Home Prod. Corp., 627 N.W.2d 342, 350 (Minn. Ct. App. 2001). Nor does Indiana appear to recognize a claim for negligent misrepresentation. *See also* Passmore v. Lee Alan Bryant Health Care Facilities, Inc., 765 N.E.2d 625, 628-30, 632 (Ind. Ct. App. 2002).

37. Spitler v. Select Tool & Die Co. (June 2, 1992), 2d Dist. No. CA-12791, 1992 WL 120567, at *5 ("Whenever one person undertakes to respond to another's questions under circumstances in which it should be assumed that the latter is likely to be relying, reasonably, upon those answers for the protection of himself or of others, a duty exists to exercise reasonable care in answering the questions.").

Restatement include New Hampshire,[38] Iowa,[39] Illinois,[40] Washington D.C.,[41] Texas,[42] and New York.[43] The United States Court of Appeals for the Fifth Circuit also recognized a Louisiana cause of action for negligent misrepresentation when it refused to dismiss a plaintiff's claim that the defendant tobacco company had both intentionally and negligently communicated to the plaintiffs and to others from Louisiana "false representations of material facts as to the addictive and cancer-causing effects of their tobacco products."[44]

Nonetheless, keeping in mind the appropriate conflicts of law rules, the lawyer should consider the application of section 311 to neo-scientists who negligently present incorrect information to federal, state, or local governments and the public.

This Part will discuss how the four major elements of section 311 may be satisfied in the example scenario where neo-scientists overstep the bounds of legitimate dispute.[45] First, this Part will consider what constitutes negligently giving false information as further defined in subsection (2) of section 311(2). Second, this Part will elaborate on the "risk of physical harm" language in the *Restatement*. Third, this Part will discuss what constitutes the "reasonable reliance" necessary to trigger liability. Finally, this Part will explore who would constitute potential plaintiffs.

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38. New Hampshire, for example, has accepted the cause of action as set forth in section 311. *See* Marcotte v. Pierce Constr. Co., 280 A.2d 105, 108-09 (N.H. 1971) (finding both the electrical contractor who provided false information about the lack of available safety equipment and the general contractor who relied on those representations were liable to the plaintiff-employee who was injured because the safety equipment was not used).

39. Freese v. Lemmon, 210 N.W.2d 576, 580-81, 584 (Iowa 1973).

40. Baylie v. Swift & Co., 327 N.E.2d 438, 449 (Ill. App. Ct. 1975) (finding the elements were not met in that case because the plaintiff had not relied on the defendant's misrepresentation about the flammability of calcium stearate); *see also* Bd. of Educ. of Chi. v. A, C & S, Inc., 546 N.E.2d 580, 592-93 (Ill. App. Ct. 1989).

41. Hall v. Ford Enters., Ltd., 445 A.2d 610, 612 (D.C. Cir. 1982) (holding that the elements for negligent misrepresentation were (1) "the defendant negligently communicated false information; (2) the defendant intended or should have known that the plaintiff would be imperiled by acting in reliance upon the misrepresentation; and (3) the plaintiff reasonably relied upon the false information to his detriment").

42. *See* Golden Spread Council Inc. v. Akins, 926 S.W.2d 287, 295-96 (Tex. 1996) (expanding negligent misrepresentation to nonpecuniary injury case involving failure of a local scouting group to inform a church group that a scout leader had previously molested children).

43. Brown v. Neff, 603 N.Y.S.2d 707, 709 (N.Y. Sup. Ct. 1993) (denying, in part, motion to dismiss and finding privity not required for a negligent misrepresentation claim; finding the defendant liable not only to the party in privity, but to others who he should have realized would likely be imperiled by the misrepresentation).

44. Guidry v. U.S. Tobacco Co., 188 F.3d 619, 627 (5th Cir. 1999).

45. *See supra* Part I (describing common scenario).

A. *What Constitutes Giving False Information?*

Section 311(2) sets forth two important examples of what constitutes negligently giving false information. First, negligently giving false information can include failing to exercise reasonable care in ascertaining the accuracy of the information being given.[46] According to the *Restatement*, when a person, such as an environmental scientist, provides information and should know the security of others depends upon that information, that person is required to exercise reasonable care to: (1) ascertain the facts and (2) determine whether the information being given is accurate.[47]

This neo-scientist will be considered negligent in supplying information which is, in fact, false, where he (1) failed to perform the proper investigation to determine if the information was true or (2) unreasonably failed to recognize that it was not accurate.[48]

This cause of action is arguably applicable to a variety of scenarios that may arise with respect to use of information developed or presented by neo-scientists. For example, with respect to the common scenario presented in this Article, the element of giving false information may be triggered by a common tactic employed by polluters and the scientists they hire—failing to perform adequate sampling of environmental media according to reliable methods, yet proceeding to make broad pronouncements about the presence or absence of contamination and threat to health and the environment in the vicinity of a site. This scenario includes the failure to look for contamination along known or foreseeable pathways, failing to acknowledge identifiable pathways, failing to use proper sampling methodology or failing to interpret data according to proper, reliable principles with that field of study, or failing to recognize findings in well-established scientific literature.

Negligence may also be found when false information is provided if there is a failure to exercise reasonable care in the manner in which the information is communicated.[49] Thus, a neo-scientist who has properly

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46. RESTATEMENT (SECOND) OF TORTS § 311(2)(a) (1965).

47. *Id.*

48. *Id.* § 311 cmt. (d). According to comment (d):

> Where the actor furnishes information upon which he knows or should realize that the security of others depends, he is required to exercise the care of a reasonable man under the circumstances to ascertain the facts, and the judgment of a reasonable man in determining whether, in the light of the discovered facts, the information is accurate. *His negligence may consist of failure to make proper inspection or inquiry, or of failure after proper inquiry to recognize that the information is not accurate.*

Id. (emphasis added).

49. *Id.* § 311(2)(b). Comment (e) to section 311 further explains:

ascertained facts must present those facts in a manner to be properly understood by the recipients. Whether the omission of salient facts can give rise to liability under section 311 has not been uniformly decided by courts. At least one Ohio court has found that, with respect to negligent misrepresentation claims under section 552 of the *Restatement* (for pecuniary loss), an omission can be the basis of a negligent misrepresentation claim when there is a duty to disclose the fact at issue.[50] On the other hand, another Ohio court has held otherwise.[51]

Applying section 311 to neo-scientists who present incorrect information regarding such things as the nature and extent of environmental contamination through a community, or the adverse effects from exposure to a particular chemical, is bolstered by comment (b) which specifically notes that section 311 "finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends."[52]

A neo-scientist acting as a "hired gun" in the example scenario would necessarily meet this standard since the neo-scientist is working for a polluter "in furtherance of his own interests" and "undertakes to give information to another" (e.g., the polluter, the government or directly to the affected community).[53] In such circumstance, it would be unreasonable to suggest the neo-scientist did not know that the safety of

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> The negligence for which the actor is liable under the statement in this Subsection consists in the lack of reasonable care to furnish accurate information. It is, therefore, not enough that the actor has correctly ascertained the facts on which his information is to be based and has exercised reasonable competence in judging the effect of such facts. He must also exercise reasonable care to bring to the understanding of the recipient of the information the knowledge which he has so acquired.

Id. § 311 cmt. (e).

50. Stonecreek Props. Ltd. v. Ravenna Sav. Bank, 11th Dist. No. 2002-P-0129, 2004-Ohio-3679.

51. Textron Fin. Corp. v. Nationwide Mut. Ins. Co. (Oct. 30, 1996), 115 Ohio App. 3d 137, 684 N.E. 2d 1261 ("Negligent misrepresentation does not lie for omission; there must be some affirmative false statement." *Id.* at 1269 (citing McElroy v. Boise Cascade Corp., 632 S.W.2d 127 (Tenn. Ct. App. 1982))). One possible distinction may be made in cases where there is a complete failure to disclose information (which may not trigger liability) versus the failure to disclose facts coupled with misleading statements (which, in combination with each other, may be sufficient to trigger liability). The court found the negligent misrepresentation claim was proper where the defendant "failed to disclose the true location of [the plaintiff's] computer and, in fact, represented a location which was, if not initially, then ultimately, incorrect." *Id.* at 1271. The misrepresentation claim was not allowed for other acts of concealment that were not accompanied by misleading statements. *Id.* at 1272. The court in *McElroy* did keep the door open on the potential for omissions to trigger liability by stating that "conduct tantamount to a false statement" is a sufficient basis for negligent misrepresentation. *McElroy*, 632 S.W.2d at 133.

