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CAUSATION

A recent asbestos decision by the New York Court of Appeals is a ''dangerous outlier and untethers products liability from its traditional limitations,'' attorneys Paul M. Pohl, Charles H. Moellenberg Jr., Dominic Rupprecht and Hayley A. Haldeman say. The ruling—imposing liability on a manufacturer for failing to warn about the alleged dangers of a product it neither manufactured, sold, nor advertised—should be treated as a rare exception to the general rule that a manufacturer has no duty to warn about the dangers of another's products.

You Are Your Brother's Keeper: New York Extends The Duty to Warn to Other Manufacturers' Products




By Paul M. Pohl, Charles H. Moellenberg Jr., Dominic Rupprecht and Hayley A. Haldeman

Once again, asbestos litigation makes bad law. A ''bedrock'' of tort law is that ''for there to be a recovery for an injury, it must be established that defendant's act was a cause-in-fact of an injury.'' *See, e.g., Aegis Ins. Servs. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 179 (2d Cir. 2013); Restat 3d of Torts: Products Liability, § 1 (limiting liability to a manufacturer's own product with only a narrow exception for component parts integrated with other products). A recent decision of the New York Court of Appeals, however, calls this fundamental principle into question by imposing liability on a manufacturer for failing to warn about the alleged dangers of a product it neither manufactured, sold, nor advertised. The decision is a dangerous outlier and untethers products liability from its traditional limitations.

The Court of Appeals' Decision

In the Matter of New York City Asbestos Litigation, 27 N.Y.3d 765 (N.Y. 2016), concerned two suits against Crane Co. in which plaintiffs, a Navy boiler technician and a General Motors pipe fitter, alleged that they had contracted mesothelioma as a result of exposure to asbestos. Crane had sold high pressure valves to the Navy and General Motors in the 1930s. The valves did not contain any asbestos. Rather, plaintiffs alleged exposure to asbestos that came from replacement gaskets, insulation, and packing that the Navy and General Motors purchased from other manufacturers for use with

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Crane's valves. The alleged exposure did not come from a product made or sold by Crane.

Despite the fact that plaintiffs were not injured by a product made or sold by Crane, they alleged that Crane had a duty to warn them of the hazards of asbestos exposure from products made or sold by others, but used with Crane's valves. In its defense, Crane cited *Rastelli v. Goodyear Tire & Rubber*, 79 N.Y.2d 289 (N.Y. 1992). In that case, the Court of Appeals ''decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer.'' Relying on *Rastelli*, Crane argued that it was not required to warn about the dangers of products made or sold by others because it did not place the asbestos-containing parts into the stream of commerce or exercise any control over their manufacture, sale, or labeling.

The Court of Appeals disagreed with Crane. It held that ''the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended.'' It found that Crane should have known that its asbestos-free products would result in asbestos exposure from other products, because Crane had designed its valves to be used with asbestos-containing products and had actually sold its own asbestos-containing gaskets and packaging to be used with the valves. Thus, even though the plaintiffs were exposed to asbestos from replacement parts made by others, the Court held that it was ''readily foreseeable'' to Crane that the use of its valves would endanger plaintiffs from asbestos exposure. Therefore, Crane had a duty to warn of the risks of asbestos exposure.

Decision Departs From Established Law

The Court of Appeals' decision is a victory for the plaintiffs' bar, which has been casting about the country for a court to adopt its expansive view of the duty to warn. By ruling for the plaintiffs, the Court of Appeals has cemented the duty to warn as a claim of last resort for plaintiffs' attorneys in New York. *See*, *e.g.*, *Peraica, et al. v A.O. Smith Water Prods. Co., et al.*, 2016 BL 334650 (N.Y. App. Div. 1st Dep't Oct. 6, 2016) (following *In re Asbestos*, 27 N.Y.3d 765).

The uncertainty spawned by the New York Court of Appeals' decision has already reached other jurisdictions. In October 2016, a court in the Eastern District of Louisiana, citing *In re Asbestos*, denied a motion for summary judgment on the question of whether a manufacturer has a duty to warn about a product ''that is not its own 'product.' '' *Bell v. Foster Wheeler Energy Corp.*, 2016 BL 331598 (E.D. La. Oct. 4, 2016). In so ruling, the court attempted to strike a ''middle ground,'' holding that in certain circumstances (albeit more limited than those envisioned by *In re Asbestos*) a manufacturer could indeed be held liable for failing to warn about another manufacturer's product.

As a result of these expansions of product liability, a failure to warn claim now permits a plaintiff to establish strict liability without a design defect, without a manufacturing defect, and – under the New York Court of Appeals' decision – without proving that the defendant manufactured, sold, or otherwise distributed the product alleged to have caused the harm. Under this formulation, the duty to warn becomes a *post hoc* means of extracting payment, rather than a principled attempt to identify culpable persons.

