

PDF FACSIMILE
BY
PROBATIVE PRODUCTION
"Bad news for Big Tobacco"
sparkl ex @ att.net

Not an official document

**SUPERIOR COURT OF THE STATE OF
CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

DEPARTMENT 308 HON. CHARLES W. McCOY, JUDGE

RICHARD BOEKEN,)	
PLAINTIFF,)	
)	CASE NO. BC226593
Vs.)	
)	STATEMENT OF DECISION
PHILIP MORRIS,)	RE: DEFENDANT'S MOTIONS FOR
INCORPORATED, A)	(1) NEW TRIAL, AND
CORPORATION; INTL.)	(2) JUDGMENT
HOUSE OF PANCAKES)	NOTWITHSTANDING
INCORPORATED, A)	THE VERDICT, JUNE 6, 2001.
CORPORATION)	
DEFENDANTS.)	
_____)	

I.

BACKGROUND

Trial in this action, brought by plaintiff Richard Boeken (Boeken) against defendant Philip Morris Incorporated (Philip Morris), commenced before a jury on March 19, 2001 and concluded on June 6, 2001 when the jury returned a verdict of \$5,539,127 in compensatory damages and \$3 billion in punitive damages. Philip Morris now moves for a new trial under CCP §657 and, alternatively, for judgment notwithstanding the verdict pursuant to CCP §629.

II.

MOTION FOR A NEW TRIAL

1. Punitive Damages.

Trial courts must, under California law, remit and/or grant motions for new trials in punitive damage cases where the amount of a jury award is excessive as a matter of law. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910. Trial courts sit "not in an appellate capacity but as an independent trier of fact" when evaluating claims that punitive damage awards are excessive. *Id.* 933. If the entire record, including reasonable inferences therefrom, reveals an excessive award, trial courts have a "duty to grant a new trial," *Tice v. Kaiser Co.* (1951) 102 Cal. App. 2d 44, 46.

To determine whether a punitive damage award satisfies California's legal requirements, this Court must evaluate, three primary factors: (1) the relationship between punitive and compensatory damages awarded to the particular plaintiff; (2) defendant's financial condition; and (3) the degree of reprehensibility of defendant's conduct. *Neal*, 21 Cal. 3d A 928; *Adams v. Murakami* (1991) 54 Cal. 3d 105, 110.

The jury instruction given here, BIDI 14.71, accurately and succinctly characterizes California law, and states in part:

In arriving at any award of punitive damages, you are to consider the following: (1) The reprehensibility of the conduct of the defendant. (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition. (3) That the punitive damages; must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff.

The U.S. Constitution further requires trial court examination of allegedly excessive punitive

verdicts to insure they comply with due process requirements. *BMW of North America, Inc. v. Gore* (1990) 517 U.S. 559, 568. As with state law, a California trial court must conduct "an independent examination of the relevant criteria" in assessing compliance with federal due process, *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.* (U.S. 2001) 121 S. Ct. 1678, 1685. Federal due process review of punitive damage awards reaches beyond simply examining a jury verdict to determine whether a rational basis exists to justify it. *TXO Production Corp. v. Alliance Resources Corp.*, (1993) 509 U.S. 443, 456 (rejecting The rational basis test). /1

Federal due process requires that a punitive damage award possess "a reasonable relationship to compensatory damages" awarded to a particular plaintiff. *BMW*, 517 U.S. at 580. Courts must test the reasonableness of that relationship using three non-exclusive guideposts established by the *BMW* court. They are: (1) the degree of reprehensibility of defendant's conduct; (2) the relationship between punitive and compensatory damages awarded to the particular plaintiff; and (3) the civil and criminal penalties that could be imposed for comparable misconduct. *Id.* at 575-85.

A. Reprehensibility of Defendant's Conduct.

The jury plainly, and with substantial evidentiary support, found Philip Morris's conduct reprehensible. The record fully supports findings that Philip Morris knew by the late 1950s and early 1960s that the nicotine in cigarettes is highly addictive, that substances in cigarette tar cause lung cancer, and that no substantial medical or scientific doubt existed on these crucial facts. Nevertheless, motivated primarily by a professed desire to generate wealth, Philip Morris, in concert with other major American tobacco companies, consistently endeavored through calculated

1. The United States Supreme Court did not rule in *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415 that a rational basis test is the constitutional standard of review.

misrepresentations to create doubts in the minds of snickers , especially addicted smokers such as Richard Boeken, that cigarettes are neither addictive nor disease-producing, In the language of a key internal document revealing the plan, Philip Morris and other tobacco companies set out to "create doubt about the health charge without actually denying it."

The evidence supports a finding that in 1954 Philip Morris promised in a public announcement run in over 400 newspapers nationwide to pursue objective research into the health risks of smoking and to release the results for the benefit of consumers. But, to the contrary, Philip Morris privately constrained research to produce results casting doubt oh the alleged risks of smoking and went to extraordinary lengths to hide its own scientific information showing the company was fully aware of the true health dangers. One revealing memo written to the Company's top research scientist disclosed a practice of "burying" adverse internal research results ("[if the study proves nicotine is addictive] we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.")

