

# Asbestos

***Dummitt v. Crane Co.:* New York's Highest Court Should Reaffirm Its "Stream Of Commerce" Approach To Product Liability And Confirm That New York Law Is In Harmony With The Clear Majority Rule Nationwide**

*by*  
*Mark A. Behrens*

*Shook, Hardy & Bacon L.L.P.*  
*Washington, D.C.*

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# Commentary

## ***Dummitt v. Crane Co.*: New York's Highest Court Should Reaffirm Its "Stream Of Commerce" Approach To Product Liability And Confirm That New York Law Is In Harmony With The Clear Majority Rule Nationwide**

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*[Editor's Note: Mark Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. Copyright © 2014 by Mark A. Behrens. Responses are welcome.]*

Over twenty years ago, in *Rastelli v. Goodyear Tire & Rubber Co.*,<sup>1</sup> the Court of Appeals of New York - that state's court of final review - defined the circumstances under which the manufacturer or seller of a product that itself caused no injury can be held liable for another's injury-causing defective product when the two products are used together. Under the *Rastelli* doctrine, 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.<sup>2</sup>

Since *Rastelli* was issued, scores of courts across the United States, including the highest courts of California and Washington<sup>3</sup> and numerous appellate courts, have applied the *Rastelli* "stream of commerce" doctrine to provide the clear majority rule nationwide.<sup>4</sup> The courts have held a manufacturer of a product is not legally responsible for allegedly injurious asbestos-containing materials made and sold by third-parties, simply because it was foreseeable that those other products would be used near or in conjunction with the manufacturer's equipment post-sale.<sup>5</sup>

Within New York, however, application of the *Rastelli* doctrine in the asbestos context has been uneven, at best. *Rastelli* was applied in an asbestos case decided by the Fourth Department appellate court.<sup>6</sup> Additionally, New York City federal judges have found *Rastelli* to be in harmony with the majority rule and have refused to impose legal responsibility upon a manufacturer for an allegedly injurious product that the manufacturer did not make, sell, or otherwise place in the stream of commerce.<sup>7</sup> In the New York City asbestos litigation ("NYCAL"), however, state court judges have offered a range of legal standards that are largely incompatible with *Rastelli* and internally consistent, except that they nearly always result in the imposition of liability on a defendant.

For example, some NYCAL court opinions rely upon a single-paragraph First Department appellate court memorandum opinion, *Berkowitz v. A.C.&S., Inc.*,<sup>8</sup> to support the view that a defendant equipment manufacturer can be legally responsible for any and all injury-causing materials that were foreseeably (in hindsight) used with or near the defendant's equipment.<sup>9</sup> In other cases, judges on the same court have required a greater relationship between the equipment manufacturer and the third-party's product.<sup>10</sup>

Over the coming months, in *Dummitt v. Crane Co.*, the New York Court of Appeals will have an opportunity to recalibrate the application of *Rastelli* in the NYCAL and confirm that *Rastelli* and New York law are in

harmony with the clear majority rule nationwide. It should do so.

### **THE RASTELLI DOCTRINE**

In *Rastelli*, plaintiff's decedent was killed inflating a truck tire made by Goodyear when a multipiece tire rim made by a different company separated explosively. Plaintiff claimed that Goodyear had a duty to warn against its tire being used in conjunction with allegedly defective multipiece tire rims made by others because Goodyear was aware that those rims could be used with its tires. This Court explained that "a plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of *its* product."<sup>11</sup> The Court rejected plaintiff's foreseeability-based theory and said 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. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode."<sup>12</sup> The court "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 another manufacturer."<sup>13</sup>

The *Rastelli* doctrine reflects traditional principles of tort law and is firmly established in New York outside of the asbestos context.<sup>14</sup> A manufacturer's knowledge that its product may be used in conjunction with a third-party's product does not turn the manufacturer into an insurer for harms caused by the other's product.<sup>15</sup>

Nearly ten years after *Rastelli* was decided, however, the First Department appellate court in *Berkowitz* considered whether a trial court properly granted summary judgment to a manufacturer of metal pumps, whose pumps were alleged to have caused Navy sailors to have been exposed to asbestos.<sup>16</sup> In what has been characterized as "a one-paragraph [memorandum] opinion with no clear holding,"<sup>17</sup> the First Department in *Berkowitz* reversed the trial court, but did not modify or reject the *Rastelli* rule. Rather, the *Berkowitz* opinion accepted *Rastelli* as controlling, and cited *Rastelli* to illustrate the distinction between situations in which the defendant's equipment *required* the use of the allegedly injurious material and the situation in which the

allegedly injurious material was one that *could* be, but did not need to be, used with the allegedly injurious material.<sup>18</sup> In the end, the *Berkowitz* panel was unable to determine at the summary judgment stage which combined-use scenario prevailed so the case was permitted to proceed to the fact-finding stage (during which the matter settled).

