



COMPETING RULINGS TEST LIMITS OF DESIGN DEFECT LIABILITY UNDER NEW YORK LAW

by

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Recently, courts applying New York law have issued competing rulings regarding plaintiffs' ability to proceed on design defect claims against cigarette manufacturers. In *Mulholland v. Philip Morris USA, Inc.*, No. 05 Civ. 9908 (S.D.N.Y. July 24, 2007), a federal court applying New York law dismissed plaintiffs' design defect claims. Only eight days later, in *Fabiano v. Philip Morris Inc.*, No. 102715/04, 2007 N.Y. Misc. LEXIS 6015 (Sup Ct, New York County, Aug. 1, 2007), a New York state trial court allowed plaintiffs to proceed with a seemingly identical design defect theory. The ultimate resolution of this issue will be significant not just for the tobacco industry as it continues its decades-long defense of products liability actions, but also for other manufacturers and retailers faced with design defect claims.

The two courts' tobacco holdings diverged on the question of how a "feasible alternative design" should be defined. The federal court in *Mulholland* determined that the question of what constitutes a feasible alternative design was a legal matter by considering the context of the product's regulatory and consumer history. The state court in *Fabiano* left the question open for jury consideration. After providing an overview of these two competing rulings, this LEGAL BACKGROUNDER will explain why the *Mulholland* opinion is consistent with well-developed American jurisprudence, while the *Fabiano* holding – if allowed to stand and if followed by other courts – could dangerously allow juries to second-guess societal decisions about entire classes of desirable, lawful products, including high-fat foods.

The Competing New York Tobacco Rulings. The competing rulings in *Mulholland* and *Fabiano* both center on the opinions of William Farone, Ph.D., a former cigarette industry research scientist who has repeatedly surfaced as a fact and expert witness for plaintiffs in numerous tobacco lawsuits over the past decade.

The *Mulholland* court found that Dr. Farone's proposed alternative designs for cigarettes were not "feasible" as a matter of law, in that they were being "offered in an attempt to use a design defect claim to impose state law tort liability on the manufacture and sale of virtually every cigarette now on the market." *Mulholland*, at 15. It ruled that a state law requirement imposing Dr. Farone's proposals (that cigarettes

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should have been made without tar or nicotine) would be tantamount to a “virtual ban on cigarettes,” just as a requirement that allows only “alcohol-free” liquor would be a “ban on whiskey.” *Mulholland*, at 15. The *Mulholland* court refused to let a claim raising such a sweeping assertion reach a jury, explaining that the “vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be ‘outlaws.’” *Mulholland*, at 15 (citation omitted).

The *Fabiano* court arrived at just the opposite conclusion. It held that Dr. Farone’s opinion – that the tobacco industry “refused to adopt technology that would cause significant reductions in potent chemical toxic materials” – adequately supported a claim based on a design defect theory. *Fabiano*, at *16. It specifically cited to Dr. Farone’s opinions that manufacturers could have made cigarettes with “harsher ‘uninhaleable’ tobacco which cannot be inhaled by most people,” or could have made “de-nicotized” or “no tar” cigarettes. *Fabiano*, at *16. According to the *Fabiano* court, this expert evidence “clearly” raised an issue of fact as to whether “it was feasible to design cigarettes in a safer manner.” *Fabiano*, at *16.¹

American Jurisprudence, The Restatement Of Torts, And Common Sense Favor The Logic Of Mulholland. Courts applying New York law will now be faced with choosing between the federal court *Mulholland* approach and the state court *Fabiano* approach when deciding whether plaintiffs have presented sufficient evidence of a feasible, alternative design to reach a jury.

Prior courts considering a cigarette manufacturer’s liability under a design defect theory have been reluctant to let the issue go to a jury. *See, e.g., Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16, 21 (D. Mass. 2004) (rejecting notion that menthol cigarettes, “though cancer-causing,” could be considered “generally defective”); *Jeter v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 686 (W.D. Pa. 2003) (rejecting design defect claims on ground that manufacturer cannot be held liable for “inherent risk of using the product”), *aff’d*, 113 Fed. Appx. 465 (3rd Cir. 2004); *Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 523 (D.N.J. 2002) (New Jersey law precludes design defect claims by “tobacco victims”) (omitting citation); *LaBelle v. Philip Morris Inc.*, 243 F. Supp. 2d 508, 519 (D.S.C. 2001) (rejecting notion that alternative cigarette design was safer or commercially feasible); *The American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 433 (Tex. 1997) (rejecting design defect argument that cigarettes should have been made “reasonably safer by filtration, and by reducing the amount of tobacco, tar, nicotine and toxins in them”).