Fortunately, New York remains an outlier in accepting this novel theory of liability. For example, in *O'Neil v. Crane Co.*, 53 Cal. 4th 335 (Cal. 2012), the California Supreme Court rejected liability for Crane under nearly identical facts. It held that Crane had no duty to warn about the dangers of asbestos-containing replacement gaskets that were used with Crane's valves, even where Crane had originally sold its valves with asbestos-containing gaskets (made by Crane), because others made the replacement gaskets. The court explained that ''no case law . . . supports the idea that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn the purchaser of potentially defective additional pieces of equipment that the purchaser may or may not use to complement the product bought from the manufacturer.'' *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 352 (Cal. 2012) (internal quotation omitted, alteration in original). The California Supreme Court's decision is in accord with most jurisdictions that have considered the issue. *See*, *e.g.*, *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373 (Wash. 2008); *Stark v. Armstrong World*, 32 F. App'x 371 (6th Cir. 2001) (boiler makers have no duty to warn about asbestos containing products attached to boilers post-sale by ship owners); *Walton v. Harnischfeger*, 796 S.W.2d 225 (Tex. App. 1990) (no duty to warn regarding replacement rigging of crane, notwithstanding that manufacturer originally included a nearly identical rigging, because another company made the replacement rigging).

And rightly so. The contrary holding of *New York City Asbestos* conflicts with basic principles regarding the duty to warn: a manufacturer of a product is best suited to investigate and warn of its reasonably foreseeable hazards. This responsibility has common sense origins. The manufacturer is the expert of its product, after spending the time and resources to design, manufacture, and market it, as well as receiving feedback on the product's performance. Also, the fact that a manufacturer profits from the sale of its products may create a logical fairness for having it bear liability in appropriate cases. It does not profit from sales made by someone else.

Court of Appeals Relied On Erroneous Assumptions

The Court of Appeals' decision is premised on a series of unproven assumptions that are divorced from the real world.

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First, the Court of Appeals assumed that warning of the risks of others' products is easy to do and imposes only a ''relatively modest'' cost. This assumption that the cost of a warning is just a few barrels of ink is pervasive and incorrect. It ignores the significant costs to consumers of over-warning, including, ''the increase in time and effort required for the user to grasp the message.'' *Cotton v. Buckeye Gas Products Co.*, 840 F.2d 935, 937-938 (D.C. Cir. 1988). As noted by the District of Columbia Circuit, ''The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print.'' *Id.*; Henderson and Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U.L. Rev. 265 (1990). It further ignores the substantial practical costs to manufacturers associated with developing a warning (not to mention the new retroactive liabilities faced by manufacturers, or their successors, that will be held responsible for products sold and used decades ago). Even for sophisticated manufacturers, warnings and instructions for some products may take months or years to craft, following expert testing and detailed failure, misuse, and risk analyses of the product and the development and testing of the effectiveness of various possible warnings. Timothy P. Smith (ed), et al., *Developing consumer product instructions*, US Consumer Product Safety Commission (2003); Eric F. Shaver & Curt C. Braun, *Is Your Company Using a Process to Develop Warning Information?*, In-House Defense Quarterly, Summer 2007. That burden would expand multifold if a manufacturer were required to foretell, investigate, and create warnings for all potential risks of other products that could be used in combination with its product.

Second, the Court of Appeals found that ''where one manufacturer's product is a durable item designed for continuous use with the other manufacturer's fungible product . . . the manufacturer of the durable product typically is in the best position to guarantee that those who use the two products together will receive a warning.'' The opposite is true. A durable product may be intended to last decades, and its accompanying warnings are more likely to be lost, obscured, or disregarded over time after the early successful uses of the product. Additionally, not only does the manufacturer of the ''fungible'' item interact with the consumer more regularly (and is, thus, better positioned to repeatedly provide necessary warnings), the manufacturer of the fungible item is better positioned to respond to new developments in the state of the science. To take the example of *New York City Asbestos*, Crane did not know the danger of asbestos when its valves were sold in the 1930s. Those same valves, however, were in use in the late 1970s, as the Navy and GM purchased asbestos-containing gaskets from manufacturers who were in a better position by then to warn of risks based on current science.

