



NEW YORK HIGH COURT SHOULD KEEP “STREAM OF COMMERCE” TORT RULE

by Mark A. Behrens and Virginia R. Knapp Dorell

In *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), New York’s highest court defined the circumstances under which the manufacturer of a product that itself caused no injury can be held liable for a third party’s injury-causing defective product when the two products are used together. Under *Rastelli*, in a combined use scenario, a manufacturer can only be held liable for a harm caused by an injurious defective product made or sold by a third party when the manufacturer: (1) controlled the production of the injury-producing product, (2) derived a benefit from the sale of the injury-producing product; or (3) placed the injury-producing product in the stream of commerce.

Scores of courts across the United States, including the highest courts of California and Washington and numerous appellate courts, have applied the *Rastelli* “stream-of-commerce” doctrine to provide the clear majority rule nationwide. Within New York, however, application of *Rastelli* in asbestos cases has been uneven, at best. In particular, state court judges in the New York City asbestos litigation (“NYCAL”) have offered a range of legal standards that are largely incompatible with *Rastelli* and internally inconsistent, except that they nearly always result in the imposition of liability on a defendant.

Dummitt v. Crane Co. provides the New York Court of Appeals with an opportunity to recalibrate the application of *Rastelli* in the NYCAL and confirm that New York law is in harmony with the majority rule.

The *Rastelli* Doctrine. In *Rastelli*, plaintiff’s decedent was killed inflating a truck tire made by Goodyear when a tire rim made by a different company separated explosively. Plaintiff claimed that Goodyear had a duty to warn against its tire being used with allegedly defective rims made by others because Goodyear was aware that those rims could be used with its tires. The New York Court of Appeals held there could be no liability because “Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale.”

Nearly ten years after *Rastelli*, however, the First Department appellate court in *Berkowitz v. A.C. & S., Inc.*, 733 N.Y.S.2d 410 (1st Dep’t 2001), issued a one-paragraph memorandum opinion finding that a genuine issue of material fact existed with respect to a metal pump manufacturer’s duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. The court accepted *Rastelli* as controlling and cited it to distinguish between situations in which the defendant’s equipment *required* the use of the allegedly injurious material and situations in which the allegedly injurious material was one that *could* be, but did not need to be, used with the defendant’s equipment. In subsequent years, various New York judges, primarily in NYCAL cases, have applied *Berkowitz* to provide a rule that an equipment manufacturer

Mark A. Behrens and **Virginia R. Knapp Dorell** are attorneys in the Public Policy Group of Shook, Hardy, & Bacon L.L.P. Mr. Behrens is a member of WLF’s Legal Policy Advisory Board.

has a legal duty to warn for every asbestos-containing product that could have been foreseeably used (in hindsight) with that equipment, even though *Berkowitz* stands for no such proposition.

In *Surre v. Foster Wheeler L.L.C.*, 831 F. Supp. 2d 797 (S.D.N.Y. 2011), a New York City federal court analyzed the NYCAL judges' longstanding interpretation of *Berkowitz* and concluded that the "foreseeability" analysis that had permeated numerous NYCAL decisions was flawed. After surveying a broad spectrum of New York decisions, the court held that a manufacturer of equipment that did not require the use of asbestos to function is not responsible for asbestos materials made and sold by others that were used with that equipment—even if the use of asbestos was foreseeable—unless the equipment manufacturer had control over the production of the asbestos-containing material or otherwise placed the asbestos-containing material to which the plaintiff was exposed into the stream of commerce. In *Kiefer v. Crane Co.*, No. 12-7613 (S.D.N.Y. Feb. 3, 2014), another New York federal judge agreed that *Rastelli* continues to be a correct statement of New York law and that the stream-of-commerce test applies, not the foreseeability test.

The Dummitt Case. Ronald Dummitt served on naval vessels as a boiler technician and at the Brooklyn Navy Yard from 1960 to the late 1970s. He claimed exposure to asbestos-containing materials that were used with or near shipboard equipment associated with numerous manufacturers, including Crane Co. It was undisputed that Crane Co. did not manufacture or sell the asbestos-containing materials to which Dummitt was exposed. Moreover, Dummitt offered no evidence that Crane Co.'s equipment required the use of asbestos materials to operate properly, and Crane Co. presented evidence to the contrary. Nevertheless, disregarding *Rastelli*, the trial court gave a jury instruction that extended Crane Co.'s legal duty to include warning about third parties' asbestos products to the extent the use of those products with Crane Co.'s valves was reasonably foreseeable. The jury held Crane Co. responsible for ninety-nine percent of Dummitt's damages, which the jury calculated to be \$32 million. After remittitur and certain setoffs, the trial court entered judgment against Crane Co. for a little over \$4.4 million.

On appeal to the First Department, all five justices agreed that the jury charge extending a manufacturer's legal duty to the outer bounds of foreseeability was erroneous. Moreover, the three-justice majority characterized as "unremarkable" the legal premise that "where there is no evidence that a manufacturer had any active role, interest, or influence in the types of products to be used in connection with its own product after it placed its product into the stream of commerce, it has no duty to warn." Rather than remand the matter, however, the majority engaged in its own fact finding—most of which was at odds with the record before it—and concluded that Crane Co. was still liable. Since two justices dissented from the outcome, the case is now before the Court of Appeals, where the *Rastelli* issue will feature prominently.

Conclusion. In *Dummitt*, five appellate court justices agreed unanimously that the "foreseeability equals duty" test that has been applied in NYCAL cases over the past decade is incorrect. In light of that finding, as well as an absence of any New York precedent that suggests any viable rationale for abandoning *Rastelli*'s longstanding and well-accepted "stream-of-commerce" test, the Court of Appeals should use *Dummitt* to reaffirm *Rastelli* in the asbestos litigation context and confirm that New York law is in harmony with the clear majority rule nationwide.