Products Liability Law Daily Wrap Up, DAMAGES—TOBACCO PRODUCTS—M.D. Fla.: $20M punitive damages award against Philip Morris upheld, (Sept. 16, 2019)

Products Liability Law Daily Wrap Up

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By David Yucht, J.D.

By bringing several motions post-appeal, Philip Morris was conducting a "rear-guard action" that "served no … purpose" except "to delay payment" of a judgment. Sanctions should be considered in case of further unsuccessful appeal.

A federal district court in Florida determined that Philip Morris USA, Inc. had presented no reason to modify a jury verdict against it in a case filed by a former smoker who developed chronic obstructive pulmonary disorder (COPD). Based on the verdict, which already had been reviewed by the U.S. Court of Appeals for the Eleventh Circuit, the tobacco company must pay $6.25 million in compensatory damages and $20,760,000 in punitive damages (*Cote v. Philip Morris USA, Inc.*, September 13, 2019, Carr, J.).

A former cigarette smoker developed COPD after decades of smoking. She filed a complaint against several tobacco companies, including Philip Morris. She sued under theories of negligence, strict liability, fraudulent concealment, and conspiracy to conceal. The case proceeded to a bifurcated jury trial against Philip Morris. After the first phase of the trial, the jury returned a verdict for the former smoker and awarded her $6.25 million in compensatory damages. A second phase of the trial was conducted in which the jury decided how much in punitive damages to award. Following this second phase, the jury returned a punitive damages verdict of $20,760,000. After trial, the court granted Philip Morris judgment as a matter of law on the fraudulent concealment and conspiracy-to-conceal claims for lack of proof. Consequently, it vacated the $20.7 million punitive damages award.

On appeal, the Eleventh Circuit affirmed the denial of Philip Morris's motion for remittitur and a new trial based on improper arguments, as well as the rejection of Philip Morris's due process and federal preemption arguments. The appellate court also reversed the trial court's order granting Philip Morris judgment as a matter of law on the intentional tort claims and remanded the matter for the re-instatement of the jury's punitive damages award [see *Products Liability Law Daily*'s January 18, 2019 analysis]. Philip Morris thereafter moved before the trial court, filing: (1) a renewed motion for new trial or, in the alternative, remittitur of the punitive damages award; (2) a renewed motion for judgment as a matter of law on the punitive damages claims; and (3) a renewed motion to amend the judgment to apply credit for guaranteed sum in accordance with stipulation. All three motions were denied.

New trial. The court denied Philip Morris's motion for a judgment as a matter of law or, alternatively, a new trial. In arguing for a new trial, Philip Morris contended that "[t]he punitive damages award in this case is so grossly excessive and unsupported by the evidence that it could only have been the product of passion or prejudice." This argument was barred by the mandate rule, which provides that subsequent courts are bound by any findings of fact or conclusions of law made by the court of appeals in a prior appeal of the same case. In the prior appeal, the Eleventh Circuit had affirmed the motion court's denial of Philip Morris's previous motion for a new trial based on improper closing arguments.

Punitive damages. The court also denied the motion to reduce the punitive damages award. The motion court found that Philip Morris's conduct was easily in the upper range of reprehensibility, that the 3.3 to 1 ratio of punitive damages to compensatory damages was reasonable, and that the punitive damages here were comparable to the civil penalties assessed in similar cases under Florida law. Philip Morris's argument that

new legal restraints would prevent repetition was unconvincing because fraudulent concealment has long been unlawful, but that did not stop Philip Morris from deceiving Congress, regulators, and the public about the addictive and hazardous characteristics of cigarettes. Philip Morris offered no convincing reason why new legal restraints were guaranteed to prevent further intentional misconduct. The former smoker had introduced ample independent evidence showing that Philip Morris engaged in intentional misconduct. For example, Philip Morris knew that cigarette smoke caused diseases like lung cancer and COPD, but intentionally concealed such information. Philip Morris and several other cigarette makers founded the Tobacco Industry Research Committee (TIRC) as a front for disseminating misinformation and distraction science, with the goal of discrediting scientific evidence showing that cigarette smoke posed serious health risks. Based on internal research dating back to the 1940s and 1950s, Philip Morris and other cigarette makers knew that nicotine was addictive, and cigarette companies designed cigarettes to maximize addictiveness. Moreover, Philip Morris designed a marketing strategy that targeted adolescents, knowing that 90 percent of smokers start in their youth.

Other issues. The court also denied Philip Morris's motion for a credit based on a "Guaranteed Sum Stipulation" that Philip Morris and the *Engle* class (*Engle v. Liggett Group*, *Inc*., 945 So. 2d 1246 (Fla. 2006)) had agreed to in 2001. The court noted that every Florida appellate court to have addressed this argument had rejected it. In its conclusion, the motion court referred to these motions as a "rear-guard action by Philip Morris" that "served no other purpose than to delay payment of the judgment." Moreover "[l]ike all rear-guard actions, its fusillade of scattershot arguments had no hope of avoiding the ultimate outcome. Like obedient foot-soldiers, its attorneys dutifully followed the orders of those in charge, to whom the foreseeable result was of immaterial consequence." The judge warned that if the cigarette manufacturer were to unsuccessfully appeal this decision, he would urge the Court of Appeals to issue sanctions.

The case is No. 3:09-cv-14157.

Attorneys: Charlie Easa Farah, Jr. (Farah & Farah, PA) for Judith Berger. Bonnie C. Daboll (Johnson Daboll Anderson PLLC) for Philip Morris USA, Inc. Dana G. Bradford, II (Smith, Gambrell & Russell, LLP) for Liggett Group, LLC.

Companies: Philip Morris USA, Inc.; Liggett Group, LLC

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