The record adequately demonstrates for purposes of this motion that Philip Morris publicly and falsely represented that: no proof existed that smoking causes cancer, knowing the opposite was true; that authorities have reached no agreement on what causes lung cancer, knowing the opposite was true; and that smoking is not addictive, knowing the opposite was true. While Philip Morris claims to have been relying on certain technical definitions of the language it used, substantial evidence was presented at trial showing that Philip Morris intended its publicly and widely disseminated words to be understood in a non-technical sense, communicating a false impression that the nicotine in cigarettes is not in fact addictive and that cigarette tars do not in fact cause cancer.

Information, widely disseminated by sources other than Philip Morris, revealed the true health risks of cigarettes. Nevertheless, in light of all the evidence presented, it appears that Philip Morris's doubt-creating scheme fully succeeded in the case of Mr. Boeken and others addicted to the nicotine in cigarettes. Nationally renowned experts on smoking and health testified that addicts, such as Richard Boeken, predictably search for reasons to continue their drug consumption. Substantial evidence was presented demonstrating that Philip Morris seized on the opportunity presented by this predictable addictive behavior and provided the sought-after, albeit false, reasons in the form of statements calculated to create false doubt. This concerted effort to create doubt with misinformation was initiated long before the federal government enacted labeling statutes and was carried out for decades thereafter up through the late 1990s, coinciding almost exactly with Mr. Boeken's lifetime.

Substantial evidence supports a finding that Philip Morris was aware people who do not begin smoking in their adolescence are unlikely to become heavily addicted, life-long smokers. Most people who are mature enough to understand the risks involved, and who are not already addicted, do not begin smoking. Substantial evidence further supports a finding that, with this in mind, Philip Morris focused its marketing on children, including the adolescent Richard Boeken in the 1950s, placing advertising where children were most likely to see it and crafting ads appealing to youthful passions for feelings of independence, identity and acceptance.

An internal Philip Morris document describes a strategy of targeting minors to produce "a rapidly increasing pool of teenagers from which to replace smokers lost through normal attrition." The evidence supports a finding that the pool Philip Morris had in mind included the under-age Richard Boeken, who became fully addicted to smoking before reaching his 18th birthday. The

evidence further indicates that Philip Morris monitored the relative market share of its Marlboro brand - the brand smoked by Boeken from his teens - to insure it maintained dominance among underage smokers to whom cigarettes could not be sold legally.

Evidence indicating a nationwide pattern of deceit involving millions of American consumers was properly admitted at trial. Proof "of a nationwide pattern of tortious conduct" is specifically admissible to show reprehensibility. *BMW*, 517 U.S. at 576-77 (citing *TXO*, 509 U.S. at 462 N.Y, rejecting TXO's objection to the admission of its alleged wrongdoing in other parts of the country and stating "[u]nder well-settled law, . . . factors such as these are typically considered in assessing punitive damages.") /2

Philip Morris urges the Court to conclude, as a matter of law, that its actions were not reprehensible in light of certain cigarette-related California and federal statutes. Citing the Public Health Cigarette Act of 1969, 15 U.S.C. 1331 *et seq.*, Philip Morris argues that Congress has determined "that it is not reprehensible ... to market and advertise cigarettes with the warning prescribed in that statute." Philip Morris is not being punished for marketing cigarettes, but rather for engaging in a fraudulent business scheme initiated long before passage of the Act. The Act left open the power of states to punish defendants for conduct of the sort proved here. *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 538-40.

California Civil Code §1714.45 (enacted in 1981 and repealed 1998) does not evidence a legislative determination that conduct of the sort in evidence here is not reprehensible as a matter of law. On the contrary, circumstances surrounding repeal of §1714.45 suggest some, if not a

2. Philip Morris did not object at trial to the admission of out-of-state information. It did move *in limine* to exclude evidence of alleged wrongdoing occurring in other countries, and that motion was granted and consistently enforced throughout the trial.

majority, of California's legislators in 1998 were deeply disturbed by revelations flowing from ongoing investigations of Philip Morris. /3

Exercising its independent judgment, the Court finds the preceding facts, supported by substantial evidence, true for the purposes of assessing the reasonableness of the jury's punitive damages award. Philip Morris's conduct was in fact reprehensible in every sense of the word, both legal and moral.

B. Relationship Between Punitive and Compensatory Damages Awarded to the Particular Plaintiff.

California law focuses on the necessity to punish the particular wrongdoer in determining the amount of a legally appropriate punitive-to-compensatory ratio. *See, e.g., Neal*, 21 Cal. 3d at 928 & n.13. While deterring others is a legitimate function of punitive damages, and BAR 14:71 instructs juries to award punitive damages "for the sake of example," the quantum selected must be assessed in relation to the defendant and only its wrongdoing. The law expects that in appropriately punishing the particular wrongdoer, the wrongdoer and others will be deterred from engaging in the same or similar conduct. The law does not, however, authorize punitive damage theories attempting to punish one wrongdoer for the conduct of others in order to deter those others from future misconduct. As indicated by the California Supreme Court, "the quintessence of punitive damages is to deter future misconduct by the defendant." *Adams v. Murakami* (1991) 54 Cal. 3d 105, 110. Consequently, BAJI 14.71 specifically instructs fact-finders to consider "the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition."