52. RESTATEMENT (SECOND) OF TORTS § 311 cmt. (b).

53. *Id.*

those depended on the accuracy of his statements about conditions at a contaminated site.[54]

Because an environmental consultant should know that her testimony affects the security of the people living and doing business around the polluted site he or she is charged with investigating or remediating, he or she would fall squarely within the category of people covered by section 311 of the *Restatement*. The law charges polluters with the responsibility of paying for the investigation and remediation. The "polluter pays" principle protects individual property owners from having to pay tens of thousands or hundreds of thousands of dollars to duplicate investigations in order to know whether their property has been harmed by the polluter's actions. The Resource Conservation and Recovery Act (RCRA) requires such an investigation at all treatment, storage, and disposal facilities for all solid waste management units, regardless of when waste was handled there.[55] The imminent and substantial endangerment provision of RCRA (as well as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) also requires polluters to foot the bill for investigative and remediation costs.[56] Innocent bystanders who happen to be within the zone of the pollution created by others should not have to be the ones paying the substantial costs to investigate contamination caused by others.

Consequently, it would be disingenuous for any neo-scientist hired to advocate that a site poses no threat to health or the environment or explain the limits of contamination in a given community, to claim that he or she did not realize the safety of the people exposed to that contamination would depend upon the accuracy of the information provided.

As subsections (2)(a) and (b) make clear, liability under section 311 arises from the neo-scientists' negligence. A conscious misstatement or the intent to mislead is not a required element under section 311. Rather, liability will attach for the failure to perform reasonable care either in determining if the facts the neo-scientist is disseminating are accurate or in communicating accurate facts to the recipient.[57]

In bringing an action under section 311 of the *Restatement*, the precise false statement must be determined so there is no ambiguity as to what is actually being represented. Some examples would be specific

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54. *Id.*
55. Resource Conservation Recovery Act of 1976, 42 U.S.C.A. § 6924(u) (2007).
56. *Id.*
57. RESTATEMENT (SECOND) OF TORTS § 311(2)(a)-(b).

instances of misstated facts or conclusions, unreliable methodology underlying those conclusions, and misleading "studies" or the like.[58] For example, the court in *Hall v. Ford Enterprise, Ltd.*, found no liability where the plaintiff entered a building based on the decal posted outside which stated that the building was protected by a detective agency.[59] The plaintiff understood the presence of the detective agency to mean the building was "safe."[60] The court found that no false information had been communicated because the building was, in fact, protected by a detective agency which provided "roving security patrols."[61] Just because such patrols could not guarantee the safety of all visitors did not mean the representation implied in the decal was false.[62]

In *Board of Education of Chicago v. A, C, and S, Inc.*, however, the court held that the manufacturer and distributor of asbestos-containing material could be liable under a negligent misrepresentation claim based on their misrepresentation that the materials were safe.[63] The court held that the defendants "had a duty not to be negligent in supplying information when reliance of that information might result in physical injury."[64]

While an actor may not be liable for all leaps in logic made by those receiving the information, meaningless disclaimers that make conclusions about the limited extent of contamination "based upon available information" are unacceptable where the neo-scientist knows or should know the investigation he performed is not adequate to quantify the nature and extent of the threat posed by the contaminants at the site.

In general, all environmental consultants have an obligation to ascertain whether the information they present to government agencies, the public, or the community on behalf of polluters is correct. If a neo-scientist claims that the level of contamination at a site poses no threat to public health, yet knows or should know that the highest level of contamination has not been detected, he could be liable for falsely informing the surrounding community that no threat exists. Those living and doing business in the vicinity of the site subject to an unrevealed threat may have a cause of action against such a neo-scientist.

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58. *See* Hall v. Ford Enters., Ltd., 445 A.2d. 610, 612 (D.C. Cir. 1982). *But cf.* Bd. of Educ. Of Chi. v. A, C & S, Inc., 546 N.E.2d 580, 592-93 (Ill. App. Ct. 1989).

59. 445 A.2d. at 612.

60. *Id.*

61. *Id.*

62. *Id.*

63. *A, C & S, Inc.*, 546 N.E.2d at 593.

64. *Id.*

Finally, neo-scientists should not be protected by the case law finding that general publishers of works of general circulation have no duty to warn plaintiffs of the accuracy of their publications.[65] In the scenario presented here, neo-scientists are not publishing works for general circulation. Rather, they are providing purportedly scientific reports to government bodies and the affected communities in order to aid them in their specific decision making processes. Consequently, the analogy to publishers does not hold up.

B. Risk of Physical Harm

Under section 311 of the *Restatement*, the neo-scientist who negligently provided false information would be liable for the physical harm caused by the action taken "by [another] in reasonable reliance upon such information".[66] This includes physical harm to either the direct recipient of the information or to any third person "as the actor should expect to be put in peril by the action taken."[67] In the scenario presented here, this would include, potentially, those people who live in, own property in or otherwise frequent the actual zone of contamination.

The term "physical harm" is broader than just bodily harm and includes property damage. (While the *Restatement* (First) of Torts did limit liability under section 311 to bodily harm,[68] the *Restatement (Second) of Torts* expands the reach of this cause of action to include damage to property as well.[69]) Courts have recognized that "[t]he words 'physical harm' are used throughout the *Restatement* to denote the physical impairment of the human body, or of land or chattels."[70] Section

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65. Cases failing to hold publishers of materials in general circulation liable for inaccuracies in the books or guide published include *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1265-66 (Ill. App. Ct. 1985), and *Birmingham v. Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70, 75 (Haw. 1992).

66. RESTATEMENT (SECOND) OF TORTS § 311 (1965).

67. *Id.* § 311(1)(b).

68. RESTATEMENT (FIRST) OF TORTS § 311(1) (1934) provides:

> (1) One, a part of whose business or profession it is to give information upon which the bodily security of others depends, and who in his business or professional capacity gives false information to another, is subject to liability for bodily harm caused by the action taken in reliance upon such information by the recipient or by a third person to whom the actor should expect the information to be communicated if the actor, although believing the information to be accurate, has failed to exercise reasonable care
>
> (a) to ascertain its accuracy, or
>
> (b) in his choice of the language in which it is given.

69. RESTATEMENT (SECOND) OF TORTS § 311.

70. Century Display Mfg. Corp. v. D.R. Wager Constr. Co., 376 N.E.2d 993 (Ill. 1978) (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 7(3); Verbryke v. Ownes-Corning Fiberglass Corp. (Dec. 18, 1992), 84 Ohio App. 3d 388, 616 N.E.2d 1162).

552, comment (i) of the *Restatement* also speaks to the definition of physical harm, noting:

> When a misrepresentation creates a risk of physical harm to the person, land or chattels of others, the liability of the maker extends, under the rules stated in §§ 310 and 311, to any person to whom he should expect physical harm to result through action taken in reliance upon it.[71]

Thus, physical harm includes not only bodily injury caused by the continued exposure to the contamination, but also the damage to property, such as the groundwater contamination, surface water contamination, or soil contamination.

C. *What Constitutes Reasonable Reliance*

For liability to exist, the party seeking to impose liability must show they relied on the misrepresentation and that such reliance was justifiable.[72] Using Ohio as an example, courts there have held that reliance is justified if the representation does not appear unreasonable on its face, and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation.[73] Taken in broad strokes, reliance should be considered justifiable when an entity charged with a duty (such as identifying the nature and extent of contamination or supplying health-related information about a chemical for which exposure standards are being determined) fails to supply accurate information relating to that duty.[74]

Courts have defined times when reliance is not justifiable. For example, reliance will not be considered justified if the plaintiff is sophisticated and experienced in the subject matter of the misrepresentation,[75] if a plaintiff is on notice not to rely on a statement,[76]

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71. *See also* RESTATEMENT (SECOND) OF TORTS § 311 cmt. c (distinguishing between section 552, governing liability for pecuniary loss, and section 311 governing liability for both bodily harm and "physical harm to the property of the one affected").

72. *Id.*

73. Three-C Body Shops, Inc. v. Welsh Ohio, LLC, 10th Dist. No. 02AP-523, 2003-Ohio-756, at ¶ 21 (citing Crown Prop. Dev., Inc. v. Omega Oil Co. (Aug. 26, 1996), 113 Ohio App. 3d 647, 681 N.E.2d 1343).

74. *See, e.g.*, Burr v. Bd. of County Comm'rs of Stark County (Apr. 11, 1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101, 1106 (holding, in the context of fraud, that reliance on a county welfare department's statements relating to the health of child up for adoption is justifiable).