In the years following *Berkowitz*, various judges, primarily in NYCAL cases, have applied *Berkowitz* to provide a rule that an equipment manufacturer has a legal duty to warn for every asbestos-containing product that could have been foreseeably (in hindsight) used with that equipment,<sup>19</sup> even though the *Berkowitz* opinion stands for no such proposition.<sup>20</sup> In the absence of any meaningful appellate guidance, the NYCAL decisions on this point proliferated, so that there were scores of opinions from the same court, citing its own prior opinions, all of which were predicated upon the same flawed interpretation of *Berkowitz*.

In *Surre v. Foster Wheeler L.L.C.*,<sup>21</sup> decided in December 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 under New York law.<sup>22</sup> After surveying a broad spectrum of New York decisions, the court held that, under New York law, 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.<sup>23</sup>

In February 2014, in *Kiefer v. Crane Co.*,<sup>24</sup> another New York City federal court judge agreed that the *Rastelli* doctrine continues to be a correct statement of New York law:

Under New York law, it is clear that one manufacturer cannot be held liable for the products of another. That is Judge Chin's decision in the *Surre v. Foster Wheeler* case [citation omitted]. That is true even if it is known that the asbestos-containing product would be used in conjunction with the

defendant manufacturer's own product unless it was necessary that only the particular product could be used or there was involvement in the selection of the asbestos-containing product. Neither of these facts are present here.<sup>25</sup>

The judge in *Kiefer* then said she agreed "with the *Surre* case that under the prevailing case law the correct rationale is that the stream of commerce test applies, not the foreseeability test, thereby requiring the grant of summary judgment."<sup>26</sup>

Nevertheless, even after *Surre*, *Kiefer*, and numerous out-of-state opinions clarified the meaning of *Rastelli*, the NYCAL court has chosen to proceed with the "foreseeability" test that finds no support in New York law (including *Berkowitz*), thereby eschewing the well-established stream of commerce test that is articulated in *Rastelli*.

Now, in *Dummitt v. Crane Co.*, after a unanimous Appellate Division panel has rejected the NYCAL court's "foreseeability" test, the New York Court of Appeals will have an opportunity to direct the correct interpretation of *Rastelli* in this off-repeated fact pattern.

### **THE DUMMITT CASE**

#### **A. Background**

An originally framed, asbestos personal injury claims were typically pursued against the entities that made and sold the materials that released the allegedly injurious asbestos fibers to which the plaintiffs were exposed.<sup>27</sup> These materials generally consisted of friable insulation products, the manufacturers and suppliers of which are sometimes referred to as the "big dusties."<sup>28</sup> When the "big dusties" left the tort system following scores of asbestos-related bankruptcies, the asbestos litigation became an "endless search for a solvent bystander," according to one plaintiffs' lawyer.<sup>29</sup>

In or around the early 2000s, companies that produced World War II era steam-system equipment for the United States Navy became attractive "solvent bystanders," and asbestos plaintiffs across the country began targeting those entities by claiming that the equipment manufacturers were legally responsible for all of the asbestos-containing materials that the United States Navy chose to use in the steam systems into which

the defendants' equipment was incorporated. For purposes of this argument, it was irrelevant that the Navy directed and controlled the use of the asbestos-containing materials on its ships, or that the equipment suppliers were required to comply with Navy guidelines that called for the use of asbestos-containing materials, even if non-asbestos-containing alternative materials were available.<sup>30</sup> Instead, asbestos plaintiffs argued that the equipment supplier had a duty to warn about any asbestos-containing products that could "foreseeably" have been used with the shipboard equipment, even where the equipment manufacturer had no control over the Navy's use of asbestos.