3. See, discussion of Legislative intent at p. 23, *infra*.

California law focuses on the actual harm suffered by the plaintiff in determining the denominator of the relational analysis. *See e.g., Neal, supra*, BAJI 14.71 instructs fact-finders to consider "the injury, harm or damage actually suffered by the plaintiff in arriving at a reasonable punitive-to-compensatory ratio. /4 Plaintiff here urges the Court to consider values, outside the evidence, relating to the potential harm to others in assessing the appropriate punitive damage denominator, The Court, however, must consider only the ratio between punitive damages and injuries suffered by the plaintiff, not other persons. Plaintiff incorrectly urges the Court to characterize the resultant ratio as 3-to-10, based on unlitigated assumptions as to how many Californians may in the future sue Philip Morris and what their individual recoveries might theoretically be. Such an approach is not authorized by existing case law.

No exact mathematical ratio exists giving courts a bright line in deciding when the punitive-to-compensatory damages relationship becomes excessive as a matter of law. Indeed, the United States Supreme Court in *BMW* warned against any "categorical approach" to ratios, noting that it had "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . ." *BMW*, 517 U.S. at 582. *See also, Finney v. Lockhart* (1950) 35 Cal. 2d 161, 164 ("[T]here is no fixed ratio. . .")

Here, the jury settled on figures producing a 540-to-1 ratio. Such a ratio is not unprecedented. *See e.g., TXO Prod. Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443

-
4. The Court rejected a Philip Morris drafted instruction directing the jury to ignore all harm done by defendant to persons other than Mr. Boeken, regardless of where they lived, BAJI 14.71 precisely covers the matter in connection with determining an appropriate punitive to-compensatory ratio ("the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff") and correctly does not apply a "plaintiff only" limitation on the question of reprehensibility.

(upholding a \$10 million award with a 526-to-1 ratio). On the other hand, in a purely economic damages case, the *BMW* court cautioned that a ratio in the 500-to-1 range should "raise a suspicious judicial eyebrow." *BMW*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481, O'Connor, J., dissenting). In an intentional fraud case, the United States Supreme Court has deemed a ratio of 4-to-1 "close to the [constitutional] line." *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23-24.

Plaintiff lists a string of cases in which California courts have let stand punitive damages awards substantially exceeding a 4-to-1 ratio. /5 Philip Morris correctly observes that none of these cases involved compensatory awards in the range of \$5 million, and argues that the amount of the compensatory award, if high, must, as a matter of law, operate to independently reduce the potential size of any punitive damage award, pointing out that no California appellate court in any published opinion has ever upheld a ratio of greater than 3-to-1 when the compensatory award was more than \$1 million. In the end, this argument leads to the unsupportable proposition that those who commit the most devastating and reprehensible wrongs are given caps on their punitive damages exposure which those who commit lesser wrongs do not receive - a proposition standing the legitimate and necessary role of punitive damages on its head. While no reported case with compensatory damages exceeding \$ 1 million exceeds a ratio of 3-to-1, that does not mean that 3-to-1 establishes a bright line beyond which no jury must go in California, especially in cases where a defendant's conduct is so utterly reprehensible, and has such devastating and widespread consequences, as here presented.

-
5. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910 (78-to-1); *Finney v Lockhart* (1950) 35 Cal. 2d 161 (2000-to-1); *Moore v. American United Life Ins. Co.* (1984) 150 Cal. App. 3d 610 (83-to-1); *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal. App. 3d 266 (190-to-1).

C. Defendant's Financial Condition.

Philip Morris offered no evidence of its financial condition and rested entirely on the state of plaintiff's evidence. Plaintiff's expert economist, Robert Johnson, testified essentially un rebutted, that Philip Morris's domestic tobacco company has a value of between \$30 and \$35 billion. The worth of the company's domestic operation is not reported separately in the parent company's annual report and must be broken out using estimations involving income and revenue. California law permits using defendant's wealth, income, or both to estimate financial condition. *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal. App. 3d 45 1; *Wetherbee v. United States Ins. Co. of America* (197 1) 18 Cal. App. 3d 266. A strict accountant's "assets vs. liabilities" calculation is not required, and Philip Morris offered no expert testimony at trial rebutting the validity of the methodology used by Mr. Johnson.

While Robert Johnson offered evidence indicating a potential value exceeding \$35 billion, ample evidence, uncontradicted by credible contra evidence, exists on the record to support a finding that defendant's current worth at the time of trial was between \$30 and \$35 billion. Exercising its independent judgment, the Court finds this fact true for the purposes of assessing the reasonableness of the jury's punitive damages award.