75. *See* Three-C Body Shops, 2003-Ohio-756, at ¶ 21. The court found that the plaintiff's reliance on the defendant's representation that a lease agreement had been consummated was not justifiable since the plaintiff was acting through a chief operating officer with more than thirty years of commercial leasing experience and because the plaintiff was fully aware that the defendant's real estate agent, who made the representation, was acting solely on the defendant's behalf. *Id.*

when reliance contradicts the plain language of a contract,[77] or when the parties are on equal terms and the means of knowledge is readily within reach.[78] The sophistication of the actor and his experience in the matters being misrepresented can weigh heavily on the determination as to whether reliance actually occurred, and if it did occur, whether it was reasonable.[79]

Often in environmental or exposure scenarios, the regulated industry and its neo-scientists are under a legal duty to supply complete and accurate information about the scope of contamination at a site or the adverse effects of exposure to a certain chemical. Where those actors systematically convey to the government and affected community that the scope of the contamination is limited, or that exposure at certain levels is "safe," even though the facts do not confirm those representations or the investigation is not sufficient to make such representations, neither entity has lived up to its duty. Reliance by others on representations made in satisfaction of these legal duties should, by definition, be justified. Otherwise, the entire scheme of self-reporting that is at the heart of environmental laws would be undermined.[80]

A review of the case law gives more concrete examples. In *Burr v. Board of County Commissioners*, the county welfare department made numerous false statements about the health of a baby adopted by the plaintiffs and about the health of the baby's parents, and failed to notify the plaintiffs that the baby's history indicated that it was at risk of

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76. *See* Foster Wheeler Enviresponse v. Franklin County Convention Facilities Auth., 78 Ohio St. 3d 353, 1997 Ohio 202, 678 N.E.2d 519. Similarly, reliance is not justified when a plaintiff, through knowledge and prior experience, recognizes that the representation at issue may be incorrect. *Id.*

77. *See* Crown Prop. Dev., Inc. v. Omega Oil Co. (Aug. 26, 1996), 113 Ohio App. 3d 647, 657, 681 N.E.2d 1343, 1354 (holding that plaintiff's reliance on defendant's statements regarding possible right of first refusal in lieu of extension of financing contingency was not justified since discussions were only general and did not cover specific terms, and since the real estate purchase contract explicitly stated that any extensions must be in writing).

78. *See* J.A. Indus., Inc. v. All Am. Plastics, Inc. 133 Ohio App. 3d 76, 1999-Ohio-817, 726 N.E.2d 1066, 1074-75. Reliance was not justified where the buyer of equipment for making plastic sheeting relied on seller's representation that the sample roll would conform with buyer's specifications when buyer had unfettered access to equipment and sample roll for two months before closing but failed to determine the reliability of seller's statement. *Id.*

79. *See, e.g.*, Kommanvittselskapet Harwi Rolf Wigand v. United States, 467 F.2d 456, 459, 464 (3d Cir. 1972).

80. Most environmental laws carry with them detailed investigative and self-reporting requirements. *See, e.g.*, Federal Water Pollution Control Act of 1972 § 308, 33 U.S.C.A. § 1318 (2006) (stating that Discharge Monitoring Reports are public documents that the discharger must submit regularly in accordance with NPDES permit); *see also* Clean Air Act § 401, 42 U.S.C.A. § 7651k(a) (2006).

developing Huntington's disease.[81] This disease was not evident at the time of adoption and would not be diagnosed until years later.[82] The court found that the plaintiffs' reliance on the department's misrepresentation was justified given that the department was charged with the legal duty and authority to arrange adoptions in accordance with the law.[83]

In *Kommanvittselskapet Harwi v. United States*, the plaintiff argued that the United States negligently misrepresented the depth of the channel in a navigational chart and had failed to properly survey and maintain the channel depth.[84] In finding there was no justifiable reliance that caused the grounding of the plaintiff's vessel, the court looked to the fact that the plaintiff had previous experience in the channel and was under a duty to check the depths by other methods.[85] The dissent, however, noted that the principal negligent act was the publishing of misleading information and that there was sufficient reliance on the charts to impose liability.[86] Thus, the case-by-case analysis that will ensue when evaluating this element of section 311 will be fact-intensive. Such an analysis will require a detailed review not only of what the neo-scientists did, but of the reasonableness of the plaintiff's reliance on those actions. Where there is no reliance on the misrepresentation, there will be no liability.[87]

In the scenario presented here, residential or even commercial neighbors of the polluting facility should have the right to rely upon the accuracy of the facts and conclusions submitted by polluters and the scientists they hire in supposed compliance with the governing law. In order to find such reliance unreasonable, a court would have to hold that members of the public must assume polluters are not complying with legal requirements when submitting their reports. In groundwater

81. Burr v. Bd. of County Comm'rs of Stark County (Apr. 11, 1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101, 1104.

82. *Id.*

83. *Id.* at 1106.

84. Kommanvittselskapet Harwi Rolf Wigand v. United States, 467 F.2d 456, 456 (3d Cir. 1972).

85. *Id.* at 459.

86. *Id.* at 464 (Van Dusen, J., dissenting).

87. *See* English v. Lehigh County Auth., 428 A.2d 1343, 1356-57 (Pa. Super. Ct. 1981) (finding that the evidence showed the plaintiff did not rely on the advice of the defendant when assigning the decedent to work at a sewage station, which had not been properly listed as hazardous work by the defendant franchisor); *cf.* Hamman v. County of Maricopa, 775 P.2d 1122, 1125 (Ariz. 1989) (overturning a motion to dismiss where it was possible that parents of a schizophrenic child had relied on the defendant doctor's assurances that the child was harmless, thereby foregoing a course of action that would have prevented the harm later caused by the child).

contamination cases, for instance, the polluters (and the neo-scientist they hire to assist them) must shoulder the costly burden of determining how much of an area has been polluted. That is a duty that has a specific public benefit, i.e., it relieves the individual property owner or the government from the costly burden of doing their own investigation. In all likelihood, residential owners or even small business owners caught in the middle of a groundwater plume of contamination will have neither the expertise nor the financial ability to perform their own investigation. The law puts the burden of such an investigation on the polluters.[88] It follows then that members of the potentially affected public be able to rely on the veracity and accuracy of the findings. The same is true for the downstream users of polluted rivers and streams or those impacted by the migration of pollutants across property lines.

D. Conclusion

Section 311 of the *Restatement* provides a potential mechanism to hold neo-scientists accountable when they cross the line from science to advocacy. The need for such accountability is underscored by the fact that the scope of work performed by them is determined by the entity paying the bills—the polluter who has hundreds of thousands to millions of dollars at stake. Where polluters enter into a campaign of misinformation about the nature and scope of contamination and the threat to public health or the environment that their facilities pose to neighboring property owners, not only should the polluter be held liable for disseminating that misinformation, but any neo-scientist who aids and abets that activity should be liable as well. It is not enough to claim that the neo-scientist was only doing what the client paid him to do. While the scope of the actual work performed during the investigation may be limited by what the polluter is willing to fund, the neo-scientist controls, or should control, what he or she reports about the investigation. Where the neo-scientist joins the campaign of misinformation, he or she should be held liable just as the polluter is. Knowing that they face potential liability could help ensure that neo-scientists present only those findings and conclusions that are based on a proper factual and scientific foundation.

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88. *See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6924 (2003) (referring to the responsibility to, inter alia, take corrective action for releases of hazardous substances and to ensure safe closure of a facility).

III. *RESTATEMENT (SECOND) OF TORTS* SECTION 310: CONSCIOUS MISREPRESENTATION INVOLVING RISK OF PHYSICAL HARM

In addition to claims involving the negligent misrepresentation of facts where there is physical harm, section 310 of the *Restatement* also sets forth the elements of a claim based on the conscious misrepresentation of facts where there is a risk of physical harm:

> An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor
> (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
> (b) knows
> (i) that the statement is false, or
> (ii) that he has not the knowledge which he professes.[89]

The lawyer should consider the application of section 310 when a neo-scientist makes a statement (e.g., about environmental conditions, chemical safety and the like) to the public, the government, or even the polluter, either knowing the statement is false or knowing that he has not done the investigation necessary to give him the knowledge he professes. In such circumstances, the neo-scientist could be liable for physical harm resulting from action taken by others in reliance on that statement.

As a review of this cause of action shows, it is very similar to section 311 of the *Restatement* except that section 310 requires that the misrepresentation be a conscious misrepresentation as opposed to merely a negligent one. The elements of section 310 are satisfied when the misrepresentation was consciously made in an area where the neo-scientist should realize harm is likely to result (e.g., families will continue to use their groundwater); it is not necessary that the harm be intended.[90]

This section's applicability to neo-scientists can be seen by comment (b) which not only makes clear that section 310 applies to representations of "fact, opinion, or law,"[91] but also provides:

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89. RESTATEMENT (SECOND) OF TORTS § 310 (1965).

90. *Id.* § 310 cmt. a.

91. *Restatement (Second) of Torts* section 310 comment (b) provides:

> The representation to which this section applies may be one of fact, opinion, or law. Where the representation is one of opinion, prediction, or law, the other's reliance upon it may be less reasonable, and so less justified. (Compare §§ 542, 544 and 545). Where the reliance is justified; however, the rule here stated applies to representation of both opinion and law.

