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## New York's Highest Court Addresses Whether Consumer Acceptability Of An Alternative Design Is An Element Of A Negligent Design Claim

In our May 2008 legal alert, we reported on the First Department's decision in *Rose v. Brown & Williamson Tobacco Corporation* which reversed a jury verdict against the defendant tobacco companies and dismissed the complaint where the plaintiff failed to demonstrate that low-tar, low-nicotine (a/k/a "light") cigarettes would have been an acceptable, safer alternative to consumers in place of the allegedly defective "regular" cigarettes. In a 3-2 decision, the First Department held that "a manufacturer cannot be held liable for failing to adopt an alternative product design that has not been shown to retain the 'inherent usefulness' the product offers when manufactured according to the more risky (but otherwise lawful) design that was actually used." The Appellate Division determined that the "usefulness" of cigarettes was the "production . . . of certain subjective sensations and feelings in the user (the taste of tar and the psychological effects of nicotine)" and that such "usefulness" could only be measured by its acceptability to consumers.

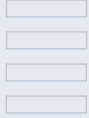
In a December 16, 2008 decision, New York's Highest Court affirmed the First Department decision. Agreeing with the First Department, the Court of Appeals held that the plaintiffs "failed to prove an essential element of their case: that regular cigarettes and 'light' cigarettes have the same 'utility.' The only 'utility' of a cigarette is to gratify smokers' desires for a certain experience, and plaintiffs did not prove, or try to prove, that light cigarettes perform this function as well as regular cigarettes."

Although the only claim at issue in the case was for negligent product design, the Court of Appeals cited to strict product liability doctrine that: "The plaintiff . . . is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." The Court of Appeals held that the negligent design claim at issue contained the similar requirement that the plaintiff had to prove that "it was feasible to design the product in a safer manner," meaning that the plaintiffs must show "the potential for designing . . . the product so that it is safer but remains functional."

In addressing the potentially larger question of whether the holding of this case could have broader application in the product liability arena, the Court of Appeals noted:

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“It is not necessary in every product liability case that the plaintiff show the safer product is as acceptable to consumers as the one the defendant sold; but such a showing is necessary where, as here, satisfying the consumer is the only function the product has.”

The Court also addressed the “irony in speaking of cigarettes’ ‘utility’” noting that a “strong argument” could be made that cigarettes have no utility when one balances the “pleasure” of smoking cigarettes against the harm they do - an argument that would seemingly negate the element of proving equal utility. However, the Court of Appeals rejected that argument finding that as long as it was lawful for people to buy and smoke regular cigarettes and for cigarette companies to sell them, a holding that the mere sale of regular cigarettes should expose the manufacturer to tort liability would amount to a judicial ban on the product. The Court of Appeals found that any such ban should be done by the legislature, not by the judiciary.

In his dissenting opinion, Judge Pigott stated that the majority’s holding improperly shifted the burden of proving consumer acceptability to the plaintiffs. Judge Pigott also noted that the defendants moved at trial to introduce evidence demonstrating that the “alternative design” (light cigarettes) was not acceptable to consumers and that the trial court denied the motion. Judge Pigott stated that he would have overruled that ruling and remitted the case to the trial court to permit the *defendants* to present proof that the light cigarettes were not acceptable to consumers. ■

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