UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VINCENT J. BIFOLCK, AS EXECUTOR OF THE ESTATE OF JEANETTE D. BIFOLCK AND INDIVIDUALLY, Plaintiff, v. PHILIP MORRIS INCORPORATED, Defendant.	Civil Action No. 3:06-CV-1768 (SRU)

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO CERTIFY

Defendant Philip Morris USA Inc. ("PM USA") hereby submits its opposition to Plaintiff's Motion to Certify. Plaintiff's motion should be rejected for two independently sufficient reasons.

First, granting the motion would impermissibly interfere with the manner in which the Second Circuit has decided to handle the pending cross-appeals in *Izzarelli*. As this Court observed in its October 10, 2013 Conference Memorandum, the Second Circuit's decision in *Izzarelli* "will have a significant impact on this case." *See* Docket #171. Indeed, as the Court is aware, *Izzarelli* presents the *same* questions of Connecticut law that are at issue here. The Second Circuit has decided to certify one of those questions to the Connecticut Supreme Court, and it has expressly *declined* to certify the other two—the very same negligence and punitive damages questions that Plaintiff now asks this Court to certify. Rather than certifying those questions, the Second Circuit has announced its intention to address those issues itself, in a decision that will provide binding appellate guidance to this Court. This Court should reject

Plaintiff's attempt to evade the Second Circuit's decision and interfere with its handling of the *Izzarelli* appeal.

Second, certification would be inappropriate even if these questions were not pending in the Second Circuit, because Connecticut case law provides a sufficient answer to them (which is presumably why the Second Circuit chose not to certify them). On the negligence question: Connecticut law requires a plaintiff bringing any design defect claim—whether pled as strict liability or negligence—to prove that the product at issue was both defective and unreasonably dangerous. And the answer to Plaintiff's proposed punitive damages question is equally clear: as this Court held in *Izzarelli* and another judge in this District recently held in *Fraser v. Wyeth, Inc.*, 2013 U.S. Dist. LEXIS 109293, at **8-14 (D. Conn. Aug. 5, 2013), the text and legislative history of the Connecticut Products Liability Act compel the conclusion that the Act does not alter the longstanding common law rule that punitive damages are limited to attorneys' fees.

ARGUMENT

I. CERTIFICATION IS INAPPROPRIATE, BECAUSE IT WOULD INTERFERE WITH THE SECOND CIRCUIT'S CHOSEN COURSE OF ACTION IN *IZZARELLI*.

Plaintiff's counsel in this case represents the plaintiff in the *Izzarelli* appeal, and the claims in this case are substantively identical to those tried in *Izzarelli*. There are three issues before the Second Circuit in the *Izzarelli* appeal that are pertinent to Plaintiff's motion to certify:

(a) Whether a plaintiff can assert a claim under the Connecticut Products Liability Act ("CPLA") premised on a theory that the defendant's cigarettes were defectively designed because they were purposefully manufactured to increase daily consumption of cigarettes, absent evidence that the cigarettes were adulterated or contaminated.

(b) If the answer to the first question is "no," whether the plaintiff can pursue a negligence claim under the same theory.

(c) Whether punitive damages under the CPLA are limited to attorneys' fees.

Compare "Final Form Brief of Appellee-Cross-Appellant Barbara A. Izzarelli" (attached hereto as Exhibit 1) at 35-42 (addressing negligence) and 67-77 (addressing punitive damages) *with* Pl.'s. Mem. in Supp. of Mot. to Certify ("Pl.'s Mem.").

Last month, the Second Circuit decided to certify the first of these three issues to the Connecticut Supreme Court. *See* Sept. 10, 2013, Order (attached as Exhibit 2). It did not, however, certify the other two. The original order was silent with respect to the negligence issue (issue b, above), but it expressly discussed the punitive damages question (issue c), explaining that it plans to address that issue itself, once the case returns from the Connecticut Supreme Court:

> The parties also argue issues involving admissibility of evidence and punitive damages. Since we are certifying the principal and threshold legal issue, we need not decide those issues now, and will decide them depending on how the Connecticut Supreme Court decides the certified question.

Id. at 3 n.2. The Connecticut Supreme Court has received the certified question (*see* order attached as Exhibit 3), and the parties to the *Izzarelli* case will submit briefs on the strict liability question pursuant to a court-ordered briefing schedule.