> The situation to which the rule stated in this Section is most usually applied is where the misrepresentation is made concerning the physical condition of a thing, either land, structures, or a chattel, and induces the other to believe that the thing is in safe condition for his entry or use, or induces a third person to hold the land or chattel open to the entry or use of the other in the belief that it is safe for the purpose. The rule is, however, equally applicable to misrepresentation of other matters upon which the safety of the person or property of another depends.[92]

Under the scenario presented in this Article, where the neo-scientists are making representations about whether a plume of groundwater contamination reaches certain properties, they are making a misrepresentation concerning the physical condition of land.[93] By telling a community that the groundwater contamination does not reach them when the neo-scientist knows he has not done sufficient testing to reveal that contamination, a neo-scientist is inducing a third party to use or develop that property based on the belief that it is not contaminated. For example, an environmental consultant may have recommended that a series of wells be drilled and sampled in a specific location in order to determine if contamination was present. The polluter/client, however, may not have authorized the consultant to proceed with those wells. Certainly the consultant cannot proceed with an investigation for which the polluter/client has not agreed to pay. However, the environmental consultant should not then proceed with reporting conclusions that the extent of contamination is limited to certain areas based on the available data. When an environmental consultant knows that the available data is not sufficient to determine the extent of contamination, he should not make representations about the extent of contamination. Where an environmental consultant proceeds to supply conclusions about the extent of contamination while knowing a complete investigation has not been performed, he becomes a neo-scientist and liability for conscious misrepresentation under section 310 may be triggered.

The neo-scientist's potential liability for misrepresentation about health and safety matters extends to both the person whose conduct the neo-scientist intends to influence and all others who could foreseeably be harmed by action taken in reliance upon his misrepresentation.[94] A neo-scientist who misrepresents facts about health and safety issues could be liable to more than just those specific persons "whose conduct the

92. *Id.*
93. *Id.*
94. *Id.* § 310 cmt. c.

misrepresentation is intended to influence."[95] Nor would his liability necessarily be limited "to harm received in the particular transaction which the misrepresentation was intended to induce."[96] Rather, the liability could extend to those injured because they used the property which was improperly deemed safe. For example, property owners will make decisions to build homes, lease property or otherwise make improvements upon their property if they are told the contaminants leaving the polluter's facility are not reaching them. If, in fact, their property is being affected by a groundwater plume of contamination or soil gas migration, they should have recourse against the neo-scientist who helped to hide that contamination from those most directly affected by it.

The scenario described in comment (d) to section 310 of the *Restatement* shows that liability runs not just from the neo-scientist to the polluter who hired him, should he misstate facts about conditions at a facility, but also to third parties who are harmed by conditions not truthfully revealed.[97]

IV. *RESTATEMENT (SECOND) OF TORTS* SECTION 552: INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS

In addition to being potentially liable for physical harm, neo-scientists may also be liable for pecuniary damages caused by negligent misrepresentation under section 552 of the *Restatement*. Section 552 recognizes a cause of action for pecuniary loss where:

- Someone, in the course of his "business, profession or employment", *or* "in any other transaction in which he has a pecuniary interest,"
- provides false information "for the guidance of others in their business transactions,"
- where the loss is caused by their "justifiable reliance" upon the information,
- if that person or entity "fails to exercise reasonable care or competence" in either obtaining or in communicating that information.[98]

Both subsections (2) and (3) of section 552 of the *Restatement* describe in further detail exactly who a party, such as a neo-scientist, may be liable to. Subsection (2) limits liability to losses suffered by the persons or group of people "for whose benefit and guidance he intends to

95. *Id.* § 310 cmt. d.
96. *Id.*
97. *Id.*
98. *Id.* § 552 (emphasis added).

supply the information or knows that the recipient intends to supply it" if the loss occurred when those people have relied upon the information "in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction."[99]

Subsection (3) extends the liability of anyone, such as a neo-scientist, who is "under a public duty to give the information."[100] For those actors, liability runs to anyone "of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them."[101]

While the liability under section 552 is intended to be more restricted than the liability for physical harm under sections 310 and 311 (and for fraud under section 531), given the public duties involved in providing scientific information on the nature and extent of contamination and resulting threat to public heath or the environment, an environmental scientist turned neo-scientist should pass those extra hurdles.[102]

Comments (a) and (i) to section 552 of the *Restatement* provides the reasoning behind why the liability for pecuniary loss based on negligent misrepresentations involving commercial transactions is not as broad as the liability for physical harm flowing from either negligent or conscious misrepresentations or fraud.[103] One reason for the difference is tied to the fact that section 552 provides liability for just pecuniary loss and not actual physical harm.[104] A second reason for the different scope of liability between sections 552 and 311 or 531 (fraud) of the *Restatement* is tied to the difference between negligent acts of misrepresentation and conscious acts. Given the potential widespread use of the misinformation, and the potentially large amount of pecuniary losses at issue, acts of negligence will be viewed less harshly than acts of outright deceit.[105]

According to comment (a), the narrower scope of liability for negligent misrepresentations than for conscious ones is tied to the difference between "the obligations of honesty" and the duty of reasonable care.[106] The touchstone of the difference in scope of liability is the basic concept that one may be negligent, i.e., by breaching a duty of

99. *Id.* § 552(2).
100. *Id.* § 552(3).
101. *Id.*
102. *Id.*
103. *Id.* § 552 cmts. a, i.
104. *Id.* § 552 cmt. i.
105. *Id.* § 552 cmt. a.
106. *Id.*

care, but still be "honest". It is a reasonable expectation by all who foreseeably will ultimately be receiving and relying on the information that the provider of the information is "honest", i.e., speaking "in good faith and without consciousness of a lack of any basis for belief in the truth or accuracy of what he says."[107]

The group of people who can expect the supplier not to be negligent is much smaller. Under the *Restatement*, however, that smaller group still includes those who are served by the public duty to supply the information.[108]

Under section 552, in ordinary circumstances, a neo-scientist would be liable to those people for whose guidance he knows the information was to be supplied.[109] It is enough that the neo-scientist knows the client intends to repeat the information to a certain class of people, such as the government or the community surrounding the client's contaminated site.[110] Thus, even under subsection (2)'s basic standard, without reaching the broader scope of subsection (3), this element of section 552 should not be a significant hurdle in situations involving neo-scientists who are hired by polluters, manufacturers, and other regulated industries to advocate their positions about the purported "limited" nature and scope of contamination or the negligible threat posed by the site.

Under the scenario presented in this Article, a neo-scientist is arguably supplying information on the scope of contamination to polluters knowing they intend to disseminate it to various regulatory bodies (e.g., the EPA, the state government or the local government) or known community or environmental groups participating in the discussion. It would be disingenuous for such neo-scientists to argue that they were not aware their client was distributing the information in order to reduce their liability. In fact, in many situations, the neo-scientists submit the information directly to the regulatory body, local government, or even to the neighboring community.[111]

If there is any question about whether the neo-scientist "knew" those impacted by the various plumes of contamination were part of the

107. *Id.*
108. *Id.* § 552(3).
109. *Id.* § 552.
110. *Id.* § 552 cmt. h.
111. For example, lawyers practicing environmental law on behalf of the victims of pollution should be all too familiar with the common scenario where neo-scientists become the spokesperson for the polluters when they are called on to make the presentations at public hearings or community meetings. It is the neo-scientists who, on behalf of the polluter, explain the so-called "facts" about the site contamination and threat to the community, although often just to alleviate the community concerns. In fact, because the information is coming from a third party "professional" and not the polluter itself, it will likely be better received by the community.

group of people "for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it," then one need only review subsection (3), which identifies the situations in which the limited scope of liability under subsection (2) is expanded.[112]

Subsection (3) provides for expanded liability when there is a public duty to disclose the information in question.[113] Where such a public duty exists, liability will extend beyond those for whose guidance the neo-scientist knew the information was being supplied.[114] Rather, liability will extend to anyone in the class of people for whose benefit the duty to disclose was created.[115] Liability will cover losses associated with any transaction that duty was intended to protect.[116] Given the investigative and self-reporting requirements found in the various federal environmental laws, numerous state laws and even some local ordinances, in all likelihood there would be a public duty to disclose the information.

Given the high likelihood that the expanded scope of liability under section 552 of the *Restatement* will be triggered when applied to misrepresentations made by neo-scientists, attorneys should consider the application of this section, under the appropriate state law, when evaluating potential causes of action in a particular case.

This Part of the Article will explore how section 552 of the *Restatement* can be used in the example scenario by evaluating:

A. *Circumstances in which Neo-Scientists could potentially be liable under this section*.[117] This includes a discussion of what constitutes a pecuniary interest of the neo-scientist, what constitutes providing "false information" and how one determines the proper standard of conduct on which to base any breach of duty claim.

B. *The Parties to Whom the Neo-Scientist Would Be Liable and The Types of Losses for Which They Would Be Liable*.[118] This includes a discussion of whether privity is needed between the neo-scientist and

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112. RESTATEMENT (SECOND) OF TORTS § 552 cmt. h.

113. *Id.* § 552(3).

114. *Id.*

115. *Id.*

116. *Id.*

117. For example, what constitutes a "transaction in which [the neo-scientist] has a pecuniary interest;" what constitutes providing a "false statement;" and what constitutes failure to exercise reasonable care. *Id.* § 552(1).