Plaintiff suggests, and the Court agrees, that California cases tend to limit punitive damages awards to sums generally in a range under 10% of a defendant's total worth. See, *Goshgarian v. George* (1984) 161 Cal. App. 3d 1214, 1228. As with punitive-to-compensatory ratios, this figure is not a matter of mathematical certainty or invariant. See, *Villabona v. Springer* (1996) 43 Cal. App. 4th 1525, 1539-41 (upholding 23.1%); *Devlin v. Kearny Mesa AMC/Jeep/Renault. Inc.* (1984) 155 Cal. App. 3d 381, 391-92 (upholding 17.5%). The jury's award here is within the percentage

of worth guideline generally allowed by California law.

D. Civil and Criminal Penalties That Could Be Imposed for Comparable Misconduct.

Finding analogous penalty provisions sanctioning frauds leading to wrongful death is a difficult, if not impossible, undertaking. Plaintiff points to the California Unfair Competition Act proscribing "any unlawful, unfair or fraudulent business actor practice..." Cal. Bus. & Prof. Code §17200. Using the potential multiples achievable for discrete antitrust violations proscribed by the California Unfair Trade Practices Act, a different law, plaintiff attempts an analogy assuming, the sale of each pack of cigarettes as a single violation, leading to staggering potential fines at \$1000 per sale. Plaintiff also cites Penal Code provisions purporting to permit fines of \$10,000 for each violation, and separate provisions allowing courts to fine employees individually for their misconduct. Philip Morris offers no analogies other than to criticize those proposed by plaintiff.

The Court has not on its own found any convincing analogous civil or criminal penalties that could be imposed for comparable misconduct, and considers this factor relatively neutral in assessing the reasonableness of the jury's punitive damages award here.

E. Deterrence of Future Conduct.

Citing details of the Master Settlement Agreement with the state Attorneys General and the company's very recent, and admittedly belated, public confession that the nicotine in cigarettes is addictive and that tars in cigarettes cause lung cancer, Philip Morris argues punishment is inappropriate here because there is no possible future conduct requiring deterrence. Philip Morris had a full opportunity to present the precise details of the Master Settlement Agreement (MSA) to the jury in mitigation of, or as an argument against, punitive damages. While that agreement does

prohibit much of the misconduct at issue here, it by no means guarantees that Philip Morris will now become the model corporate citizen which it now claims to be.

Effective deterrence involves more than just prohibiting conduct, and requires changing mindsets. Philip Morris has, in the past, demonstrated a willingness and ability to achieve its ends by creative means, and the Court cannot predict what those means might in the future be for a corporation with enormous resources profiting from the sale of a life threatening product. Philip Morris can, of course, continue to lawfully sell its product, but it must do so with a mindset far different from that evidenced by its corporate history to date. Such a sea change may have begun to occur at Philip Morris, but, in the exercise of independent judgment in light of all the evidence at trial, the Court finds that deterrence in the form of substantial punitive damages is both necessary and proper to prevent Philip Morris's return to the old mindset or its crafting of ever-more ingenious ways to generate wealth through tortious means.

F. Potential for Future Punitive Damages Awards.

Philip Morris correctly argues that "[t]he likelihood of future damage awards may also be considered" in assessing the reasonableness of a punitive damages award. *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal. App. 4th 1645,1661. Given the evidence presented at trial here, and the fact that Philip Morris refused to accept even a scintilla of responsibility for the harm it has done to Richard Boeken and other similarly situated consumers of its products, the Court does not doubt that Philip Morris will continue to incur large punitive damages awards in California and elsewhere. Given the law that a party is fully liable for injuries to another when that party's tortious misconduct constitutes a substantial contributing factor to the injury suffered, it appears highly likely that future juries will continue to hold Philip Morris liable for large compensatory awards, even

when they believe the plaintiff's conduct (choice to smoke) also constitutes a substantial factor contributing to the injuries. In this setting, when Philip Morris refuses to accept any responsibility, moral or otherwise, it is easy to see how juries will predictably find the company deserving of substantial punishment. /6

If Philip Morris continues to make the argument, attempted with this jury, that even though its highest executives may have lied to the American public about the risks of cigarettes, it bears absolutely no moral or legal responsibility for the deaths of people who consumed its Products, because every consumer should have known from the outset that the executives were not truthful, then, in this Court's view based on the evidence examined through weeks of trial, Philip Morris is entirely correct that it will continue to incur substantial future compensatory and punitive damage awards by other juries.

This Court takes into consideration the potential for future damage awards in its ultimate decision here, but with the caveat that it cannot speculate at the amounts or number of such awards and cannot rely on such predictions in reaching a final punitive damage result.