These opinions are consistent with the notion that “categorical liability” cannot be imposed by courts against an entire class of products. *See, e.g., Dauphin Deposit Bank and Trust Co. v. Toyota Motorcorp.*, 596 A.2d 845, 849 (Pa. Sup. Ct. 1991) (affirming that “risks associated with alcohol consumption do not outweigh their utility”). *See also Crosswhite v. Jumpking, Inc.*, 411 F. Supp. 2d 1228, 1231-32 (D. Or. 2006) (trampolines not defectively designed); *Marzullo v. Crosman Corp.*, 289 F. Supp. 2d 1337, 1342-43 (M.D. Fla. 2003) (BB guns not defectively designed).

Nor could *some* cigarettes be found defective because they contain higher levels of tar and/or

¹The analysis in *Fabiano* is consistent with earlier New York state court rulings that have allowed plaintiffs to proceed with design defect claims against cigarette manufacturers. *See Tomasino v. American Tobacco Co.*, 807 N.Y.S.2d 603, 606 (2d Dep’t 2005) (through Farone affidavit, plaintiffs raised sufficient issue of fact as to whether cigarette manufacturers “opted not to develop, pursue, or exploit available technologies to reduce the toxins in cigarettes”); *Miele v. American Tobacco Co.*, 770 N.Y.S.2d 386, 392 (2d Dep’t 2003) (Dr. Farone’s affidavit “sufficed to raise an issue of fact as to whether the foreseeable risk of harm posed by cigarettes could have been reduced or avoided by the adoption of a reasonable alternative design”); *Rose v. Brown & Williamson Tobacco Corp.*, 809 N.Y.S.2d 784, 797-98 (Sup Ct., New York County, 2005) (precluding defendants from introducing at trial evidence showing that proffered safer alternative design was not acceptable to consumers).

nicotine. As of 2007, consumers continue to purchase brands of cigarettes with higher levels of tar and nicotine, despite knowledge of tobacco's health risks and the availability of cigarettes that are lower in tar and nicotine. This illustrates the desirability of different types of cigarettes, thus precluding any notion that a higher tar/higher nicotine cigarette could be considered "defective" while a lower tar/lower nicotine cigarette is "safe."

In this respect, the *Restatement (Third) of Torts* provides two examples that are very much on point. First, the *Restatement* rejects the notion that a compact car can be considered defectively designed just because of its size. According to the *Restatement*, a plaintiff cannot establish an automobile defect by merely maintaining that a smaller car is less safe than a larger car because "eliminating smaller automobiles from the market would unduly restrict the range of consumer choice among automobile designs. . . . Given that the risks and benefits associated with relative automobile size are generally known, decisions regarding which sizes to purchase and use should be left to purchasers and users in the market." RESTATEMENT (THIRD) OF TORTS § 2 comment f, Illustration 9. Second, the *Restatement* provides the example of bullet-proof vests, explaining that a manufacturer cannot be held liable because it makes some vests with "front and back protection only," while it also makes other vests with "wrap-around protection." Although the wrap-around design is "somewhat safer," the *Restatement* explains, "the differences in advantages and disadvantages are sufficiently understood by consumers that omission of the wrap-around feature does not render the front-and-back design not reasonably safe. To subject sellers to liability based on that design would unduly restrict the range of consumer choice among products." RESTATEMENT (THIRD) OF TORTS § 2 comment f, Illustration 10.

The claim that cigarettes should be manufactured with "no tar" and "no nicotine," or that they should be made harder to inhale – as Dr. Farone now advocates – does not warrant an exception to the *Restatement's* logic. To the contrary, Dr. Farone's alternative design theory makes the case easier to dismiss as a matter of law, for he is not advocating a different design in the same product, but an entirely different product. By way of comparison, no one can reasonably contend, at least in our current society, that (1) grape juice is a feasible alternative to wine, (2) soy bacon is a feasible alternative to "real" bacon, (3) a "garden burger" is a feasible alternative to a hamburger, (4) skim milk is a feasible alternative to whole milk, or (5) frozen yogurt is a feasible alternative to ice cream. Clearly, there are many Americans who prefer healthier alternatives, but consumers are left free to choose among the various options.