118. For example, what constitutes "pecuniary loss" caused by "justifiable reliance" from a "transaction that [the neo-scientist] intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." *Id.* § 552(2)(b).

the potential plaintiff and the circumstances in which there is a public duty to disclose that triggers expanded liability.[119]

A. *Section 552: Circumstances in Which Neo-Scientists Could Potentially Be Liable*

The basic elements under section 552 for imposing liability on a neo-scientist who negligently fails to perform the proper investigation and yet still informs the government, the public and those directly impacted by the unrevealed contamination and associated dangers are:

1. The neo-scientist supplied the information "in the course of their business, profession or employment or in any other transaction in which [they have] a pecuniary interest";[120]
2. The information supplied was false;
3. The neo-scientist failed to exercise "reasonable care or competence" in either "obtaining or communicating" the information;
4. The neo-scientist has a pecuniary interest.[121]

The tort recognized in section 552 of the *Restatement* only arises when the neo-scientist has a pecuniary interest in the transaction.[122] However, because the neo-scientists being discussed here are those hired by the industry in question, that element will be met.[123]

It will usually be sufficient that the person giving the false information is getting paid for a transaction that includes supplying the information in question.[124] As comment (d) to the *Restatement* adds: "The fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has

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119. For example, what constitutes a "public duty to give the information" and who are the "class of person for whose benefit that duty is created" and what is a "transaction in which the duty to disclose was intended to protect them." *Id.* § 552(3).

120. *Id.*

121. *Id.* § 552(1).

122. *Id.* Section 552 of the *Restatement* imposes liability on anyone who supplies false information "in *any* . . . transaction in which he has a pecuniary interest." (emphasis added). Thus, the information no longer has to be supplied "in the course of his business or profession" as was required in section 552 of the *Restatement (First) of Torts*.

123. Comment (c) notes:

> If he has no pecuniary interest and the information is given purely gratuitously, he is under no duty to exercise reasonable care and competence in giving it. The situation is analogous to that of one who gratuitously lends or otherwise supplies a chattel, whose duty is only to disclose any facts he knows that may make it unsafe for use.

Id. § 552 cmt. c.

124. *Id.* § 552 cmt. d.

a pecuniary interest in it, even though he receives no consideration for it at the time."[125]

1. The Information Supplied Was False

Generally, to prove negligent misrepresentation, a plaintiff must prove that he or she was supplied false information via an affirmative false statement.[126] However, an omission may be the basis of a negligent misrepresentation claim if a duty to disclose such a fact existed.[127] Thus, one may need to show that the neo-scientist owed a duty to the plaintiff to provide the information left out of a study, report, or presentation.

There are several circumstances in which there can be a duty to disclose. First, the various environmental or health based laws are replete with disclosure requirements, both on the face of the law and in the forthcoming regulations and guidances implementing those laws.[128] Under Ohio law, for example, courts may look to the law or regulations for standards of conduct in applying common law claims.[129] Using a law or regulation to find the standard of conduct for an environmental professional is not the same as finding the actor liable *under that law or regulation* or even under negligence per se for violating that law or regulation.[130] Neo-scientists who willingly accept this duty by submitting

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125. Scientific professionals, however, would not likely be liable for what are commonly referred to as "curbstone opinions" (i.e., where a professional makes a "casual and offhand" opinion on a point within his profession gratuitously as part of informal conversations). This is because in such casual circumstances "[t]he recipient of the information is not justified in expecting that his informant will exercise the care and skill that is necessary to insure a correct opinion and is only justified in expecting that the opinion will be an honest one." *Id.*

126. *See, e.g.*, Stonecreek Prop. v. Ravenna Sav. Bank, 11th Dist. No. 2002-P-0129, 2004-Ohio-3679, at ¶ 56.

127. *Id.*

128. This includes both the closure and corrective action requirements of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 and the state laws operating "in lieu" of those requirements under 42 U.S.C. § 6926. CERCLA, 42 U.S.C. §§ 9701-9708, has similar duties in its National Contingency Plan requirements for performing remedial actions. Similarly, the Clean Air Act, 42 U.S.C. §§ 7401-7431, requires submission of emission information for federally regulated sources and the National Pollutant Discharge Elimination System (NPDES) permitting program under the Clean Water Act, 33 U.S.C. §§ 1251-1274, requires the disclosure of information involving a facilities discharge of pollutants into navigable waters.

129. *See* Eisenhuth v. Moneyhon (May 5, 1954), 161 Ohio St. 367, 119 N.E.2d 440, 444.

130. When distinguishing between the use of a law for purposes of imposing a standard of conduct and the use of a law for holding someone liable for violating that law in a negligence per se claim, the court in *Eisenhuth* stated:

> [I]f a positive and definite standard of care has been established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation is negligence per se; but where the jury must determine the negligence or lack of negligence of a party charged with the violation of a rule of conduct fixed by legislative enactment from a consideration and evaluation of

reports or making presentations on behalf of the regulated industry should be held liable when they "omit" an essential fact from the report or presentation.

A second avenue for finding a duty to disclose would be the code of conduct that governs the license or certification under which a particular neo-scientist operates. For example, the Ohio Administrative Code provides in part that professional engineers shall "[b]e completely objective in any professional report, statement or testimony and shall include all relevant and pertinent information in the report, statement or testimony when the result of omission would, or reasonably could, lead to a fallacious conclusion."[131] Because of this express duty not to omit relevant information from reports or presentations, an omission of some salient fact may rise to the level of negligent misrepresentation for Ohio engineers.

It is also important to keep in mind that the failure of a neo-scientist to reveal that a full and complete investigation was not performed should not be considered an "omission." To the contrary, the "misrepresentation" stemming from that negligent or even conscious failure would take the form of affirmative statements about the extent of contamination and threat of exposure to the surrounding community. For example, a neo-scientist who knows he has not investigated all pathways of migration from a contaminated site because his client has refused to pay for the additional investigation, but proceeds to tell the government or community that the "risks" associated with exposure to contaminants emanating from the site are minimal or limited to a certain area, has made an affirmative misrepresentation. Those affected by the unrevealed contamination via the uninvestigated pathway of migration could arguably use section 552 of the *Restatement* to hold the neo-scientist accountable for misleading the government and public into believing the contamination did not extend down that particular pathway of migration.

2. Exercise of Reasonable Care

A showing of "negligent" misrepresentation can only be made when there has been a failure of the neo-scientist to use reasonable care in obtaining or communicating the information in question.[132] Comment (e)

> multiple facts and circumstances by the process of applying, as the standard of care, the conduct of a reasonably prudent person, negligence per se is not involved.

Id.

131. OHIO ADMIN. CODE 4733:35-03 (2003).

132. For situations where the neo-scientist is deliberately withholding key facts or knowingly presenting false information to further his client's interest, then the fraudulent

of section 552 of the *Restatement* makes clear that the question of reasonableness of the consultant's conduct will depend on the circumstances of each case, to be answered by the fact-finder.[133] Neo-scientists, by their very nature, are expected to have normal professional competence. Comment (e) provides that the recipients of that information are justified in expecting that the care and competence employed in acquiring that information be commensurate with that level of expertise.[134]

Comment (f) of section 552 of the *Restatement* is particularly useful in evaluating a neo-scientist's liability when noting, first and foremost, "[i]f the matter is one that requires investigation, the supplier of the information *must exercise reasonable care and competence to ascertain the facts on which his statement is based*."[135] Further, he must use his professional expertise "in drawing inferences from facts not stated in the information."[136]

Subsequently, he must also exercise the same standard of care and competence "in communicating the information so that it may be understood by the recipient, since the proper performance of the other two duties would be of no value if the information accurately obtained was so communicated as to be misleading."[137]

For example, where a neo-scientist claims to have identified the extent of groundwater contamination based on inferences he made from the results of six monitoring wells, he could trigger liability if those monitoring wells are not located in areas where the contamination is expect to be migrating. Whether the monitoring wells were improperly placed or more wells were simply needed based on well-established geologic principles about groundwater flow, the fractured nature of the subsurface or witness information identifying unmonitored areas of disposal, the neo-scientist who fails to use his expertise to account for those factors could, and should, face liability. Far too often the neo-scientist escapes accountability for the unsupported conclusions they offer about the conditions at and about contaminated facilities. They use the inherent uncertainties in the various scientific fields as a shield to aid and abet the polluter in its campaign to limit its own liability for the

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misrepresentation cause of action under section 531 of the *Restatement* may be used to impose liability directly on the neo-scientist. Although not discussed in this Article, an attorney confronted with such a situation should consult section 531 of the *Restatement*.

133. RESTATEMENT (SECOND) OF TORTS § 552 cmt. e (1965).

134. *Id.*

135. *Id.* § 552 cmt. f (emphasis added).

136. *Id.*

137. *Id.*

pollution it has caused. Section 552 has the potential to close the door on this practice. Imposing liability on negligent neo-scientists will give them an economic incentive to ensure that those impacted the most by a contaminated facility have a complete and accurate understanding of the true threats to health or the environment posed by that site.

To determine what constitutes the proper standard of care in the example scenario being discussed in this Article, the same codes of conduct that govern the licenses and certifications for the neo-scientist discussed above should be consulted. The various government agencies, both at the state and federal levels, have also developed a vast array of guidance documents setting forth the proper methodologies to use in numerous situations.[138] Finally, standards within the precise field of study should be well known by other experts in the field. Attorneys should consult their own scientific professional when evaluating what standard of care is appropriate for a given scientific investigation.