After balancing all the relevant considerations, the Court finds that the jury's punitive damage award was legally excessive because it produced an excessive punitive-to-compensatory ratio. While the Court cannot know with certainty what ratio is exactly correct, it finds that a ratio of approximately 20-to-1 is -appropriate in this particular circumstance. No party disputes the rationality of the jury's compensatory award of \$5,539,127, and the Court, exercising its

6. In the present case, Philip Morris elected not to bifurcate the punitive damages portion of the case. That choice, which it freely made, while not giving the jury a feared "two bites at the apple," deprived the company of the traditional opportunity to acknowledge responsibility after liability had been determined but before the jury had assessed punitive damages.

independent, judgment determines from all the evidence that a punitive award of \$100 million is a reasonable sum to be awarded against Philip Morris in these circumstances.

2. Plaintiffs Causes of Action.

A. Scope of Preemption.

The only claims to which preemption applies involve post-1969 failures to warn through advertising and promotional activities. The Court specifically instructed the jury not to consider such claims for any conduct occurring after July 1, 1969, the effective date of the Federal Cigarette Labeling Act (FCLAA) 15 U.S.C. §§1331, *et seq.* The FCLAA does not preempt any claims submitted to the jury here.

The United States Supreme Court in *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504 expressly rejected the implied preemption theory which defendant advanced from the outset of this case. This Court denied motions *in limine* on the preemption assertions now advanced, and the Court again denies them for the reasons stated in its written *in limine* decision.

Specifically, *Cipollone* does not bar post-1969 claims that Philip Morris committed affirmative fraud by making knowingly false statements, whether in advertisements, promotions, or elsewhere. The Court in *Cipollone* held that the FCLAA preempts post-1969 failure to warn claims: (1) that a manufacturer should have included additional, or more clearly stated, warnings; (2) that cigarette advertising and promotions which, though not false, neutralized federally mandated warning labels; or (3) that cigarette advertisements or promotions concealed material facts, *Cipollone*, 505 U.S. at 524, 527-28. Claims such as tried here, including affirmative fraud, are not preempted - a result not altered by the United States Supreme Court's recent decision in *Lorillard Tobacco Co. v. Reilly* (2001) 121 S. Ct, 2404.

All the evidence admitted at trial was relevant to non-preempted claims. Defendant has not cited one instance in which objected-to but admitted evidence related only to a preempted claim.

B. Reliance.

Plaintiff tried this case on a theory of indirect reliance, One who makes false representations need not have a particular victim in mind. *Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082, 1092. Fraudulent advertising, as an example, is actionable on a theory of indirect reliance. See e.g., *Committee on Children's Television, Inc. v. General Foods* (1983) 35 Cal. 3d 197.

Plaintiff did not need to prove that he remembered actually seeing or hearing Philip Morris's false statements. Reliance may be inferred here from the conduct and beliefs of Mr. Boeken consistent with his reliance on Philip Morris's false, doubt-creating statements, including those made by others acting in concert with Philip Morris, the exact content of which Boeken cannot now recall. As the California Supreme Court stated in *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 814, reliance "may be inferred from the circumstances," which may provide "much stronger and more satisfactory evidence" of reliance than "direct testimony to the same effect." An "inference of reliance arises" when the plaintiffs actions, as here, were "consistent with reliance on the representation." *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal. 3d 355, 363. This result is not inconsistent with *Mirkin* because reliance is not presumed but rather inferred from circumstantial evidence, in the same way facts are inferred circumstantially in other cases. The fact of reliance may be inferred circumstantially from the widespread nature, and false content, of the representations and Mr. Boeken's behavior and beliefs consistent with them.

The cumulative impact of mass disseminated misrepresentations in cases such as here presented permits a circumstantial inference (as distinguished from a presumption) of reliance.

Children's Television., 35 Cal. 3d at 218-19 (where an inference of reliance was permitted from false statements regarding sugared cereals even though the children involved could not recall the specific false statements). While the California Supreme Court in *Mirkin* distinguished *Vasquez* and *Occidental Land*, it did not reject the traditional availability of inferred reliance. Moreover, *Mirkin* did not render *Children's Advertising* inapposite. *Mirkin* disallowed a claim by plaintiffs who said they had generally relied on the integrity of the stock market but, unlike Boeken, did not hear any misrepresentations, either directly or indirectly, to justify that reliance.

While Philip Morris may be correct that fraud claims in California cannot rest solely on visual images, *Maneely v. General Motors Corp.* (9th Cir. 1977) 108 F.3d 1176, 1181, Boeken's claims rest on misinformation which Philip Morris's own documents, and the documents of those acting in concert with Philip Morris, say was widely and purposefully communicated over a period of decades to consumers and the public at large to the effect, among other things, that, in Richard Boeken's words, "tobacco is not harmful" and "there is no good proof or scientific fact that it causes cancer"

The record contains adequate evidence from which a circumstantial inference can reasonably be drawn that Mr. Boeken relied on Philip Morris's misrepresentations forming the basis of the fraud claims here. The Court, exercising its independent judgment, finds it true for the purposes of deciding this motion.

C. Evidence of Felony Convictions.

The Court exercised its discretion to exclude Mr. Boeken's felony convictions under Evidence Code §352 on grounds that their prejudicial effect outweighed their probative value. Plaintiff's cancer is not related to any prior convictions. He did not serve time for any conviction.