Restrictions on categories of products should not be made by means of tort claims that might be differently decided from courtroom to courtroom, but rather (if at all) by lawmaking bodies, following the opportunity for appropriate public comment and debate. Whether many Americans like it or not, cigarette smoking has not been outlawed in the United States, although the tobacco industry has been heavily regulated for the past four decades, *e.g.*, through federally-mandated package labeling, restrictions on advertising, prohibitions of sales to minors, and smoking bans in public places. The United States Supreme Court has made this very point. While acknowledging that cigarette smoking is "one of the most troubling public health problems facing our Nation" causing "thousands of premature deaths" each year, the Supreme Court also recognized that Congress "for better or worse" has chosen to regulate the tobacco industry instead of banning the sale of tobacco products. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 138-40, 159 (2000).

The fact that tens of millions of Americans continue to smoke – including smokers who have never really tried to quit and young adults who have been brought up in a culture that has bombarded them with stark warnings about the risks of lung cancer and addiction – serves to illustrate consumer demand for the product. Tort law should not be utilized to "subsidize" consumers who have made – and who continue to make – riskier product choices. RESTATEMENT (THIRD) OF TORTS § 2, comment a ("individual users and consumers" should "bear appropriate responsibility for proper product use").

Ramifications For Products Liability Litigation Involving High-Fat Foods. Comparing the tobacco litigation to lawsuits involving the food industry is by no means far-fetched. Although most Americans seem to consider lawsuits against fast food retailers to be preposterous,² some of the plaintiffs' claims in those lawsuits sound very much like the cigarette plaintiffs' design defect theories based on Dr. Farone's assertions. For example, plaintiffs in a New York lawsuit against McDonalds alleged that the fast-food giant could make Chicken McNuggets and french fries without adding various chemicals and by reducing their fat content. These plaintiffs have argued that McDonalds' products have been "processed to the point where they have become completely different and more dangerous than the run-of-the-mill products they resemble and than a reasonable consumer would expect." *Pelman v. McDonalds Corp.*, 237 F. Supp. 2d 512, 533 (S.D.N.Y. 2003).

No one can objectively dispute that the American public is well-aware that fast food is not the optimal nutritional choice, yet every day, millions of Americans eat at restaurants like McDonalds because of the convenience, cost and/or taste, despite the overwhelming amount of public information about the risks of a high-fat diet. Analogous to smokers, consumers of high-fat foods may not know details about the extent of the health risk or the brain-chemistry explaining why they find high-fat foods desirable, but there can be no doubt that a "reasonable" consumer living in this country appreciates the notion that a Big Mac or Kentucky Fried Chicken poses a greater health risk compared to lower-fat alternatives. The tens of millions of Americans who frequent fast food restaurants illustrate that high-fat foods are desirable products. Clearly, no design defect claim should allow a jury to second-guess this societal choice.

As with tobacco, the means to place restrictions on foods that impose an unacceptable societal health risk is through appropriate lawmaking bodies. New York City residents have recently observed how this process works. Last year, we became (with much notoriety in the national press) the first municipality in the nation to determine that most trans fats should be eliminated from foods served in restaurants, after our Board of Health determined that these fats could be "replaced with heart healthy alternatives."³ If a similar change needs to be made requiring cigarettes to be made "safer" (as Dr. Farone's opinions would lead one to believe), the proper place to address that concern is the appropriate government rulemaking body, not through individual products liability damages actions that can result in a crazy-quilt of different legal rulings and jury verdicts.

²See, e.g., Amity Shales, *Lawyers get fat on McDonalds*, CHICAGO TRIBUNE, Nov. 27, 2002, at 25 ("Every now and then America draws a cartoon of herself for the amusement of the rest of the world. Last week's fat lawsuit against McDonald's is one of those occasions."); Sarah Avery, *Is Big Fat the Next Big Tobacco?* RALEIGH NEWS & OBSERVER, Aug. 18, 2002, at A25 ("[A related] lawsuit has brought howls of dissent and derision – as yet another example of a litigious society run amok."); *How did the lawyer keep from laughing?* SOUTH BEND TRIBUNE, Aug. 13, 2002 ("The fast-food lawsuit is generally regarded as a joke . . .").

³*Notice of Adoption of an Amendment (§81.08) to Article 81 of the New York City Health Code* (December 5, 2006). See also Charisse Jones and Nanci Hellmich, *NYC bans trans fats in restaurants*, USA TODAY, Dec. 6, 2006; Thomas J. Lueck and Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006.