B. Section 552: The Parties to Whom the Neo-Scientist Would Be Liable and the Types of Losses for Which They Would Be Liable

A neo-scientist who misrepresents material facts about a contaminated site and its impact on the surrounding neighbors could be liable for pecuniary loss incurred in justifiable reliance on the information to either:

> i. a person (or one in a group of people) for whose benefit and guidance the neo-scientist intended to supply the information or knew the recipient intended to supply the information
>
> —for loss from a transaction that the neo-scientist intends the information to influence or knows that the recipient so intended or in a substantially similar transaction; or,
>
> ii. anyone in the class for whose benefit the duty was created
>
> —for loss in any transaction in which it is intended to protect them, where the neo-scientist has a public duty to give the information.[139]

1. Pecuniary Loss Caused by Justifiable Reliance

Under section 552 of the *Restatement*, a neo-scientist would be liable only for the pecuniary loss caused by a plaintiff's justifiable reliance on the information. Pecuniary loss is a loss of money or

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138. *See, e.g.*, OHIO ADMIN. CODE 3745:51-20, app. I (2004). This statute sets forth sampling protocols for determining whether a substance exhibits the characteristics of a hazardous waste.

139. RESTATEMENT (SECOND) OF TORTS § 552(2)-(3).

something by which money may be acquired.[140] The "justifiable reliance" prong of section 552 of the *Restatement* parallels the "justifiable reliance" prong of section 311 previously discussed in this Article.

Lawyers pursing causes of action under section 552 should consider whether and to what extent those making statements about health and safety issues have attempted to limit their liability through the use of specific disclaimers. For example, in *Delman v. City of Cleveland Heights*, the Ohio Supreme Court concluded that the plaintiff could not have justifiably relied upon representations made by the defendant's housing inspector, because a local ordinance and a certificate of inspection both contained an express disclaimer as to the reliability of the inspections.[141] In this case, the inspections were being done for a specific purpose in mind—and the housing inspector did not want his work to be taken out of context and utilized for different purposes.[142] The disclaimer was made in good faith and had real meaning attached to it.[143] On the other hand, it is easy to imagine a scenario where the neo-scientist does not provide any "meaningful" disclaimer. General self-serving statements warning that those other than its client should not use the information is disingenuous given the circumstance under which the work is being performed—e.g., to fulfill the polluter's often statutory obligation to determine the true extent of contamination emanating from its facility for the express protection of others. For example, far too often a neo-scientist assists his polluting client in using the information he has developed as part of an orchestrated public relations campaign with the specific goal of allaying any concerns the public has regarding the health effects of a given chemical or contaminated site.

With respect to the scenario presented here, property owners in the vicinity of a plume of groundwater contamination will, by necessity, rely on contamination information offered by neo-scientists in property-related business transactions. Not only is it foreseeable to neo-scientists that such individuals will rely on their work when making pecuniary decisions about their own property, but it is a necessary consequence of supplying such information to those who live and/or own property in the vicinity of the contamination.

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140. Niepsuj v. Niepsuj, 9th Dist. No. 21888, 2004-Ohio-4201, at ¶ 7.

141. Delman v. City of Cleveland Heights (Feb. 22, 1989), 41 Ohio St. 3d. 1, 534 N.E.2d 835, 837.

142. *Id.*

143. *Id.*

There is a clear and important public policy reason why the various environmental laws put the burden of paying for the environmental investigation on the polluter. The "polluter pays" principle is a long standing principle at the heart of such statutes as CERCLA and RCRA. Moreover, basic principles of fundamental fairness dictate that the one who caused the contamination should pay to determine the scope of that contamination, and not the innocent property owners whose groundwater is now rendered useless or even outright harmful. If those people unfortunate enough to own or use property contaminated by a facility's pollution plume(s) cannot rely on the data and opinions required to be performed under the various environmental laws, then the "polluter pays" principle is rendered meaningless and every property owner will have to spend tens of thousands of dollars duplicating or filling in the investigatory work supposed to be performed by the polluter.

Arguably, any disclaimer or limit of liability found in the contract between the neo-scientist and the polluter should have no effect against a third party reasonably relying on the publicly disclosed information. The third party's cause of action is an action in tort, and does not arise out of the contract between the neo-scientist and the polluter. Consequently, that third party should not be held to terms of an unrelated contract to which he or she was not a party.

2. No Need for Privity

In order for liability to attach under section 552 of the *Restatement*, there must be a duty to the person suffering the pecuniary loss.[144] The presence of that duty is described in the elements of section 552 of the *Restatement* and discussed in the above section.[145] Because section 552 is a tort action, there is no need to establish privity of contract. Rather, a court will evaluate first whether the nature of the misrepresentation is essentially that of contract (for which privity of contract will be required) or that of tort, for which no privity of contract is required.

The Ohio Supreme Court has made clear that privity is not needed in tort claims.[146] In fact, in *Corporex Development & Construction Management, Inc. v. Shook, Inc.*, the Ohio Supreme Court specifically found that section 552 of the *Restatement* is a "generally recognized dut[y] in tort."[147] The Court did find that, under the facts of that case, the

144. RESTATEMENT (SECOND) OF TORTS § 552(3).
145. *Id.* § 552(2)-(3).
146. Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc., 106 Ohio St. 3d. 412, 2005-Ohio-5409, 835 N.E.2d 701, at ¶¶ 9-10.
147. *Id.* ¶ 10.

subcontractor was not liable to the specific plaintiff under any tort theory because the duties allegedly breached were duties arising out of a contract.[148] A claim based on a breach of duties arising out of a contract, as opposed to the duties covered by section 552, does require privity between the plaintiff and the defendant.[149]

The Ohio Supreme Court has also ruled that privity is not needed for claims to recover economic loss when those losses arise from tangible physical harm.[150] In *Queen City Terminals, Inc. v. General American Transportation Corp.*, the Ohio Supreme Court allowed a property owner to recover, from the train car manufacturer, the economic loss sustained when benzene spilled out of a shipper's tanker car.[151] The shipper had contracted with the train car manufacturer to specially build the benzene tanker cars.[152] Even though there was no privity of contract between the property owner and the train car manufacturer, the court allowed recovery for economic loss under tort theories because the economic loss arose out of the property damage caused by the benzene release.[153] Even in cases involving a contract, liability may attach under tort law if there is a sufficient nexus between the plaintiff and the party accused of negligent misrepresentation.[154]

As the court in *Haddon View Investment Co. v. Coopers & Lybrand* held, a sufficient nexus exists when the party alleging negligent misrepresentation is in the limited class of persons whose reliance on the representation is specifically foreseen.[155] In *Haddon*, the plaintiffs—a group of partners in a limited partnership—sued an accountant retained by the partnership to perform auditing services.[156] Although the partners were not in privity of contract with the accountant, the court found that accountants make reports on which people other than their clients foreseeably rely in the ordinary course of business.[157] The court also found that the accountant's duty to prepare reports using generally accepted accounting principles extends to "any third person to whom

148. *Id.* ¶ 11.
149. *Id.* ¶ 12.
150. Queen City Terminals, Inc. v. Gen. Am. Transp. Corp., 73 Ohio St. 3d 609, 1995-Ohio-285, 653 N.E.2d 661, at 667.
151. *Id.*
152. *Id.*
153. *Id.*
154. Floor Craft Floor Covering v. Parma Cmty. Gen. Hosp. Ass'n (Sept. 19, 1990), 54 Ohio St. 3d 1, 560 N.E.2d 206, 210; Haddon View Inv. Co. v. Coopers & Lybrand (June 16, 1982), 70 Ohio St. 2d 154, 436 N.E.2d 212, 215.
155. *Haddon View*, 436 N.E.2d at 215.
156. *Id.* at 213.
157. *Id.* at 214.

they understand the reports will be shown for business purposes."[158] Thus, the partners were proper parties to bring suit.[159]

As previously discussed, neo-scientists are typically held to specific standards of care by the institutions that hold their licenses and certifications. In Ohio, for example, engineers have a duty to protect the safety, health, and welfare of the public and must include all pertinent and relevant information in a report when omitting such information would result in a fallacious conclusion.[160] Thus, it is foreseeable to any engineering firm in Ohio that third parties with whom their reports are expected to be shared would rely on its representations made therein. Attorneys should make a similar analysis of the duties contained in codes of conduct governing the particular neo-scientist whose representations are at issue in any given case.

Importantly, the language of section 552 of the *Restatement* does *not* require there to be one business transaction between the plaintiff and the defendant.[161] In fact, there is no requirement that the neo-scientist must even know of the plaintiff, let alone have a business relationship with him.[162] Rather, "[i]t is sufficient . . . that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them."[163] Thus, a neo-scientist may be liable to members of a community or affected group whether he supplies reports on the nature and extent of contamination and its impact on the surrounding community directly to the community members or to a government entity for repetition to them.