The convictions were remote in time, with the most recent occurring 14 years ago.

While Mr. Boeken's credibility was in issue, the Court believed that a probability of undue prejudice existed and that a limiting instruction would most likely not have cured it. The Court, in its discretion, decided against taking the risk in view of the remoteness of the convictions.

D. Strict Products Liability and Negligence.

Plaintiff's experts testified that there were reasonable alternative cigarette designs that would have been safer and that would have reduced the risks. The products liability instructions given repeatedly referred to risks and benefits inherent in the *design* itself, as distinguished from the product itself. It is sufficient for plaintiff to demonstrate the existence of a safer cigarette design or that the risk of harm could have been reduced. Restatement of Law Third, Torts: Products Liability §2. The jury assessed the experts' credibility and their testimony was not so far out of reasonable bounds that this Court should, in exercising its independent judgment, disturb the verdict by granting Philip Morris a new trial.

E. Excusing Juror No. 5.

The Court finds that it properly excused Juror No. 5 for the reasons stated in its Statement of Decision prepared and sealed concurrently with the action taken during trial.

F. Passion and Prejudice.

Philip Morris seeks to set aside the entire verdict on grounds that plaintiff's counsel engaged in misconduct so pervasive that it prejudiced the jury to a degree such that defendant could not receive a fair trial. This trial was hard and fairly fought by counsel on both sides, with the parties well-represented at every turn by exemplary lawyers who consistently adhered the highest standards of courtroom conduct and civility. On rare occasion, counsel on both sides made statements in front

of the jury warranting objections that were made and sustained. The jury understood they were to disregard statements of counsel to which objections were sustained.

Relations of counsel with the jury and Court were such that neither side exhibited, or communicated privately to the Court, any fear of rising to make meritorious objections. Counsel were well aware that the Court would listen in chambers to any reasonable complaints they might have concerning the conduct of opposing counsel.

If, as Philip Morris now asserts for the purposes of this motion, plaintiff's counsel engaged in a sustained pattern of misconduct so egregious that it threatened to deprive defendant of a fair trial, Philip Morris could have, and should have, raised the issue during trial outside the presence of the jury. The Court was ready and willing to sustain objections to particular questions, statements, or arguments of counsel, and did so whenever an appropriate objection was stated. When such objections were sustained, as they were on occasion, counsel on both sides immediately and courteously rephrased or abandoned the point.

In these circumstances, failure to object constitutes a waiver by highly competent and effective counsel of the grounds now asserted for a new trial. None of the cited instances of alleged misconduct by plaintiff's counsel were so egregious standing alone or together that they could not have been cured by an appropriate limiting instruction which the Court would have given if properly requested.

The second portion of defendant's motion for a new trial relating to matters other than punitive damages is denied in its entirety.

III.

JUDGMENT NOTWITHSTANDING THE VERDICT

Philip Morris moves for judgment notwithstanding the verdict on grounds which, in many ways, overlap those stated in its motion for a new trial. Here the trial court must not reweigh the evidence or judge the credibility of witnesses. A judgment notwithstanding the verdict may be granted only if it appears from all the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion must be denied. *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal. App 4th 1497, 1510.

A. Misrepresentation.

Philip Morris urges the Court to enter judgment notwithstanding the verdict on grounds that plaintiff failed to prove that Mr. Boeken ever saw or heard any actionable misrepresentation. As discussed previously, Boeken may prove his case based on a theory in indirect and inferred reliance. Richard Boeken testified that in the 1960s he received misinformation of the nature shown to have been disseminated by Philip Morris, in concert with other members of the tobacco industry and their agents, to the effect that, in Mr. Boeken's words, "tobacco is not harmful" and that "there is no good proof or scientific fact that it causes cancer . . ." Boeken further recalled that in the 1970s he had an understanding that the tobacco industry, including Philip Morris, "disagreed that their product was harmful." Boeken testified, and the jury must have believed, that he trusted and relied on what he heard.

Under the evidence presented, a trier of fact could reasonably infer circumstantially that Philip Morris and those acting in concert with it (including public relations entities formed in the

early 1950s to disseminate misleading information on behalf of Philip Morris and others) were the ultimate sources of the misinformation relied on by Mr. Boeken. The fact that Mr. Boeken, after 35 years of addiction and given his present state of health, could not identify specific sources of misinformation is neither unexpected nor fatal to his case. His behavior over the years and present memory are consistent with him having relied on the Philip Morris-sponsored strategy to create false doubt in the minds of people such as Mr. Boeken. The evidence is sufficient to support a finding by the jury that Mr. Boeken's recollections are about what one would expect to hear from a truthful, life-long, addicted smoker who began consuming cigarettes in the 1950s.

There is sufficient evidence on the record to support findings that during the relevant time period Mr. Boeken read or heard actionable misrepresentations made by Philip Morris, and those acting in concert with it, concerning addiction and disease, and that Boeken in fact relied on them to his unwarranted detriment.

