

## [Products Liability Law Daily Wrap Up, DESIGN AND MANUFACTURING DEFECTS—TOBACCO PRODUCTS—Conn. Sup. Ct.: Connecticut High Court clears path for smoker's \\$28 million judgment, \(Apr. 28, 2016\)](#)

Products Liability Law Daily Wrap Up

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By Susan Lasser, J.D.

In the context of a cigarette manufacturer's appeal of a \$28 million jury verdict in favor of a former smoker who had smoked for 25 years before being diagnosed with laryngeal cancer, the Connecticut Supreme Court, answered a certified question by the U.S. Court of Appeals for the Second Circuit in the negative and held that a modified consumer expectation test is the state's primary strict product liability test, and the only test applicable to the former smoker's case. The question by the Second Circuit to the state high court asked whether the "[g]ood tobacco" exception to strict products liability contained in comment (i) to § 402A of the Restatement (Second) of Torts precluded an action in Connecticut against a cigarette manufacturer for including additives and manipulating the nicotine in its cigarettes such that a user's risk of cancer ultimately increased ([Izzarelli v. R.J. Reynolds Tobacco Co.](#), official release May 3, 2016, McDonald, A.).

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 undergone numerous surgeries to remedy breathing problems and can eat only soft foods. The smoker brought claims against R.J. Reynolds under Connecticut state law for strict liability and negligence, arguing that the cigarettes she smoked for 25 years were defective and caused her throat cancer. Evidence presented showed that the manufacturer modified its cigarettes to increase their "nicotine kick" and addictive quality, including adding ammonia compounds. Enhancing the addictive nature of the product increased the number of cigarettes smoked by a consumer. The causal relationship between smoking and cancer being dose related, increasing the Salem smoker's exposure to carcinogens increased the likelihood of cancer.

A jury found R.J. Reynolds liable in the smoker's case and 58 percent at fault under Connecticut's comparative negligence scheme. The total amount of the judgment awarded to the plaintiff was over \$28 million, which, in addition to \$7,982,250 in compensatory damages, included \$3,970,289.87 in punitive damages, \$15,777,352 in prejudgment offer of judgment interest, and \$349,739.40 in postjudgment offer of judgment interest. R.J. Reynolds appealed the judgment to the Second Circuit, arguing that Connecticut law foreclosed strict products liability suits against a cigarette manufacturer absent evidence that the cigarettes were contaminated or adulterated.

**Connecticut Products Liability Act.** The smoker's claims were asserted under the Connecticut Products Liability Act (CPLA). To prove a strict liability claim under the CPLA requires that: "(1) the defendant was engaged in the business of selling the product; (2) the product was in a defective condition unreasonably dangerous to the consumer or user; (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of the sale; and (5) the product was expected to and did reach the consumer without substantial change in condition." The Connecticut rule for strict liability was drawn from section 402A of the Restatement (Second) of Torts. Comment i to section 402A, which defines "unreasonably dangerous," excludes the harmful effects of "good tobacco": "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption .... The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the

community as to its characteristics .... *Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous ....*”

**Certified question.** The Second Circuit 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 appellate court stayed adjudication of the case until receiving guidance from the Connecticut Supreme Court (see *Products Liability Law Daily*, September 11, 2013, [analysis](#)).

**Connecticut Supreme Court ruling.** The state high court answered the Second Circuit’s question in the negative. The question required the court to revisit its strict products liability precedent, *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 694 A.2d 1319 (1997), and to clarify the proper purview of the two strict liability tests recognized in that case: (1) the ordinary consumer expectation test and (2) the modified consumer expectation test. In *Potter*, the court decided to adopt a test that would incorporate risk-utility factors into the ordinary consumer expectation test framework. Under the “modified” consumer expectation test, the jury would weigh the product’s risks and utility and then inquire, in light of those factors, whether a “reasonable consumer would consider the product design unreasonably dangerous.” Some cases do not require that a plaintiff present evidence relating to the product’s risks and utility, according to *Potter*. The ordinary consumer expectation test is appropriate when the everyday experience of the particular product’s users permitted the inference that the product did not meet minimum safety expectations.

The manufacturer argued that, under *Potter*, only the ordinary consumer expectation test applied because the modified test was limited to complex designs for which consumers lacked safety expectations. However, the court ruled that the modified consumer expectation test was the primary test. The ordinary consumer expectation test, on the other hand, was reserved for cases in which the product failed to meet the ordinary consumer’s *minimum* safety expectations, such as *res ipsa*-type 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 of the Restatement (Second) did not present a *per se* bar to recovery under the modified consumer expectation test. In so ruling, the court rejected a simple/complex divide analysis in which the ordinary consumer expectation test was the primary test, with the modified consumer expectation test reserved only for complex product designs for which an ordinary consumer could not form safety expectations. Moreover, according to the Connecticut Supreme Court, limiting the modified test to complex products for which the consumer could not form safety expectations would be antithetical to the public policies informing the state’s product liability law. Further, providing the immunity requested by the manufacturer would remove an important incentive to improving product safety.

The case is No. [SC 19232](#).

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Companies: R.J. Reynolds Tobacco Co.

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