Nationwide, a clear majority rule emerged - spearheaded by *Rastelli* - that an equipment manufacturer is not liable for failure to warn about asbestos-containing materials made and sold by third-parties and used near or in conjunction with the equipment manufacturer's product, even if the use was foreseeable, unless the equipment manufacturer made, sold, or otherwise placed the asbestos-containing materials into the stream of commerce.<sup>31</sup>

#### **B. The Dummitt Trial**

Ronald Dummitt served on seven naval vessels as a boiler technician and at the Brooklyn Navy Yard from 1960 to the late 1970s.<sup>32</sup> He claimed exposure to asbestos-containing materials that were used with or near shipboard equipment that he associated with numerous manufacturers, including Crane Co.<sup>33</sup> It was "undisputed that Crane neither manufactured nor sold nor distributed the particular materials that gave rise to Mr. Dummitt's asbestos exposure."<sup>34</sup> Moreover, Dummitt offered no evidence that Crane Co.'s equipment required the use of asbestos-containing materials to operate properly, while Crane Co. presented abundant evidence to the contrary. Nevertheless, in derogation of both *Rastelli* and the prevailing majority view, the trial court provided a jury instruction that extended Crane Co.'s legal duty to any asbestos-containing product that may have foreseeably been used with or near its valves:

[A] manufacturer's duty to warn extends to known dangers or dangers which should have been known in the exercise of reasonable care of the uses of the manufacturer's product with the product of another manufacturer if such use was reasonably foreseeable.<sup>35</sup>

In accordance with the charge, even though Crane Co. was one of many equipment manufacturers identified by Mr. Dummitt, the jury held Crane Co. to be

responsible for a startling ninety-nine percent of his damages, which the jury calculated to be \$32 million. The trial court remitted the damages to \$8 million and entered judgment for a little over \$4.438 million, after accounting for certain setoffs. The court denied Crane Co.'s post-trial motions in all other respects.

### C. The First Department Review

On appeal, all five justices hearing the matter agreed that the jury charge extending a manufacturer's legal duty to the outer bounds of foreseeability was erroneous.<sup>36</sup> 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."<sup>37</sup> Nevertheless, as opposed to remanding the matter so that a jury could assess whether Crane Co. exerted sufficient control over the Navy's use of asbestos to warrant liability under this newly articulated test, the majority engaged in its own findings of fact - most of which were at odds with the record before it - and concluded that Crane Co. was still liable.

Since two of the five justices in the First Department in *Dummitt* dissented from the outcome, the matter proceeds automatically to the Court of Appeals.<sup>38</sup> The *Rastelli* issue will appear prominently among the issues raised in that appeal.

### CONCLUSION

In *Dummitt*, five justices agreed unanimously that the "foreseeability equals duty" test that has been applied in the NYCAL over the past decade is incorrect, and cannot withstand judicial scrutiny. 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 its *Rastelli* "stream of commerce" precedent and confirm that New York law is in harmony with the clear majority rule nationwide in cases asserting that a manufacturer has a duty to warn about asbestos-containing products sold by third-parties and used near or in conjunction with the manufacturer's product.

### Endnotes

1. 79 N.Y.2d 289, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992).

2. 79 N.Y.2d at 298, 591 N.E.2d at 226, 582 N.Y.S.2d at 377.

3. See *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012); *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008).

4. See Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association*, 37 Am. J. Trial Advoc. 489 (2014).

5. See *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012); *Dalton v. 3M Co.*, 2013 WL 4886658, at \*10 (D. Del. Sept. 12, 2013) ("The majority of courts embrace the principles of the bare metal defense and refuse to impose liability upon manufacturers for the dangers associated with asbestos-containing products manufactured and distributed by other entities."), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013); *In re Asbestos Litig. (Arland Olson)*, 2011 WL 322674, at \*2 (Del. Super. Ct. New Castle Cnty. Jan. 18, 2011) (following "the persuasive weight of decisions from other jurisdictions declining to impose a duty" where the defendant failed to warn or protect against hazards arising from a product it did not manufacture, distribute, or sell, "even if the defendant's product incorporated component parts that posed similar risks and would require replacement."); *Morgan v. Bill Vann Co., Inc.*, 969 F. Supp. 2d 1358, 1366-67 (S.D. Ala. 2013) (stating "the prevailing majority rule in other jurisdictions is to recognize the 'bare metal defense' (under which a pump manufacturer... cannot be liable for a third party's asbestos materials used with its products, where the pump manufacturer was not in the chain of distribution of such asbestos-containing materials)" and that "the trend in other jurisdictions favors adoption of that defense for sound and even compelling policy reasons...").

6. See *Matter of Eighth Jud. Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l)*, 92 A.D.3d 1259, 1260, 938 N.Y.S.2d 715, 716 (4th Dep't), *lv. denied*, 969 N.E.2d 222 (N.Y. 2012).

