

## [Products Liability Law Daily Wrap Up, EVIDENTIARY ISSUES—TOBACCO PRODUCTS—2d Cir.: \\$28M award against R.J. Reynolds upheld following Connecticut high court guidance, \(Jul. 11, 2017\)](#)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

A ruling by the U.S. Court of Appeals for the Second Circuit left undisturbed a nearly \$28 million judgment in favor of a longtime smoker against the manufacturer of the cigarettes she smoked which she claimed were defectively designed and caused her throat cancer. The appellate court had certified questions to the Connecticut Supreme Court and that court's answers provided the framework for the appellate decision ([Izzarelli v. R.J. Reynolds Tobacco Co.](#), July 7, 2017, *per curiam*).

The smoker began smoking cigarettes at age 12 in 1970. By 1972, she smoked a pack a day of Salem Kings brand cigarettes manufactured by R.J. Reynolds Tobacco Company. For the next 25 years, she smoked at least two packs of Salems a day. In 1996, at age 36, she was diagnosed with laryngeal cancer. After a laryngectomy in 1997, she no longer had a voice box and had to breathe through a tracheotomy hole in her throat. She has had a number of surgeries to remedy breathing problems. The smoker brought suit against R.J. Reynolds under the Connecticut Products Liability Act (CPLA) for strict liability and negligence, claiming that the particular brand of cigarettes she smoked for 25 years was defectively designed and caused her laryngeal cancer.

A jury agreed with the smoker and found R.J. Reynolds liable (and 58 percent at fault) under theories of strict liability and negligence. It awarded her compensatory damages of \$7,982,250 plus punitive damages, which the district court set at \$3,970,289.87—the amount of her litigation expenses less taxable costs. The total amount of the judgment awarded to the plaintiff was over \$28 million, which, in addition to the compensatory damages and punitive damages awards, included \$15,777,352 in prejudgment offer-of-judgment interest, and \$349,739.40 in post-judgment offer-of-judgment interest.

The trial court denied R.J. Reynolds's post-trial motion for judgment as a matter of law or for a new trial, and entered judgment in favor of the smoker. The cigarette manufacturer appealed on various grounds, and the smoker cross-appealed the district court's ruling limiting punitive damages to litigation expenses less taxable costs.

**First Second Circuit appeal and certified question.** The current case was the second time that the Second Circuit considered an appeal in the smoker's litigation. In the initial appeal [see *Products Liability Law Daily's* September 11, 2013 [analysis](#)], the cigarette manufacturer argued that the smoker's claims were barred by the rule "re-stated" in the Restatement (Second) of Torts §402A. The Connecticut rule for strict liability was drawn from §402A, and included a "[g]ood tobacco" exception (Comment i) to the unreasonably dangerous condition requirement of a strict products liability claim. R.J. Reynolds argued that Comment i precluded the smoker's suit because she failed to produce evidence of contamination or adulteration of its product. Because the issue was undecided under Connecticut law, the appellate court certified the following question to the Connecticut Supreme Court: "Does Comment i to section 402A of the Restatement (Second) of Torts preclude a suit premised on strict products liability against a cigarette manufacturer based on evidence that the defendant purposefully manufactured cigarettes to increase daily consumption without regard to the resultant increase in exposure to carcinogens, but in the absence of evidence of any adulteration or contamination?"

The Connecticut Supreme Court answered the question in the negative and clarified Connecticut law regarding strict liability, holding that a modified consumer expectation test is the state's primary strict product liability test and the only test applicable in the smoker's case [see *Products Liability Law Daily's* April 28, 2016 [analysis](#)].

The ordinary consumer expectation test, the court said, was reserved for cases in which the product failed to meet the ordinary consumer's minimum safety expectations, such as *res ipsa loquitur* cases. A jury could not reasonably conclude that cigarettes that cause cancer failed to meet the consumer's minimum safety expectations. Therefore, the state high court held that the smoker was required to proceed under the modified consumer expectation test, and that Comment i to §402A did not present a per se bar to recovery under the modified test.

**Two other certified questions.** Two other questions certified to the Connecticut Supreme Court in another case, *Bifolck v. Philip Morris, Inc.* [see *Products Liability Law Daily's* February 18, 2014 [analysis](#)], also affected the case at bar. Those two questions were: (1) "Does §402A of the Restatement (Second) of Torts (and Comment i to that provision) apply to a product liability claim for negligence under the CPLA?"; and (2) "Does Connecticut's common law rule [limiting] punitive damages [to litigation expenses less taxable costs] ... apply to an award of statutory punitive damages pursuant to the punitive damages provision of the CPLA?" The state high court answered these questions in the negative as well.

According to the parties, the state supreme court rulings in both *Izzarelli* and *Bifolck* (1) foreclosed R.J. Reynolds's argument that the Restatement (Second) of Torts §402A barred the smoker's claims; and (2) confirmed the smoker's contention that the district court incorrectly limited punitive damages to litigation expenses less taxable costs. These rulings, however, did not dispose of the manufacturer's remaining arguments that: (1) erroneous evidentiary rulings and jury instructions required a new trial; (2) the cigarette maker was entitled to judgment as a matter of law because the smoker failed to prove that a defect in Salem Kings caused her cancer; and (3) the smoker's claims were preempted by federal law because they amounted to a ban on cigarettes. These were the questions put to the Second Circuit in this second appeal.

