

Products Liability Law Daily Wrap Up, DESIGN AND MANUFACTURING DEFECTS—TOBACCO PRODUCTS—2nd Cir.: \$25 million judgment for smoker stayed pending question certified to Connecticut Supreme Court relating to CPLA’s “good tobacco” provision, (Sep. 11, 2013)

By Susan Lasser, J.D.

Following a tobacco company’s appeal of a \$25 million jury verdict in favor of a 25-year smoker, the U.S. Court of Appeals for the Second Circuit has certified a question to the Connecticut Supreme Court resulting in a stay in the resolution of the case ([Izzarelli v. R.J. Reynolds Tobacco Co.](#), September 10, 2013, Jacobs, D.). The court of appeals asked whether Comment i to Section 402A of the Restatement (Second) of Torts precludes claims under the Connecticut Products Liability Act against cigarette manufacturers absent evidence of contamination or adulteration, as the question had not been decided in Connecticut.

Background. Barbara Izzarelli began smoking at age twelve 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, she was diagnosed with laryngeal cancer. After a laryngectomy the following year, 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.

Izzarelli brought claims against R.J. Reynolds under the Connecticut state law for strict liability and negligence, arguing that the cigarettes she smoked for 25 years were defective and caused her throat cancer.

At trial, Izzarelli presented the following experts and their testimony: Dr. Alexander Glassman, a psychiatrist, testified that Izzarelli was “severely addicted” to nicotine; Dr. Marshall Posner, Izzarelli’s expert on cancer, testified that he was “absolutely convinced” her cancer was caused by smoking and that 95 percent of laryngeal cancers are caused by smoking; and Dr. Thomas Lesnik, Izzarelli’s treating otolaryngologist, testified that her cancer was caused by her smoking. Izzarelli also introduced evidence that R.J. Reynolds manufactured Salems to specifications intended to encourage non-smokers to become addicted to nicotine and to lead addicted smokers to smoke more cigarettes without satiating their addiction. This included evidence that the cigarette maker understood that to sell more cigarettes, it had to: (1) maintain smokers’ addiction by increasing the nicotine “kick” felt by the smoker with each drag and (2) reduce the total nicotine level (the nicotine “yield”) in cigarettes to require smokers to purchase more cigarettes to fulfill their addiction’s daily requirement. The company manipulated the nicotine yield, lowering it from 2-3 milligrams per cigarette in the 1950s and 1960s to approximately 1.3 milligrams per cigarette at the time of trial. One internal document asked, “How low can we go?” The goal was to identify the lowest nicotine yield that would keep smokers addicted while requiring them to smoke more cigarettes to feed their addiction.

R.J. Reynolds, however, elicited testimony that Izzarelli’s cancer was not specific to Salems; the opinions of Izzarelli’s experts would not change if she smoked a different brand. The cigarette maker provided its own experts to testify to the notion that addiction was separate from the brand of cigarettes smoked. One expert testified that he did not need to know what brand of cigarettes Izzarelli smoked to conclude that smoking caused her cancer.

The jury in the case found R.J. Reynolds liable (and 58 percent at fault under Connecticut’s comparative negligence scheme), and awarded Izzarelli \$7,982,250 in compensatory damages; punitive damages, which the district court calculated as \$3,970,289.87; and \$16,127,086.40 in offer-of-judgment interest. R.J. Reynolds appealed the judgment, arguing that Connecticut law forecloses strict products liability suits against a cigarette manufacturer absent evidence that the cigarettes were contaminated or adulterated.

Connecticut Products Liability Act. Izzarelli’s claims were asserted under the Connecticut Products Liability Act (CPLA). The question by the Second Circuit concerned strict liability law, and specifically, the existence of a defective condition. To prove a strict liability claim under the CPLA required 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, which provides: “(1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.”

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*”

The Connecticut Supreme Court has explicitly adopted Comment i’s definition of “unreasonably dangerous,” and R.J. Reynolds argued that Comment i precluded Izzarelli’s suit because she failed to produce evidence of contamination or adulteration (*i.e.*, “something like marijuana”). However, the state high court had not considered the proviso for “good tobacco” in Comment i, and the Second Circuit found it unclear as to whether or not Comment i precluded all products liability claims in Connecticut against tobacco companies absent allegations of contamination or adulteration. Izzarelli argued that Comment i specified “good tobacco” as opposed to “good cigarettes” and, therefore, it did not pertain to the manufacturing process. She asserted that a cigarette is a nicotine delivery device that can change how tobacco is smoked and its effect on the smoker, and that R.J. Reynolds varied the blends and components to make Salems more addictive and varied the nicotine levels to maximize the number of cigarettes needed per day to satisfy the addiction.

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 case number is 11-3865-cv(L).

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Companies: R.J. Reynolds Tobacco Co.

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