

[Products Liability Law Daily Wrap Up, TOP STORY—TOBACCO PRODUCTS—2d Cir.: Fairness analysis of instructing jury that Philip Morris previously spiked nicotine levels in cigarettes required on remand, \(Aug. 22, 2019\)](#)

Products Liability Law Daily Wrap Up

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By David Yucht, J.D.

The nonmutual offensive collateral estoppel doctrine will require a jury to be instructed that Philip Morris previously spiked nicotine levels in its cigarettes if a federal trial court determines that this instruction will not be unfair to the cigarette manufacturer.

A trial court misapplied the standard for applying the nonmutual offensive collateral estoppel doctrine in a lawsuit brought by the estate of a smoker against Philip Morris USA Inc., according to a ruling by the U.S. Court of Appeals for the Second Circuit. However, the trial court's error did not necessarily require an order vacating judgment in favor of the tobacco company. Consequently, the Second Circuit remanded the case and directed the lower court to consider whether the application of nonmutual offensive collateral estoppel would be unfair (*Bifolck v. Philip Morris USA Inc.*, August 22, 2019, Wesley, R.).

A smoker began smoking Marlboros in the early 1970s and stopped shortly before her death from lung cancer in 2000. In 2006, her estate sued Philip Morris USA Inc. under the Connecticut Product Liability Act, alleging that the company's Marlboro cigarettes were negligently designed, containing toxic materials which caused the smoker's death. Before trial, the estate moved to give preclusive effect to certain factual findings made in a civil Racketeer Influenced and Corrupt Organizations Act (RICO) case against Philip Morris and other cigarette manufacturers before a federal court in the District of Columbia, *U.S. v. Philip Morris USA, Inc.*, (449 F. Supp. 2d 1 (D.D.C. 2006)), which found that the cigarette makers had violated the RICO Act in part by intentionally designing cigarettes to make them more addictive. In *U.S. v. Philip Morris*, after a finding of liability, the court required Philip Morris to issue a statement admitting that it had spiked the levels of nicotine in its product. The trial court in the case at bar denied the estate's motion to give preclusive effect to this statement and, after a two-week trial, a jury found in Philip Morris's favor.

The estate appealed arguing that the trial court misapplied the nonmutual offensive collateral estoppel standard. Nonmutual offensive collateral estoppel is a type of issue preclusion that prevents a defendant from relitigating an issue that the defendant had previously litigated and lost to another plaintiff. The Second Circuit agreed with the estate. However, the trial court's error did not necessarily require vacatur of the judgment. Consequently, the appellate court remanded the case and directed the lower court to consider whether the application of nonmutual offensive collateral estoppel would be unfair.

Collateral estoppel. The Second Circuit noted that four conditions must be satisfied to invoke nonmutual offensive collateral estoppel. The issue in the current and prior cases must be identical and it must have been actually litigated in the prior proceeding. Additionally, "there must have been a full and fair opportunity for litigation in the prior proceeding," and this issue must have been necessary to support a judgment on the merits. Moreover, trial courts "must ensure that application of the doctrine is not unfair." Trial judges have broad discretion to determine when this doctrine applies. Here, the estate requested that the district court give preclusive effect to a factual finding about Philip Morris's knowledge and corporate practices. This finding supported the estate's theory at trial, including the claim that Philip Morris could produce safer cigarettes by reducing "the nicotine to nonaddictive levels." Philip Morris's argument that the identity prong required that the identical issues be issues that were required to be proven for a finding of liability was mistaken. It sufficed

that the issue decided in the prior proceeding was identical to the issue as to which preclusion was sought. The appellate court also disagreed with the trial court's conclusion that the issues in these two cases were not identical because the scope of the two cases and the causes of action asserted therein were different. They need not involve the same scope or the same causes of action if the issues were identical.

The Second Circuit also disagreed with the trial court's finding that the issue to which the estate sought to give preclusive effect was not "necessary to support a valid and final judgment on the merits" in the earlier case. An issue is "necessary or essential only when the final outcome hinges on it," the court noted. This requirement ensures that the issue was truly disputed and the losing party in the former case put forth its best effort. The necessity requirement is met where, as here, the issue was essential to the remedy imposed, even if the issue was not essential to a finding of liability. Although Philip Morris could have been held liable in the prior case even if the court had not found that it had intentionally spiked the level of nicotine in its products, the remedy in that case, i.e. Philip Morris's public statement regarding nicotine levels, would not have been possible without that finding.

After determining that the four conditions for invoking the nonmutual offensive collateral estoppel doctrine had been met, the Second Circuit remanded this case to the trial court to determine whether the application of this doctrine would be unfair. Concerning fairness, the lower court had indicated that if it had to decide this issue, it likely would have concluded that there were equitable considerations making the use of nonmutual offensive collateral estoppel inappropriate in this case. It was not clear, however, what the trial court was relying on or if it would maintain this view on remand.

The case is No. [1:19-cv-00684](#).

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Companies: Philip Morris USA Inc.

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