**Motion for new trial.** The cigarette manufacturer argued that flawed evidentiary rulings and jury instructions warranted a new trial, and that the trial court erred in not granting one. The court of appeals, however, held that the lower court did not abuse its discretion in denying R.J. Reynold's new trial motion. The cigarette maker offered evidence that the smoker's laryngeal cancer could have been caused by "risk factors" other than smoking, but except for human papilloma virus (HPV), the trial court precluded the introduction of evidence on these factors. The court also limited the HPV evidence. The Second Circuit found that the record "amply support[ed] the district court's conclusion that HPV was the only proffered risk factor that was arguably shown to cause laryngeal cancer." Thus, it was not unreasonable to find that any relevance pertaining to the other factors was substantially outweighed by the danger of confusion and unfair prejudice.

R.J. Reynolds also argued that it was error to admit evidence of its marketing research and campaigns directed at minors. The district court found that the relevance of this evidence was not substantially outweighed by the prejudicial impact, and the Second Circuit noted that the district court retained "broad discretion" in weighing potential prejudice against the probative value of evidence. Further, the appellate court cited several reasons why evidence of the cigarette maker's youth marketing was relevant to the smoker's case, including that it supported her claim that Salem Kings were uniquely designed to contain nicotine levels that were just high enough to cause and maintain addiction yet low enough to induce frequent smoking (and thus elevated exposure to carcinogens). Also, an ingredient blend provided enhanced flavor (and more carcinogenic tar). The smoker argued that this design was adopted in part to attract young, new smokers, who disliked the bitterness of nicotine and preferred flavorful cigarettes. Additionally, youth marketing evidence indicated that minors were Salem Kings' target demographic, and this was relevant because consumer expectation was a factor in determining strict liability under Connecticut law. The evidence had bearing on whether and how R.J. Reynolds manipulated Salem King ingredients, and whether the manufacturer was aware of the health risks posed by those ingredients; and, thus, also was relevant to the issue of punitive damages. Documents showing the decisions that led to a dangerous design were probative of a reckless disregard for consumer safety. Finally, the youth marketing evidence was relevant to R.J. Reynolds's defense of comparative fault. The appellate court found that these relevancy considerations were offsets to the prejudicial evidence of youth marketing; and weighing these factors

was for the district court. The Second Circuit declined to say that the lower court's rulings constituted an abuse of discretion.

**Jury instructions.** Although the manufacturer argued that the state high court's decisions in *Izzarelli* and *Bifolck* invalidated the jury instructions regarding product liability, the Second Circuit disagreed, finding that the state high court's rulings affected only instructions on strict liability. The Connecticut Supreme Court confirmed that negligence claims were governed by the traditional common-law elements on which the jury was properly instructed. Thus, because the jury returned a separate verdict for the smoker on her negligence claim (which was undisturbed by the state high court rulings), the possible flaw in the strict liability verdict was irrelevant.

**Motion for judgment as a matter of law.** In response to R.J. Reynolds's contention that the smoker failed to prove that the claimed defect in Salem Kings caused her cancer, and that the trial court erred by not granting the manufacturer's motion for judgment as a matter of law on this basis, the Second Circuit found that the evidence was sufficient to support the jury's finding that the particular blend of ingredients in Salem Kings caused the smoker's throat cancer. The smoker provided evidence showing that (1) Salem Kings delivered a level of nicotine (along with a chemically-enhanced "kick") that provoked initial addiction and stimulated the need to smoke frequently; (2) Salem Kings contained a significant amount of carcinogenic tar; (3) the more carcinogens a smoker is exposed to, the more likely laryngeal cancer will develop; and (4) the smoker smoked 2 to 3 packs of Salem Kings a day for 25 years. In addition, the smoker offered evidence that R.J. Reynolds could have made Salem Kings safer by taking a number of steps, including: decreasing the nicotine yield to below-addiction levels; increasing the nicotine yield to levels that satisfied addiction with fewer cigarettes; or decreasing the level of tar. As such, from the evidence presented at trial, a rational jury could have found that Salem Kings had an unreasonably dangerous design that caused the smoker's laryngeal cancer.

**Preemption.** Finally, the court rejected the cigarette maker's preemption argument. R.J. Reynolds claimed that the smoker's theory of liability amounted to "a ban on all cigarettes sold in Connecticut," and, thus, was preempted by federal law. The court declined discussing the merits of the argument because it disagreed with its premise. The smoker's theory was that Salem Kings, with their particular blend of addictive and carcinogenic ingredients, were unreasonably dangerous, and was not that cigarettes in general were of such a condition. Twice, the jury was properly instructed that R.J. Reynolds could not be held liable merely because Salem Kings contained nicotine and carcinogens. Therefore, because the smoker's allegations were focused on characteristics of the brand that were not common to cigarettes in general, the manufacturer's preemption argument failed.

Thus, the appellate court affirmed the district court's judgment as to liability. It also vacated and remanded for a redetermination of punitive damages based on the Connecticut Supreme Court's holding in *Bifolck*.

The cases are Nos. [11-3865](#) and [11-3890](#).

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