Plaintiff's counsel did not object to the Second Circuit's decision not to certify the punitive damages question, but he did ask the Circuit to certify the negligence question. On September 17, 2013, Plaintiff's counsel moved the Second Circuit to amend its *Izzarelli* order to include that question in its certification request to the Connecticut Supreme Court. *See* Ex. B to Pl.'s. Mem. Hedging his bets, counsel filed a similar motion in this case two weeks later, while the *Izzarelli* motion was still pending in the Second Circuit. In his *Bifolck* motion, counsel advanced precisely the same arguments concerning the negligence question that he had made to the Second Circuit in *Izzarelli*: that Connecticut law somehow permits a product-liability

plaintiff to maintain a claim for negligent design even if he cannot prove that the alleged defect is actionable under a strict liability theory.[1] *See* Pl.'s Mot. to Certify. Four days after Plaintiff filed his motion in this case, the Second Circuit denied the *Izzarelli* motion (order attached as Exhibit 4), making unmistakably clear its determination that the negligence question should not be certified to the Connecticut Supreme Court.

By maintaining his motion in this case, Plaintiff is asking this Court to make an end-run around the Second Circuit. In its original *Izzarelli* order, the Second Circuit expressly stated that it intended to address the punitive damages question itself. And by denying the *Izzarelli* plaintiff's motion to certify the negligence question, the Circuit made the same determination with respect to that question. By declining certification on both of these questions, the Second Circuit has made a determination that as a matter of Connecticut law, both questions are sufficiently settled to make certification improper. This Court should decline Plaintiff's request to evade the Second Circuit's decisions on these matters and should instead allow those issues to be determined, in due course, in the *Izzarelli* appeal.

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[1] Technically, Plaintiff has proposed certifying two negligence questions in this case: (1) "Does Section 402A of the *Restatement (Second) of Torts* (including Comment i to§ 402A) apply to a product liability claim for negligence under the [CPLA]?" and (2) "If the answer to Question No. 1 is in the affirmative, does Comment i to § 402A preclude a product liability claim under the CPLA against a cigarette manufacturer for negligent design of a cigarette absent proof of adulteration or contamination of the tobacco in the cigarette?" Pl.'s Mem. at 2. These questions become relevant only if the Connecticut Supreme Court answers the certified question about the *Izzarelli* plaintiff's strict liability claim in the affirmative, in which case the two negligence questions may fairly be condensed into the single question of whether a plaintiff may pursue a claim that cigarettes are defectively designed under a negligence theory where the cigarettes are not defective and unreasonably dangerous under a strict product liability theory. That is the question plaintiff's counsel asked the Second Circuit to certify in *Izzarelli*. *See* Mem. of Law in Supp. of Motion to Clarify and Modify the Court's Order Dated September 10, 2013 (Ex. B to Pl.'s Mot. to Certify) at 11 (proposing the following question: "Does Comment i to section 402A of the Restatement (Second) of Torts preclude a claim under the CPLA against a cigarette manufacturer for negligence (in the design of its cigarette products)?").

II. CERTIFICATION IS UNWARRANTED BECAUSE THE LAW IS CLEAR.

This Court should decline Plaintiff's attempt to interfere with the Second Circuit's review in *Izzarelli* and deny Plaintiff's motion for that reason alone. In any event, the negligence and punitive damages questions are not appropriate for certification because Connecticut law is clear on both points. As the Second Circuit has stated, "[c]ertification should not be used as a device for shifting the burdens of this Court to those whose burdens are at least as great." *McCarthy v. Olin Corp.*, 119 F.3d 148, 153-54 (2d Cir. 1997) (citing *Dorman v. Satti*, 862 F.2d 432, 435 (2d Cir. 1988); *Kidney v. Kolmar Laboratories*, 808 F.2d 955, 957 (2d Cir.1987)). Because a federal court's "job [is] to predict how the forum state's highest court would decide the issues before [it]," it is inappropriate to "certify questions of law where sufficient precedents exist . . . to make this determination." *Id.* Here, there is ample precedent from the Connecticut courts on both questions presented by the plaintiff; the Second Circuit was right to decline certification.

A. The Negligence Question Is Settled.

Plaintiff contends that Comment i to Section 402A of the Restatement (Second) of Torts ("§ 402A"), which requires a plaintiff prove that the product in question was "in a defective condition unreasonably dangerous" to the user, does not apply to negligence claims.[2] Existing Connecticut case law makes clear, however, that Plaintiff is incorrect: § 402A applies to both negligence and strict liability theories of design defect, and to prevail on either theory, a plaintiff must prove that the product is both defective and unreasonably dangerous. *See Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 214 (1997) ("This court has long held that in order to

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[2] *See* Pl.'s Mem. at 10 ("[T]he text of both § 402A and Comment i makes clear that there is a distinction between the existence of a defect in product – which is required in both negligence and strict liability causes of action – and the requirement of proof that the defective condition is also 'unreasonably dangerous,' which is limited to strict liability. . . . It is plaintiff's understanding of Connecticut law that where a product is defective, but not unreasonably dangerous, a plaintiff may establish product liability in negligence in accordance with traditional fault requirements.").

