

Fla. Court Affirms Defense Verdict In Smoker's \$29M Suit

By **Carolina Bolado**

Law360, Miami (October 13, 2016, 4:11 PM EDT) -- A Florida appeals court on Thursday affirmed a defense verdict in favor of Philip Morris USA Inc., rejecting a former smoker's bid for a second chance to try his \$29 million suit against the cigarette maker for allegedly causing his laryngeal cancer.

Florida's Third District Court of Appeal said that the trial court did not err when it denied plaintiff Jose Vila's request for a new trial after a jury found that although smoking and addiction to cigarettes caused his cancer, the cigarettes made by Philip Morris did not.

Vila argued on appeal that the second question on the jury verdict form — which specifically asked if Philip Morris cigarettes were a legal cause of Vila's cancer — should not have been sent to the jurors because Philip Morris had failed to plead the liability of E. Leon Jimenes Co., which manufactured the Marlboro cigarettes that Vila smoked when he lived in the Dominican Republic, as an affirmative defense.

But the appeals court said that Philip Morris presented an “empty chair” defense instead of including the Jimenes company on the verdict form and having the jury apportion liability to it.

“To present an 'empty chair' defense, the defendant need only answer the complaint with a general denial and argue to the jury that the injury was due to the negligence of a nonparty to the suit,” the Third District said. “As an 'empty chair' defense is not truly an affirmative defense, it does not have to be pled in the defendant's affirmative defenses.”

Vila's case stemmed from the landmark *Engle v. Liggett Group* class that won a \$145 billion verdict against tobacco companies. In 2006, the Florida Supreme Court overturned the verdict and decertified the class but allowed up to 700,000 individuals to rely on the jury's liability findings in their own suits.

Vila sued the tobacco giant, which is a subsidiary of Altria Group Inc., for monetary damages on the premise that his years of heavy cigarette smoking made him sick and that he had no idea cigarettes could cause cancer, thanks to the marketing cover-up of smoking's adverse health effects perpetrated by the big tobacco companies beginning in the 1950s.

He sought damages in a range of \$13 million to \$29 million. Plaintiff's counsel Allan B. Kaiser of The Ferraro Law Firm PA at trial compared his condition — Vila had to have his larynx removed and now breathes through a stoma in his throat — to a job that no one wants and that he must live with constantly. His complaint also called for punitive damages.

Philip Morris contested Vila's fraud and concealment claims on the grounds that the Engle findings do not extend to smoking activity that occurred outside of the United States. Vila was born in Cuba in 1954 and moved to Spain in 1969 and then the Dominican Republic in 1974 before settling in Miami in 1989.

The cigarette maker raised doubts about whether Vila really smoked the company's Marlboro cigarettes when he took up the habit at age 15, saying that they were expensive and unpopular in Spain at the time. Philip Morris also argued that the Marlboros that Vila smoked in the Dominican Republic, during his heaviest period of smoking, were made by the Jimenes company under a license agreement, leaving only three and a half years of definite exposure to Philip Morris-made products before his cancer appeared.

In January 2015, a jury returned a defense verdict for the cigarette maker.

Vila is represented by Allan B. Kaiser and Eric M. Tinstman of The Ferraro Law Firm PA.

Philip Morris is represented by Robert A. McCarter, Miranda L. Soto and Michael L. Walden of Shook Hardy & Bacon LLP.

The case is Vila v. Philip Morris USA Inc., case number 3D15-1853, in the Third District Court of Appeal of Florida.

--Additional reporting by Nathan Hale. Editing by Stephen Berg.