Third, the Court of Appeals assumed that the new retroactive liabilities would not ''saddle manufacturers with an untenable financial burden, especially given that they can obtain insurance for this type of liability.'' This oft-repeated assumption by well intentioned judges and legislators is, in the real world, simply wrong. Insurance funds are finite, policy terms and limits are enforced, and coverage is resisted, especially for products made decades in the past. *E.g.*, Robert Berger, *The Impact of Tort Law Development on Insurance: The Availability/ Affordability Crisis and its Potential Solutions*, 37 Am. U.L. Rev. 285, 288 (1988) (noting a ''crisis in the availability and affordability of insurance'' because ''neither manufacturers nor insurers have the ability to 'spread the risk' indefinitely''). Thus, the onset of asbestos liabilities led to widespread bankruptcies for asbestos manufacturers and insurance companies, just as the creation of CERCLA liability bankrupted manufacturers and insurance companies alike. Reauthorization of Superfund: Hearing Before the Subcomm. on Water Resources of the H. Comm. on Public Works & Transp., 99th Cong. 1336 (1985) (statement of the American Insurance Association) (''To expect that by 1986 [insurance] companies would reenter the [environmental insurance] market is to expect the insurance industry to commit mass corporate suicide.''). As a result, the insurance industry developed new ways to avoid paying for massive, unexpected liabilities. For example, by 1985 the insurance industry had introduced asbestos exclusions in all policies. As a result, no policy written after the mid-1980s provides coverage for bodily injury caused by asbestos-related diseases. *See Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1204 (2d Cir. 1995) (holding that asbestos coverage was unavailable after 1985).

Thus, to cover these new risks, manufacturers must seek coverage under occurrence-based policies, the terms of which ended over half a century ago. But it is not at all certain that decades-old policies covering the new liabilities can be found, much less purchased today, or that those insurers are solvent. Even if a manufacturer were able to locate policies that cover the risk issued by solvent insurers, actually obtaining coverage often requires a fight. For example, Berkshire Hathaway has accepted tremendous volumes of long-tail liabilities, including asbestos claims, from insurers such as Lloyd's, AIG, and CNA in exchange for the cash reserves that had been maintained to pay claims to policyholders. As Warren Buffett has explained in his letters to shareholders, Berkshire is willing to accept these liabilities because its business model is to use those cash reserves to create a ''float'' that can be invested. This model creates an internal incentive to delay and deny payment. Accordingly, even meritorious claims often require expensive, time-consuming litigation against insurers.

Court of Appeals' Decision Can't Be Squared With Sound Policy

The Court of Appeals repeatedly relied on its intuitive view of ''sound public policy'' to support its imposition of liability on Crane. In fact, the Court of Appeals' decision exacerbates the public policy problems undergirding failure to warn liability by pushing warning fatigue toward warning exhaustion. Already overloaded with pages of warnings about the product at issue, consumers will now be faced with even longer warnings about *other* products that may never be used with the manufacturer's own product. Twerski & Henderson, *Fixing Failure to Warn*, 90 Ind. L.J. 237, 242-243 (2015) (outlining the costs imposed by the proliferation of warnings).

Even more fundamentally, the Court's theory of liability will effectively operate as a tax on manufacturers of durable products, divorcing payment from fault.

Creative attorneys, seeking to collect as much money as possible and force quick settlements, may be motivated to name defendants who have little actual relationship to the allegedly defective product. Without any limitation on the Court's ruling, one can see, with little imagination, the lawsuits following in the wake of *New York City Asbestos:* claims against an appliance manufacturer for failure to warn regarding risks of batteries used with the appliance; claims against light fixture manufacturers for failure to warn about improper disposal of fluorescent bulbs; claims against a wine glass manufacturer for failure to warn of fetal alcohol syndrome. Will the manufacturer of a football become liable for concussion injuries unless it warns of that risk as well as all potential hazards caused by other products that are used during the game? The list goes on and on. In its effort to justify its reach for a remaining corporate pocket to compensate asbestos plaintiffs, the Court of Appeals has announced a rule of general application that, if applied literally, has no boundaries.

Manufacturers May Limit Court of Appeals' Decision to Its Facts

While *New York City Asbestos* poses a threat to manufacturers, the decision need not prevail. The decision departs from the majority rule. Both state and federal courts across the country have rejected the outcome endorsed by the New York Court of Appeals. The potential harm of *New York City Asbestos* can, and should, be quarantined in New York.

Even within New York, however, manufacturers' counsel can mitigate the impact of the decision. The Court of Appeals both emphasized the fact-bound nature of the outcome and reaffirmed its prior decision in *Rastelli v. Goodyear Tire & Rubber*, in which the Court of Appeals refused to require one manufacturer to warn about another manufacturer's product. As such, even in New York, *New York City Asbestos* should be treated as a rare exception—turning on the unique facts of that case, as the concurrence prudently suggested—to the general rule that a manufacturer has no duty to warn about the dangers of another's products.

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