

Philip Morris Case Gives Defendants Hope For Lower Damages

By **Greg Ryan**

Law360, New York (December 12, 2012, 10:01 PM ET) -- A Florida appeals court ruled Wednesday that a judge should have ordered a new trial when he determined a \$300 million jury award against Philip Morris USA Inc. was too high, and not simply reduced the total — a decision that gives second life to companies that can show jurors' anger unduly influenced damages.

At issue in the appeal was \$36.8 million in damages awarded by Judge Jeffrey Streitfeld to plaintiff Lucinda Naugle, who claimed smoking caused her severe emphysema. Naugle's lawsuit was one of thousands lodged after the Florida Supreme Court overturned a \$145 billion verdict and decertified a class in *Engle v. Liggett Group Inc.* in 2006. The ruling allowed as many as 700,000 class members to sue using the jury's liability findings.

The jury originally awarded Naugle \$300 million in damages, but Judge Streitfeld reduced that total, granting Philip Morris' motion for remittitur. Jury members failed to limit their consideration to the harm caused to Naugle alone, as they were "moved by passions — sympathy for [Naugle's] suffering and anger toward [Philip Morris'] conduct and strategy," the judge said.

But Florida's Fourth Appellate District found that Judge Streitfeld should have ordered a new trial if he believed the jury was prejudiced and ignored his instructions. The appeals court overturned the decision to deny Philip Morris a new trial on the issue of compensatory and punitive damages, though it upheld the judge's findings of liability for the damages. The decision upended the notion that the reduction of damages by a judge forecloses the possibility of a new trial, according to attorneys.

"I thought that was very interesting, because generally speaking, if you move for remittitur and you win, it takes away a lot of your prejudice argument," Cooley Manion Jones LLP partner Brian Gross said.

If defendants can persuade a judge that a jury was in some way biased, they can point to the Fourth District ruling to try to win a new damages trial, attorneys said. Or if a defendant remains unsatisfied with an award reduction after the judge finds a jury was prejudiced, it can insist on a new trial.

"The decision turned on the fact that even though the trial court issued a remittitur of the damage awards, it specifically found that the awards were infected by passion and prejudice," Faegre Baker Daniels LLP partner James O'Neal said.

The benefits conferred by the ruling are not limited to tobacco companies in *Engle* cases, either, they said.

"It really affects anyone who has the specter of punitive damages lying out there, particularly where you have multiple plaintiffs," Gross said. "This is certainly something that would have an impact on asbestos cases ... or other types of toxic tort cases."

Though it reversed the denial of the motion for new trial, the Fourth District did uphold other portions challenged by Philip Morris.

It affirmed the lower court's denial of Philip Morris' request that it reject the verdict on Naugle's fraudulent concealment and conspiracy claims, saying only the jury could determine whether Naugle would have kept smoking the company's cigarettes if it had disclosed information about their risks, as well as whether she justifiably bought into a fake controversy about smoking's effects after May 5, 1982.

"The jury found for Naugle on these issues, and as the jury's findings are supported by competent substantial record evidence, we do not disturb these findings on appeal," the Fourth District said.

In addition, Philip Morris conceded during oral arguments that a September 2011 ruling by the Fourth District foreclosed its argument that the lower court had misapplied Engle and improperly instructed the jury as to legal causation, the court said. In that case, the appeals court concluded R.J. Reynolds Tobacco Co. was essentially trying to relitigate points that the Florida Supreme Court had upheld while reviewing the Engle action.

The state's Supreme Court is currently weighing a decision in Philip Morris v. Douglas, in which tobacco companies are arguing that the state court's application of its so-called Engle III decision has overstepped their constitutional due process rights.

A spokesman for Altria Group Inc., Philip Morris' parent company, declined to comment on the ruling. Attorneys for Naugle could not be immediately reached for comment.

Judges Mark Polen, Carole Taylor and Fred Hazouri sat on the panel for the appeals court.

Naugle is represented by Richard Rosenthal of Richard B. Rosenthal PA, Joel Perwin of Joel S. Perwin PA and Robert Kelley, John Uustal and Todd McPharlin of Kelley Uustal PLC.

Philip Morris is represented by Gary Sasso and Joseph Lang Jr. of Carlton Fields PA and Andrew Brenner and Stephen Zack of Boies Schiller & Flexner LLP.

The cases are Philip Morris USA Inc. v. Naugle, case numbers 4D10-1607 and 4D10-3574, in the Florida District Court of Appeal, Fourth District.

--Additional reporting by Bibeka Shrestha and Megan Stride. Editing by Elizabeth Bowen.