

## [Products Liability Law Daily Wrap Up, WARNINGS ISSUES—TOBACCO PRODUCTS—E.D. Pa.: Summary judgment favoring cigarette manufacturers affirmed on reconsideration, \(Mar. 25, 2019\)](#)

Products Liability Law Daily Wrap Up

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By Georgia D. Koutouzos, J.D.

Although a long-time smoker identified minor errors in the earlier analysis of his design defect and failure to warn claims against three tobacco companies, he still failed to establish that the companies were liable for his ailments.

A Pennsylvania federal court granted a motion to reconsider its earlier decision favoring three cigarette manufacturers in a smoker's product liability lawsuit, finding that it had mis-identified the manufacturer in one claim and had miscast a design defect claim as a failure to warn claim. However, those errors did not affect the court's prior findings that the smoker and his wife had adduced no more than a scintilla of evidence that the alleged design defect or failure to warn had caused his injuries, the court concluded, affirming its prior summary judgment ruling ([McCracken v. R.J. Reynolds Tobacco Co.](#), March 20, 2019, Kearney, M.).

A man who had smoked cigarettes for more than 50 years filed suit *pro se* against R.J. Reynolds Tobacco Co. (RJR), ITG Brands LLC, and Republic Tobacco, L.P., alleging that his smoking had caused him to develop emphysema and chronic obstructive pulmonary disease (COPD). The smoker asserted various claims against the three companies for failure to warn, design defect, intentional/negligent infliction of emotional distress, and loss of consortium.

Both parties moved for summary judgment following the discovery process, with the smoker arguing that the cigarette makers should be collaterally estopped from defending themselves and that the companies' answers to interrogatories established their liability as a matter of law. The court granted the manufacturers' summary-judgment motion, barring the smoker's claims due to a lack of causation evidence [see *Products Liability Law Daily's* February 15, 2019 [analysis](#)].

The smoker moved for reconsideration of the ruling, maintaining that the court erred in its analysis of his claims. According to the smoker, the court erred in its description of his failure to warn claim in holding that he had sought summary judgment on that claim against Republic for the years 1966 through 1969 when the claim actually had been leveled against ITG. According to the smoker, the court overstated his awareness of the dangers of smoking when it found in the earlier order that he had been aware of the risks of smoking throughout his life and that additional warnings would not have deterred him from using tobacco.

**Failure to warn.** The smoker's deposition testimony directly refuted his arguments in that regard, however, the court said, noting that he could not alter his sworn deposition testimony via a motion for reconsideration. Additional evidence described in the court's earlier decision buttressed the holding, such as the fact that the smoker's wife had told him to quit because smoking was bad for one's health, as well as the manufacturers' expert testimony disseminating the widespread knowledge of the harms of smoking. Despite all of that, the smoker continued his habit throughout his life, and even after his COPD diagnosis. As such, he failed to present more than a scintilla of evidence that additional warnings would have changed his behavior.

**Design defect.** Although the smoker did not raise the issue in his motion for reconsideration, the court also found that it erroneously had analyzed the smoker's design defect claims against Republic as though they were failure to warn claims. Nevertheless, the court explained that its design-defect analysis regarding RJR's King Cool cigarettes also applied to Republic's cigarettes. Therefore, just as the smoker had failed to present causation evidence regarding how tobacco had caused his harms, he failed to show how any of the alleged

defects in Republic's roll-your-own cigarettes had caused his harm. As outlined in the court's earlier decision, the smoker did not present any competent evidence that the alleged defects in those cigarettes had caused his ailments.

**Expert testimony.** The smoker challenged two issues in the court's review of the experts' opinions, asserting that the statement of the manufacturers' expert was unsworn/un-notarized and that the court should have credited his expert's medical records over the medical opinion of one of the manufacturers' experts. In that regard, the tobacco companies attached a notarized affidavit that their expert had signed and sworn, and the smoker's expert had not opined on how any design defect had caused the smoker's harms. Consequently, even if the court had ignored the opinion of the manufacturer's medical expert, the smoker's argument on reconsideration failed because he still did not present any causation evidence.

**Collateral estoppel.** As for the smoker's argument that the court should have applied the doctrine of collateral estoppel based upon the decision in *U.S. v. Philip Morris* (449 F.Supp.2d 1 (D.D.C. 2006)) regarding the addictive nature of tobacco products, the court declined to consider the specific findings of fact in that case because it would afford the smoker in the case at bar a "second bite at the apple." Even if those facts were considered, the smoker still failed to address the other reasons why the court had denied collateral estoppel in his case, i.e., its undesirable incentives, the existence of favorable judgments in other cases, and the instant case's distinguishable posture from the cited precedent.

**Emotional distress.** Furthermore, the court found that it properly dismissed the smoker's emotional distress claim in its earlier decision, given that he neither had attached medical evidence proving emotional distress nor showed outrageous conduct. In sum, the court's erroneous casting of the smoker's failure to warn claims against one of the tobacco companies as design defect claims supported reconsideration of its earlier decision. However, on reconsideration, the court continued to hold that the manufacturers were entitled to summary judgment. Having used tobacco for more than 50 years and after several notices of harm, the smoker failed to adduce more than a scintilla of evidence that a design defect or failure to warn had caused his illnesses.

The case is No. [17-4495](#).

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Companies: R.J. Reynolds Tobacco Co.; ITG Brands LLC; Republic Tobacco Inc.

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