7. See *Surre v. Foster Wheeler L.L.C.*, 831 F. Supp. 2d 797 (S.D.N.Y. 2011); *Kiefer v. Crane Co.*, No. 12-7613 (S.D.N.Y. Feb. 3, 2014) (hrg. trans.).

8. 288 A.D.2d 148, 733 N.Y.S.2d 410 (1st Dep't 2001).
9. See *Sawyer v. A.C. & S., Inc.*, 32 Misc.3d 1237(A), 938 N.Y.S.2d 230 (Table), 2011 WL 3764074, at \*2 (N.Y. Sup. Ct. New York Cnty. June 24, 2011) (Heitler, J.) (holding that "a manufacturer's liability for third-party components must be determined by the degree to which injury from the component parts is foreseeable to the manufacturer."), *motion to vacate denied*, 2011 WL 11707702 (N.Y. Sup. Ct. New York Cnty. Sept. 6, 2011).
10. See *Peraica v. A.O. Smith Water Prods. Co.*, 2012 WL 3875390, at \*3 (N.Y. Sup. Ct. New York Cnty. Aug. 27, 2012) (Heitler, J.) (holding that equipment manufacturer could be liable for asbestos-containing materials made and sold by others when the asbestos-containing materials "were necessary for the proper operation" of the defendant's equipment or the defendant equipment manufacturer "recommended or specified the use of asbestos-containing materials with its products.>").
11. 79 N.Y.2d at 297, 582 N.Y.S.2d at 376, 591 N.E.2d at 225 (emphasis added).
12. 79 N.Y.2d at 298, 582 N.Y.S.2d at 377, 591 N.E.2d at 226.
13. 79 N.Y.2d at 297-298, 582 N.Y.S.2d at 376-377, 591 N.E.2d at 225-226.
14. See, e.g., *Cleary v. Reliance Fuel Oil Assoc., Inc.*, 17 A.D.3d 503, 505, 793 N.Y.S.2d 468 (2d Dep't 2005) (affirming dismissal of claims against manufacturer of water heater where device inserted into heater that controlled temperature of water was manufactured and supplied by others).
15. See, e.g., *Tortoriello v Bally Case, Inc.*, 200 A.D.2d 475, 477, 606 N.Y.S.2d 625 (1st Dep't 1994) (dismissing claims against kitchen manufacturer for slip-and-fall injury to plaintiff caused by accumulation of ice on quarry tile floor the defendant did not "manufacture, deliver or install" even though the manufacturer's literature showed quarry tile as one of three available floor materials for walk-in freezers); *Kaloz by Kaloz v. Risco*, 120 Misc.2d 586, 588, 466 N.Y.S.2d 218, 220-21 (N.Y. Sup. Ct. Orange Cnty. 1983) (pool manufacturer not subject to liability for injury caused by allegedly defective ladder it did not manufacture, control or maintain; failure-to-warn theory cannot be "stretched to require a warning as to a conjunctive product manufactured by another even though such other product may be a *sine qua non* to the use of the first").
16. 288 A.D.2d at 149, 733 N.Y.S.2d at 411.
17. *Surre*, 831 F. Supp. 2d at 802. The manager of the federal asbestos multidistrict litigation found the *Berkowitz* opinion, "without any explanation as to the New York court's reasoning, unconvincing, especially in light of the authorities" that decline to impose liability on a defendant for a third-party's asbestos products. *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 798 n.9 (E.D. Pa. 2012).
18. *Berkowitz* draws this distinction by distinguishing the First Department's opinion in *Rogers v. Sears, Roebuck & Co.*, 268 A.D.2d 245, 701 N.Y.S.2d 359 (1st Dep't 2000), with *Rastelli*. In *Rogers*, the manufacturer of a gas barbeque grill was held to be potentially responsible for a defective propane tank valve, because the gas grill could not be used without the propane tank. Conversely, in *Rastelli*, no liability was imposed because the defendant's tire could be used with or without multipiece rims. Thus, the "rule," if any, coming out of *Berkowitz* is that a product manufacturer is legally responsible in a combined-use scenario only when the combined use was *necessary* to the operation of the defendant's product. See, e.g., *Tortoriello*, 200 A.D.2d at 477.
19. See, e.g., *Sawyer, supra*; *Peraica, supra*; *Defazio v. A.W. Chesterton*, 32 Misc.3d 1235(A), 938 N.Y.S.2d 226 (Table), 2011 WL 3667717 (N.Y. Sup. Ct. New York Cnty. Aug. 12, 2011); see also *In re Eighth Jud. Dist. Asbestos Litig. (Suttner v. Crane Co.)*, 115 A.D.3d 1218, 1218, 982 N.Y.S.2d 421, 421 (4th Dep't), *reargument denied*, 118 A.D.3d 1369, 987 N.Y.S.2d 590 (4th Dep't 2014).
20. See *Surre*, 831 F. Supp. 2d at 802-03 (stating that *Berkowitz* "hardly stands for the broad proposition that a manufacturer has a duty to warn whenever it is foreseeable that its product will be used in conjunction with a defective one. Rather, the specifications there apparently *prescribed* the use of asbestos.").

