



IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

**IN RE: TOBACCO LITIGATION
(SMOKELESS TOBACCO CASES)**

**Civil Action No. 00-C-5000
Judge Arthur M. Recht**

THIS DOCUMENT APPLIES TO ALL CASES

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on *Certain Defendants' Motion to Dismiss Long Ago Severed Smokeless Claims in Light of 15 Years of Lack of Prosecution* (Transaction ID 59610936). Defendants are moving to dismiss the universe of claims referred to as the "Smokeless Tobacco" claims on the ground that Plaintiffs have abandoned these claims.

As a starting point, a brief history of the Tobacco Litigation will put the pending motion in the proper context. These cases are categorically referred to as the "Tobacco Cases" and have been pending before this Court for nearly 20 years. The first group of cases to be tried by the Court was referred to as the "medical monitoring cases." These cases were the first group to proceed to trial and concluded with a defense verdict, after which these cases proceeded to the appeal gauntlet and the verdict was affirmed.

The next group of cases is best described as the "cigarette cases." The trial plan for these cases was a bifurcation of issues into two phases. The Phase I trial of the cigarette cases was to determine whether the Defendants in the cigarette cases manufactured a defective product, as that term is defined in the *Morning Star v. Black and Decker Mfg. Co.* 162 W.Va. 857 (1979), and whether the conduct of these same Defendants would justify an award of punitive damages. A verdict was returned in the Phase I trial on May 15, 2013, finding that only one type of

cigarette was defective, and that the conduct of the Defendants would not support a punitive damage claim.¹

The next group of cases involved a single Defendant Manufacturer, Liggett Group LLC. The Liggett cases were severed from Phase I the cigarette cases by agreement of all parties. The Court has recently entered a Case Management Order and Trial Plan moving these cases forward.²

The final group of cases is referred to as the “smokeless tobacco cases” to distinguish them from the cigarette cases. The smokeless tobacco cases were severed from the cigarette cases with no party objecting to the severance by Order dated December 3, 2001. The reason for the severance was to avoid any confusion between the cigarette cases involving a smoked product and the smokeless tobacco cases involving tobacco products not smoked. It was always the contemplation of the Court that the smokeless tobacco cases were to be scheduled for trial at or near the completion of the cigarette cases. We are now at the juncture where the smokeless tobacco cases can be scheduled for trial.

The Certain Defendants’ Motion to Dismiss Long Ago Severed Smokeless Claims in Light of 15 Years of Lack of Prosecution asserts that the smokeless tobacco claims are procedurally barred because they were abandoned at the time the smokeless tobacco cases were severed from the cigarette cases. Quite frankly, this abandonment argument comes as a great surprise to the

¹ On May 15, 2013, the Phase I jury rendered a defense verdict, except for the claims of those plaintiffs who alleged they were injured by a failure to instruct with respect to “ventilated filter cigarettes” manufactured, sold, and smoked between 1964 and July 1, 1969. Plaintiffs appealed the Phase I verdict, which was upheld by the Supreme Court. On June 8, 2015, the Court conducted a hearing regarding Phase II, and found that: 1) the term “ventilated filter cigarettes” means cigarettes with ventilated filters first introduced in 1964; and 2) there are only 30 plaintiffs who allege they smoked a brand of cigarettes during the relevant time period of 1964 to July 1, 1969, that arguably fall within the category of ventilated filter cigarettes. The Court ruled that Phase II proceedings are limited to the failure to instruct claim described in Phase I Verdict Question 1(c), and directed the parties to submit a proposed joint case management order or, if no agreement was reached, their respective proposals. Counsel identified the first five cases for Phase II trial on December 14, 2015.

² Liggett Group LLC’s Case Management Order and Trial Plan entered on January 10, 2017 (Transaction No. 60048276).

Court. It was never contemplated that anything would be tried in the smokeless tobacco cases until Phase I of the cigarette cases was resolved.

If the smokeless tobacco Defendants had argued at the time of severance that the smokeless tobacco cases should be scheduled for trial at any time before the completion the Phase I cigarette cases trial, the parties and the Court would have discussed that issue at the time severance was being considered. It cannot be stated enough that the reason for the severance of the smokeless tobacco cases was to avoid confusion between two separate and distinct tobacco products. The severance of these two types of products simply made good sense.

The Court notes that the abandonment argument is only being made by some of the Defendants who were in Phase I of the cigarette cases trial. The assertion that the smokeless tobacco claims have been abandoned *after* these certain Phase I cigarette cases Defendants have benefited from severance of these two types of tobacco products, at best, disingenuous.

Accordingly, the *Certain Defendants' Motion to Dismiss Long Ago Severed Smokeless Claims in Light of 15 Years of Lack of Prosecution* is **DENIED** for the reasons stated in this memorandum opinion.

It is so **ORDERED**.

Enter: January 25, 2017.

/s/ Arthur M. Recht
Senior Status Judge
Tobacco Litigation