prevail in a design defect claim, the plaintiff must prove that the product is unreasonably dangerous.'" (alteration and internal quotation marks omitted)); *Wagner v. Clark Equip. Co.*, 243 Conn. 168 (1997) (analyzing both strict liability and negligence claims under § 402A); *White v. Mazda Motor of Am. Inc.*, 139 Conn. App. 39 (2012) (analyzing products liability claim based on several theories, including negligence, all under the § 402A standard), *cert. granted on other grounds*, 307 Conn. 949 (2013); *Bergeron v. Pacific Food, Inc.*, No. CV075001992S, 2011 WL 1017872, at *3 (Conn. Super. Ct. Feb. 14, 2011) (holding that "defectiveness is an essential element of a products liability action based on negligence as well as one based on strict tort liability," and defining defect under the § 402A standard (internal quotation marks omitted)); *Martone v. C. Raimondo & Sons Constr.*, No. CV00070497S, 2002 WL 31234758, at *2 (Conn. Super. Ct. Aug. 28, 2002) (applying the consumer expectations test of § 402A to a negligence claim); *Faux v. Thomas Indus., Inc.*, No. CV89-0233934S, 1992 WL 293230, at *3 (Conn. Super. Ct. Oct. 8, 1992) ("The jury could not logically have found that the product was not defective and at the same time found that the defendant's negligence in designing a non-defective, non-dangerous product proximately caused the plaintiff's injuries. This is so because defectiveness is an essential element of a product liability action based on negligence as well as one based on strict tort liability.").

Moreover, Plaintiff's argument makes no sense. The strict liability doctrine as set forth in § 402A and adopted in Connecticut is intended to *reduce* a plaintiff's burden in a design defect case by eliminating the requirement of fault, not to impose a new element that is not required under a negligence theory. *See Potter*, 241 Conn. at 209, 11 (noting that strict liability developed so that "injured persons, who lack familiarity with the manufacturing process, would no longer shoulder the burden of proving negligence," and that "[s]trict tort liability merely

relieves the plaintiff from proving that the manufacturer was negligent and allows the plaintiff to establish instead the defective condition of the product as the principal basis of liability"). Plaintiff cites no case from Connecticut or any other jurisdiction in which a product was found to be neither defective nor unreasonably dangerous under a strict liability theory, but was found to be defective under a negligence theory.

B. The Punitive Damages Question Is Settled.

As to the issue of punitive damages, Connecticut law provides ample support for this Court's ruling in *Izzarelli* that punitive damages under the CPLA are limited to plaintiffs' non-taxable litigation costs (including attorneys' fees). As this Court noted in *Izzarelli*, the CPLA's text and legislative history demonstrate an intent by the Connecticut legislature not to disturb a "century-old common-law doctrine that limits punitive damages" in exactly this manner. Ruling and Order Awarding Punitive Damages in *Izzarelli*, dated December 21, 2010 (attached hereto as Exhibit 5) at 3. This Court's decision is consistent with Connecticut principles of statutory construction that a "court should follow the common-law" measure of punitive damages where "a statute authorizing punitive damages is silent about how those damages should be calculated," and that "the court shall only interpret a statute to 'impair an existing interest or to change radically existing law . . . if the language of the legislature plainly and unambiguously reflects such an intent.'" *Id*. at 3 (*citing Arnone v. Enfield*, 79 Conn. App. 501, 521-22 (2003)) and 5 (quoting *Lynn v. Haybuster Mfg. Inc.*, 226 Conn. 282, 289-90 (1993)). And its ruling respects the legislature's "desire to curb the rising cost of product liability litigation and insurance." *Id*. at 12.

This Court is not alone in its reasoning. Just two months ago, in *Fraser v. Wyeth, Inc.*, 2013 U.S. Dist. LEXIS 109293 (D. Conn. Aug. 5, 2013), Judge Arterton confronted the same question of Connecticut law and resolved it in the same way as this Court did in *Izzarelli*,

applying a substantially similar analysis. *Id*. at **8-14. Like this Court, Judge Arterton ruled that there was sufficient guidance under Connecticut law to resolve the question without resorting to certification. And, of course, the Second Circuit made the same decision when it stated in its *Izzarelli* order that it would resolve the question itself after full briefing and argument. The law on this question is clear; there would be no need to certify it even if doing so would not interfere with the Second Circuit's handling of the *Izzarelli* appeal.

CONCLUSION

For all of the foregoing reasons, Plaintiff's motion to certify should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013 a copy of the foregoing Defendant Philip Morris USA Inc.'s Opposition to Motion to Certify was served electronically and by mail on Plaintiff's counsel:

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