21. 831 F. Supp. 2d 797 (S.D.N.Y. 2011).
22. *Id.* at 802 (citing *Tortoriello*). Judge Denny Chin of the U.S. Court of Appeals for the Second Circuit, sitting by designation on the district court, reconciled his conclusion with both *Rastelli* and *Berkowitz*.
23. *Id.* at 801.
24. No. 12-7613 (S.D.N.Y. Feb. 3, 2014) (Forrest, J.) (order granting summary judgment to Cleaver Brooks Co., Inc. and Crane Co. for reasons set forth in telephonic conference and decision) (discussed in *Federal Judge: Crane Co. Not Liable For Replacement Parts Under New York Law*, 29:2 Mealey's Litig. Rep. Asbestos 6 (Feb. 19, 2014)).
25. *Kiefer v. Crane Co.*, No. 12-7613, trans. at 12 (S.D.N.Y. Feb. 3, 2014) (telephonic conference and decision).
26. *Id.* at 14.
27. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014).
28. *Id.* at 83.
29. 'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz, Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 33, 37 (quoting Mr. Scruggs); see also Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 *Widener L.J.* 59 (2013) (discussing quote from Mr. Scruggs and the ways plaintiffs' lawyers have tried to expand the asbestos litigation to impose liability on defendants for harms caused by products of others, including the theory discussed in this article).
30. It was not disputed in the *Dummitt* case or elsewhere that the Crane Co. valves did not require the use of asbestos. There were numerous non-asbestos insulation and sealing products available to the Navy at all relevant points in time. See *O'Neil, supra*; *Braaten, supra*.
31. See *O'Neil v. Crane Co.*, 266 P.3d 987 (Cal. 2012); *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008); *Toole v. Georgia-Pacific, LLC*, 2011 WL 7938847, at \*7 (Ga. App. 2011); *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1331 (Md. Ct. Spec. App.), cert. denied, 709 A.2d 139 (Md. 1998), abrogated on other grounds, *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002); *Whiting v. CBS Corp.*, 2013 WL 530860, at \*1, 982 N.E.2d 1224 (Table) (Mass. Ct. App. 2013); *Hughes v. A.W. Chesterton Co.*, 89 A.3d 179, 190 (N.J. Super. A.D. 2014); *Schaffner v. Aesys Tech., LLC*, 2010 WL 605275, at \*6 (Pa. Super. Jan. 21, 2010); *Lindstrom v. A-C Prods. Liab. Trust*, 424 F.3d 488, 496, 497 (6th Cir. 2005); *Morgan v. Bill Vann Co., Inc.*, 969 F. Supp. 2d 1358, 1366-67 (S.D. Ala. 2013); *Faddish v. Buffalo Pumps*, 881 F. Supp. 2d 1361, 1374 (S.D. Fla. 2012); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012).
32. See Memorandum of Law in Support of Crane Co.'s Post-Trial Motion Pursuant to CPLR § 4404(a), *In re New York City Asbestos Litig. (Dummitt v. A.W. Chesterton Co.)*, No. 190196/10, 2011 WL 10087222, at \*11 (N.Y. Sup. Ct. New York Cnty. Sept. 20, 2011).
33. See *id.*
34. *In re New York City Asbestos Litig.*, 990 N.Y.S.2d 174, 195 (1st Dep't 2014) (Friedman, J., dissenting).
35. *Id.*
36. *Id.* at 190 ("To be sure, mere foreseeability is not sufficient."); *id.* at 195 ("The [trial judge's] instruction was erroneous, as the majority appears to recognize, but I think we should say so more forthrightly.") (Friedman, J., dissenting).
37. *Id.* at 189.
38. See NY CPLR § 5601(a). ■



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*edited by Bryan Redding*

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: [mealeyinfo@lexisnexis.com](mailto:mealeyinfo@lexisnexis.com)

Web site: <http://www.lexisnexis.com/mealeys>

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