Counsel should also consider comment (h)'s usefulness in demonstrating that this cause of action can reach neo-scientists.[164] Comment (h) specifically notes that "it is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information."[165] In the case of the neo-scientist providing information about the nature and extent of contamination and its impact on the surrounding community, the members of the community should be within the class of people the neo-scientist should know will receive and use the information in their own business

158. *Id.*
159. *Id.* at 215.
160. *See* OHIO ADMIN. CODE 4733:35-03 (2003).
161. RESTATEMENT (SECOND) OF TORTS § 552 cmt. h (1965) (emphasis added).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

transaction, such as selling their property, leasing a house, opening a business and the like.

3. Public Duty To Disclose Information

While section 552 of the *Restatement* generally subjects the negligent supplier of misinformation to liability only to those persons for whose benefit and guidance it is supplied, section 552(3) and the comments thereto make clear that liability will be expanded where there is a public duty to supply the information that was misrepresented.[166]

As discussed elsewhere in this Article, the duty to disclose is also found in federal and state laws and local ordinances.[167] By way of further example, the Emergency Planning and Community Right To Know Act also sets forth reporting requirements for environmental releases and has led to the creation of the Toxic Release Inventory.[168]

Under section 552(3), neo-scientists who participate in the polluter's attempts to manipulate the scientific data may be liable to anyone to whom they owed a duty to give information about the health and safety issues, exposure information, scope of contamination, and the like.[169] The comments to section 552(3) specify that *this rule extends to "corporations who are required by law to file information for the benefit of the public*."[170]

When a neo-scientist willingly accepts this duty on behalf of the regulated industry, develops the underlying information reported by the regulated entity, and then participates in the campaign to distribute that information to the public, liability under section 552(3) should, as a matter of public policy, reach him.

When a state, federal, or local government has ordered a polluter to determine the nature and scope of contamination around a given facility, there is arguably a "public duty" to supply that information. When the polluter and its neo-scientist fail to perform the requisite investigation to answer that question or obfuscate facts necessary for others to evaluate the threat to their own pecuniary interest, section 552 should also be properly evoked.

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166. *Id.* § 552 cmt. k.
167. An example of a local ordinance which may impose the duty to disclose is Codified Ordinances of Yellow Springs. YELLOW SPRINGS, OHIO, ORDINANCES tit. 2, ch. 208.06 (1999).
168. Emergency Planning and Community Right To Know Act, 42 U.S.C.A. § 11023(a), (j) (2005).
169. RESTATEMENT (SECOND) OF TORTS § 552(3).
170. *Id.* § 552 cmt. k (emphasis added).

When a polluter is under a court order to determine the nature and extent of contamination, and that polluter hires neo-scientists to conduct investigations to make that determination and provide a report to the governing agency defining what that determination is, those neo-scientists could be said to have accepted the "duty to disclose" imposed on the polluter for which they work. When neo-scientists prepare and submit reports on behalf of the polluter, participate in meetings with the regulatory body, and make presentations to the affected members of the surrounding community, they should not be allowed to hide behind the walls of the contract they entered into with the polluter. That contract should not be an effective shield to prevent those neo-scientists from being responsible for the representations they made in those reports, meetings and public hearings.

V. CIVIL CONSPIRACY

An additional potential cause of action against polluters, chemical manufacturers, and the like, and their neo-scientists who misrepresent environmental and health related issues, may be the tort of civil conspiracy. Looking to Ohio as the example, Ohio courts have held:

> A civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." The elements of a conspiracy claim are: 1) a malicious combination; 2) of two or more persons; 3) injury to person or property; and 4) the existence of an unlawful act independent from the actual conspiracy.[171]

When the neo-scientist works at the direction of his polluting client to orchestrate a public relations campaign designed to limit the polluter's liability for the contamination it caused, without regard to the actual impact that undisclosed and unremediated contamination is having on the surrounding community, the elements of civil conspiracy may very well be met. Attorneys evaluating claims involving environmental contamination should review the specific facts so that this potential claim might be used to reign in renegade consultants.

A. Malicious Combination

Courts have defined malice as "that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful

171. NPF IV, Inc. v. Transitional Health Servs., 922 F. Supp. 77, 82 (S.D. Ohio 1996) (citing LeFort v. Century 21-Maitland Realty Co. (Aug. 19, 1987), 32 Ohio St. 3d 121, 512 N.E.2d 640).

excuse, to the injury of another."[172] The term "malicious combination" does not require a showing of an express agreement between the polluter and the neo-scientist. Rather, only a "common understanding or design, even if tacit, to commit an unlawful act" is sufficient.[173] "Not even a meeting is necessary . . . 'it is sufficient that the parties . . . come to a mutual understanding that they will accomplish the unlawful design.'"[174] Nor is specific intent to injure necessarily required, though the wrongful act itself must be done purposefully.[175]

B. Injury to Person or Property (Actual Damages)

Whether the requirement of actual damages means additional damages beyond those caused by the underlying tort is not well-settled. Some Ohio courts have held that a plaintiff must prove damages attributable to the conspiracy that are above and beyond those resulting from the underlying tort.[176] These courts, however, base their analysis on a misreading of *Minarik v. Nagy*.[177] While *Minarik* did require that the damages had to be "directly attributable" to the conspiracy, it did not say those damages had to be *exclusively* attributable to the conspiracy.[178]

Consequently, as the *Gosden* court found, a civil conspiracy claim "does not increase the plaintiff's burden by requiring proof of additional damages."[179] Rather, since a conspiracy claim "serves only to enlarge the pool of potential defendants from whom a plaintiff may recover damages and, possibly, increase the amount of those damages," the plaintiff need only prove damages from the underlying tort committed in furtherance of the conspiracy.[180]

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172. Gosden v. Louis (Dec. 4, 1996), 116 Ohio App. 3d 195, 687 N.E.2d 481, 496 (making clear that the malice in "malicious combination" is legal or implied malice).

173. *Id.*

174. *Id.* (citing Pumphrey v. Quillen (June 1, 1955), 102 Ohio App. 173, 141 N.E.2d 675).

175. Bevan Group 9 v. A-Best Prod. Co. (May 17, 2004), Cuyahoga C.P. Nos. 502694, 508628, 602691, 511113, 508629, 5502695, 501703, 2004 WL 1191713, at *8-9.

176. *See* Avery v. Rossford Transp. Improvement Dist. (Aug. 3, 2001), 145 Ohio App. 3d 155, 762 N.E.2d 388, 395; Crosby v. Beam (Nov. 6, 1992), 83 Ohio App. 3d 501, 615 N.E.2d 294, 304 (citing Minarik v. Nagy (Oct. 24, 1963), 8 Ohio App. 2d 294, 193 N.E.2d 280, 280-82).

177. *Gosden*, 687 N.E.2d at 497.

178. *See id.* (citing *Minarik*, 193 N.E.2d at 281-82).

179. *Id.* at 498.

180. *Id.*

C. Unlawful Act

To maintain a claim for civil conspiracy, the underlying unlawful act must be a tort.[181] Importantly, courts have held that the torts of trespass and of public nuisance are valid bases for a civil conspiracy claim.[182] Thus, where a polluter and its neo-scientist come to a mutual understanding that they will underreport hazardous air pollutants being released into a community, fail to identify the discharges of pollutants into a stream running though neighboring property, or look for the full extent of groundwater contamination, yet make representations to the contrary, all of which consequently allow the nuisance or trespass caused by those releases to perpetuate unremediated, they could be held liable for a civil conspiracy.

Other states also allow for the tort of civil conspiracy. The federal district court in Connecticut, for example, recognized a cause of action for civil conspiracy against a polluter and its scientific professional under Connecticut common law.[183] The court in *Bernbach v. Timex Corp.* refused to dismiss the plaintiff's claim alleging a conspiracy between the defendant polluter, Timex, and its consultant "to limit the nature and extent of Timex's cleanup obligation."[184] In *Bernbach*, the defendant, Timex, hired the consultant Weston, to assess the recently discovered groundwater contamination at the Timex facility in Connecticut and to develop a site remediation plan.[185] A year after learning of the groundwater contamination, Timex informed the EPA and the state Department of Environmental Protection of its intent to begin remediation.[186] The plaintiffs alleged that "subsequently, Timex and Weston conspired to provide misleading reports to EPA and the state Department of Environmental Protection (DEP) in order to avoid the requirements of the National Contingency Plan and minimize Timex's liability for cleanup expenses."[187] The Court found that under Connecticut common law, "civil liability may arise from unlawful acts

181. *See Avery*, 762 N.E.2d at 395 (rejecting civil conspiracy claim where underlying unlawful act was violation of constitutional rights and finding that underlying unlawful act must be a tort).

182. *See, e.g.*, City of Milwaukee v. NL Indus., Inc., 2005 WI App. 7, 691 N.W.2d 888 (finding that public nuisance served as the underlying tort for civil conspiracy claim); Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1217, 1224 (M.D.N.C. 1996) (denying motion for summary judgment on civil conspiracy claim because trespass, the underlying tort, remained a viable claim).

183. Bernbach v. Timex Corp., 989 F. Supp. 403, 409 (D. Conn. 1996).

184. *Id.* at 409.

185. *Id.* at 406.