B. Concealment.

The record contains substantial evidence that prior to enactment of the FCLAA, Philip Morris possessed research showing that smoking is in fact addicting and cancer-causing, and that Philip Morris actively concealed that information from its customers and the public at large. There is also substantial evidence that Philip Morris actively engaged in premeditated half-truths calculated to convey the misimpression that genuine questions existed, prior to passage of the FCLAA, as to whether cigarettes were in fact addictive or cancer-causing.

Cases cited by Philip Morris do not require the Court to find, as a matter of law, that the health risks of cigarettes had become matters of such common knowledge before passage of the FCLAA that a judgment must be entered for defendant notwithstanding the verdict. Common

knowledge is, in this instance, a question of fact - one which cuts both ways for Philip Morris and Mr. Boeken. On the one hand, common knowledge in the form of doubt-producing misinformation, supplied by Philip Morris and those in concert with it, is what Richard Boeken claims he relied on to his detriment. On the other hand, common knowledge in the form of accurate information, primarily supplied by persons and entities other than Philip Morris and those acting in concert with it, is what Philip Morris relies on to exonerate itself from liability to Richard Boeken. The record contains days of testimony and many documents pointing in different directions on this central question, and the jury's assessment prevails because it is supported by substantial evidence whichever way the facts are found.

C. Products Liability.

Philip Morris asserts that "the common knowledge described above also disposes of plaintiff's product liability claims" under "the consumer expectations test." That test focuses on the extent of danger contemplated by the ordinary consumer possessed of "ordinary knowledge common to the community." *Barker v. Lull Eng'g Co.* (1978) 20 Cal. 3d 413, 425. The Court is not persuaded that Philip Morris merits a new trial on this issue for the reasons stated in the preceding paragraph.

Philip Morris further asserts that the risk/benefits test of products liability does not apply to cigarettes because that test only applies to cases involving avoidable dangers. *Barker*, 20 Cal. 3d at 430, Philip Morris views the risks associated with cigarettes in black and white, all-or-nothing, terms, rather than as a matter of variable risk, as seen by plaintiff. Ultimately, plaintiff's is the legally correct view. It is sufficient for plaintiff to show that the risk of harm could have been reduced by a known design. Restatement of Law Third, Torts: Products Liability §2. Plaintiff's

experts testified that there were reasonable alternative cigarette designs that would have been safer and that would have reduced the risks.

There is sufficient evidence on the record to support the jury's products liability verdict.

D. Statutory Immunity.

Section 1714.45 of the Civil Code, enacted in 1988, immunized manufacturers from liability for inherently unsafe products in certain circumstances where ordinary consumers know the products are unsafe and, nevertheless, choose to consume them. As originally passed, the statute expressly listed tobacco as an immunized product. Ten years later the Legislature changed its mind, amended §1714.45, and removed statutory immunity for tobacco. Philip Morris, however, contends, among other things, that the statute still immunizes tobacco products from liability for conduct occurring before the January 1, 1998 effective date of the amendment because the amendment is not retroactive. Plaintiff contends, among other things, that the 1998 amendment was intended to have retroactive effect and, in any event, the question of retroactivity does not arise when, as here, a latent disease is first diagnosed after the amendment takes effect.

Philip Morris vigorously and correctly points out that courts do not lightly give retroactive effect to statutes creating civil liability or removing immunities that protect against liability that would otherwise exist. The question is properly within the province of the Legislature, and courts insure that it remains there by requiring a clear indication of retroactive intent before giving a statute retroactive effect. *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207.

The 1998 amendment to Civil Code §1714.45 does not expressly use the term "retroactive," but that is not the end of the inquiry. This Court must read the amendment, and all its provisions, as a whole, giving effect to all material statutory terms, if possible, and avoiding any construction

rendering key provisions meaningless, *Skeketee v. Lintz, Williams & Rothberg* (1985) 38 Cal. 3d 46, 51-52.

The amendment began as Senate Bill 67 introduced by Senator Quentin Kopp. The legislative facts underlying the Bill were summarized in a Comment to the Senate Judiciary Committee analysis dated April 8, 1997:

According to the author's office . . . 'Evidence has now become available showing tobacco companies may have deliberately manipulated the level of nicotine, a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers. In addition, evidence shows the tobacco companies have systemically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use. /7

These legislative facts prompted the Legislature to eliminate the immunity originally provided tobacco products by Civil Code §1714.45. A concern arose in the amending process that courts might not apply the legislation retroactively. On April 8, 1997, a Senate Judiciary Committee Comment pointed out:

Some concern has been expressed that SB 67 would apply only to causes of action arising on or after January 1, 1998, assuming it is enacted this year. In the absence of specific language in the legislation specifying the retroactive application, a

7. Authors' statements evidence Legislative intent. "A legislator's statement is entitled to consideration . . . when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion, *California Teachers Assn. v. San Diego Community College District* (1981) 28 Cal.3d 692, 700.

measure will operate prospectively only upon its enactment.