186. *Id.*

187. *Id.*

committed in furtherance of a conspiracy."[188] Because the plaintiff had alleged unlawful acts, the court rejected the defendant's motion to dismiss as to both the polluter and the environmental consultant.[189]

Significantly, the civil conspiracy claim against the environmental consultant was allowed to proceed even though the negligence and negligence per se claims against the consultant were dismissed.[190] The court found that under Connecticut law, the consultant for one property owner did not owe a duty to the adjacent property owner to "insist on more extensive testing of a contaminated site."[191]

VI. CONCLUSION

The *Bernbach* ruling emphasizes the fundamental difference between actions for mere negligence and actions for negligent (or conscious) misrepresentation under sections 310, 311, and 552 of the *Restatement*.[192] The tort actions under sections 311, 310 and 552 do *not* stem from the sole fact that the neo-scientist performed the insufficient investigation its client demanded. *Rather, the tort occurs where the neo-scientist then misrepresents what the results of that investigation mean*.[193]

While the standards of conduct governing the licensing of many different neo-scientists will not impose a duty to perform extra testing over the will of a client, *those standards should govern what the neo-scientists can say about those studies*. While the court in *Bernbach* noted that Connecticut's code of ethics governing engineers provided that "an engineer's 'primary obligation' is to protect the safety, health, and welfare of the public," it found that obligation did not impose affirmative duties to protect third parties.[194] However, those obligations could, and should, prevent those neo-scientists from taking the affirmative step, either negligently or consciously, *of misrepresenting facts or conclusions about the investigation that was done*. A neo-scientist who was not authorized

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188. *Id.* at 409.

189. *Id.*

190. *Id.* at 411-12.

191. *Id.* at 410 (finding that there is no requirement that "an agent of one neighbor has a duty owed to another neighbor without some sort of an affirmative action taken by the agent" (citing Midwest Aluminum Mfg. Co. v. Gen. Elec. Co., No. 4:90-CV-143, 1993 WL 725569 (W.D. Mich. Feb. 5, 1993))). These rulings are not inconsistent with the use of sections 310, 311, and 552 of the *Restatement*. The "affirmative action" for claims under sections 310, 311, and 552 is the misrepresentation made and reasonably relied upon by the neighboring property owner.

192. *Bernbach*, 989 F. Supp. at 410-12.

193. *Id.*

194. *Id.* at 411. In doing so, the court did note that it "cannot conclude that environmental consultants and engineers may never be under a duty to undertake affirmative actions on behalf of third parties." *Id.*

by the client/polluter to perform the testing necessary to determine the extent of groundwater contamination emanating from a site cannot then tell the EPA and surrounding community that the groundwater contamination is limited to a certain area. It is not the failure to do the extra testing in and of itself that constitutes the tort, *it is what the neo-scientist says about the testing that may constitute the tort if any misrepresentations are made*.[195]

Other far more complex situations not analyzed in detail by this Article may give rise to—or prohibit—misrepresentation or civil conspiracy claims against neo-scientists. Illustrations of these complexities involve misrepresentations made before regulatory bodies for purposes of obtaining regulatory approvals or setting nationwide standards. In this situation, a court may find that the federal legislative scheme preempts a state tort claim such as misrepresentation, civil conspiracy, or fraud.[196] Under these circumstances, the result often turns on whether the claim arises from state tort law principles or from specific federal requirements.[197] For example, if a fraud claim exists solely because of a violation of federal disclosure requirements, federal law will likely preempt a state tort claim based on fraud.[198]

Other factors for determining whether a fraud-based claim is preempted are: whether the representations were made just to the agency or to the plaintiffs as a class as well;[199] whether the misrepresentations

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195. This includes misrepresentations made in reports submitted to the government, in articles submitted to scientific publications, or at public hearings or meetings.

196. *See* Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341, 348 (2001) (finding that the Food, Drug, and Cosmetic Act (FDCA) impliedly preempted state law "fraud-on-the-FDA" claims "arising from violation of FDCA requirement").

197. *See id.* at 352-53 (distinguishing Silkwood ex rel. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) and Medtronic Inc. v. Lohr, 518 U.S. 470 (1996)). First, the Court found that *Silkwood* was distinguishable because the state tort at issue there was premised on "traditional state tort law principles of the duty of care owed by the producers of plutonium fuel pins to an employee working its plant." *Id.* at 352. Second, *Medtronic* was distinguishable because those claims "arose from the manufacturer's alleged failure to use reasonable care in the production of the product, not solely from the violation of FDCA requirements." *Id.*

198. This was the situation in *Buckman*, where the plaintiff alleged that a consulting company made fraudulent representations about the intended use of certain bone screws in order to obtain FDA approval for the manufacturer of the bone screws. *Id.* at 344-45. In ruling that the FDCA pre-empted a state fraud claim, the Supreme Court found that the "federal . . . scheme amply empowers the FDA to punish and deter fraud against the Administration." *Id.* at 348. Critical to this ruling was the fact "the fraud claims existed solely by virtue of the FDCA disclosure requirements." *Id.* at 353. The Supreme Court used that fact to distinguish *Buckman* from its previous rulings in which it found the FDCA did not preempt certain state tort actions.

199. *See* Woods v. Gliatech, Inc., 218 F. Supp. 2d 802, 810 (W.D. Va. 2002). The *Woods* court held that the plaintiff's claims were not preempted under *Buckman* because their fraud claim "is based on material misrepresentations to 'consumers and users and patients' and not on misrepresentations to the FDA." *Id.* One additional factor pointed to by the court was the fact the

were connected to promotional advertising that went beyond that approved by the federal regulatory agency;[200] whether the particular law meets the elements for preemption;[201] and whether the fraudulent conduct is being relied upon to support an affirmative claim or to defend against a statute of repose for a recognized state tort claim.[202] Finally, the preemption analysis will be substantially different for statutes, such as many environmental statutes, that have a savings clause.[203]

For far too long, neo-scientists have not been held personally accountable for misrepresentations they perpetuate despite the pervasive role they play in shaping health and safety decision across this country. Attorneys should use the tools provided in tort law to reign in these neo-scientists by bringing actions directly against them when appropriate. State tort law, including that reflected in the *Restatement*, contains numerous tools attorneys can use to hold neo-scientists accountable for their own words and actions. Civil conspiracy, negligent or conscious

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FDA had found that the manufacturer had committed misconduct during the drug approval process. *Id.* The manner in which the Supreme court distinguished *Silkwood* and *Medtronic* support this distinction. Where the misrepresentation is perpetuated to the public directly, via advertisement or community presentations, the claim would no longer just be a "fraud on the agency" claim. *Id.*

200. *See* Behrens v. United Vaccines, Inc., 189 F. Supp. 2d. 945, 961-65 (D.C. Minn. 2002) (finding that the Viruses, Serums, Toxin and Analogous Products Act did preempt false representation claims stemming from representations made in the label and insert materials approved by the governing APHIS *but not* for the false representations made with respect to advertising and promotions not required by the APHIS, i.e., specifically that the product would be ninety-five percent effective).

201. *In re* Pharm. Indus. Average Wholesale Price Litig., 321 F. Supp. 2d 187, 199 (D. Mass. 2004) (finding the Medicaid Rebate Statute did not preempt claims based on manufacturers fraudulently overstating "published average wholesale prices" of their prescription drugs and reporting false prices to the federal government). In so ruling, the court looked to the fact the law itself did not present a "uniquely federal interest" and contained a provision making clear the federal remedies were "in addition to other penalties as may be prescribed by law." *Id.*

202. Baier v. Ford Motor Co., No. C04-2039, 2005 WL 928615, at *2-8 (N.D. Iowa Apr. 21, 2005) (finding that the fraudulent concealment claim being made to overcome the statute of repose were not preempted by federal law). The court in *Baier* distinguished *Buckman* when noting:

> In the [sic] this case, the plaintiffs' [sic] are not seeking to hold Ford liable for fraud alleged to have been perpetrated against a federal agency. Rather, the plaintiffs' [sic] are attempting to hold Ford liable for alleged defects in the manufacturing of a product, an area which state law has traditionally occupied. The allegedly fraudulent concealment committed by Ford only arises in the present case as an attempt to get past a bar on the plaintiffs' tort claims.

Id. at *8. The court continued that "[t]he plaintiffs are not seeking to punish the defendant for fraud committed against a federal agency, but are seeking to hold Ford responsible for alleged defects in the design and manufacture of a car." *Id.*

203. Clean Air Act § 304, 42 U.S.C.A § 7604(e) (2006); RCRA § 7002, 42 U.S.C.A. § 6972(f) (2003); CERCLA § 302, 42 U.S.C.A. § 9652(d) (2005).

misrepresentation involving risk of physical harm, and negligent misrepresentation involving pecuniary loss discussed in this Article, are but a few of those tools attorneys should consider using.[204]

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204. Other causes of actions not discussed here may also be utilized, depending on the facts of the case at hand. Thus, an attorney should also consider the potential application of fraudulent misrepresentation under section 531 of the *Restatement* as well.