One week later, almost certainly in response to these expressed concerns, the Senate added subdivision (d) [now (f)] to "clarify" the Legislature's intent by stating that claims which "were or are brought shall be determined on their merits, without imposition of any claim of statutory bar or categorical defense." This language, coupled with the underlying legislative facts and circumstances prompting it, suggests a legislative determination that tobacco products should never have been immunized in the first instance.

Civil Code §1714.45(d) expressly provides that the statute, as amended, "shall apply to all product liability actions pending on, or commenced after, January 1, 1998." That means that on the day the amendment became effective, described cases, including Mr. Boeken's, must be decided on their merits without the statutory bar of former §1714.45 or the categorical defense it had embodied. Sections 1714.45(d) and (f) operate in tandem, and can only achieve their intended purpose in the case of tobacco-related latent injuries by giving them retroactive effect.

The 1998 amendment is replete with past tense language. As an example, the Legislature expressly removed the statutory bar for "California smokers . . . who have suffered or incurred injuries." Civil Code §1714.45(f). It is difficult to understand how the Legislature could have used the term "have suffered or incurred" to describe only smokers who might in the future suffer injuries from conduct occurring solely after January 1, 1998. If the Legislature had intended for the amendment to reach only people who start smoking after January 1, 1998, it would not have used past tense in describing the timing of the injuries involved. If the legislative facts in view are true (i.e., "the tobacco companies have systemically suppressed and concealed material information and

waged an aggressive campaign of disinformation about the health consequences of tobacco use" /8), then failing to provide retroactivity would have prevented suits by present and past smokers whom the Legislature saw as potential victims of the same conduct that prompted the Legislature to amend Civil Code §1714.45. Limiting the amendment to prospective application would, in effect, require the Court to conclude the Legislature chose to avoid dealing with the very legislative facts which it plainly had in mind.

Philip Morris contends the Legislature could not retroactively remove §1714.45's statutory bar and categorical defense, even if it wanted to, because the statute created immutable vested rights. But the immunity codified by Civil Code §1714.45 is not constitutionally immutable, and can be legislatively abrogated if the state's interests outweigh countervailing public reliance interests. In determining whether a retroactive statute contravenes due process, courts consider the significance of the state interest involved, the importance of retroactive application to effectuation of that interest, the extent of reliance on the former law, the legitimacy of that reliance, the extent of actions taken based on that reliance, and the extent to which retroactive application of the new law would disrupt those actions. *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592.

The state interests supporting the 1998 amendments, protecting past and future California tobacco product consumers, are undeniably compelling. There is: no evidence Philip Morris took any action in reliance on §1714.45 other than presumably pleading it as a bar to smokers' lawsuits; no evidence that §1714.45 significantly altered Philip Morris' methods of doing business or caused the company to conduct business differently in California, as contrasted with its business practices

-
8. Interestingly, the jury must have found these legislative facts true, making them judicial facts as well.

in other states where it did not have the protection of §1714.45; and no evidence that retroactive application of the amendment would disrupt any business practices adopted by Philip Morris in reliance on §1714.45. The Court must conclude, therefore, that retroactive application of the amendment does not offend due process here.

Plaintiff essentially characterizes retroactivity as a red herring because Mr. Boeken was first diagnosed with lung cancer after the 1998 amendment became effective. The California Supreme Court grappled with a similar assertion in *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 534-35 in the context of Proposition 51 and stated that: "(In suits] for personal injuries arising from a latent disease . . . applying the law in effect when plaintiff is first diagnosed with the disease, or when the symptoms of the disease first become manifest, will not work a retroactive application of [a statute]." In a later decision the California Supreme Court added (in a different context): "[T]he critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date." *People v. Grant* (1999) 20 Cal.4th 150,157. While the *Buttram* court carefully limited its decision to address Proposition 51 concerns, its core rationale rested on a compelling need to give full effect to the tort reform measures adopted in Proposition 51 in light of the long-term latency involved with asbestos-related disease. That same policy requirement arises here. It is not necessary, however, to apply *Buttram* in the manner urged by plaintiff, because this Court finds the Legislature intended §1714.45 to apply retroactively.

E. Punitive Damages.

Philip Morris contends that even if the evidence supports findings of fraud under a preponderance standard, it does not support such findings under the required clear and convincing

test. The Court finds that the evidence in the record, and highlighted in the discussion of defendant's motion for a new trial on the issue of punitive damages, is sufficient to support a punitive damages verdict rendered by clear and convincing evidence.

IV.
ORDERS

Defendant's Motion for a New Trial is denied, with the exception that Philip Morris's Motion for a New Trial is granted on grounds of excessive punitive damages, subject, however, to the condition that the motion is denied if plaintiff consents to a reduction of punitive damages to the sum of \$100 million and files a written consent to the reduction by August 24, 2001. If plaintiff does not accept this remission, a new trial is granted solely on the issue of punitive damages.

Defendant's Motion for Judgment Notwithstanding the Verdict is denied in its entirety.

DATED: August 9, 2001

_____-[signed]-_____
CHARLES W. McCOY, JR.
Judge of the Superior Court