

## Engle Plaintiff Seeks \$29M As Philip Morris Case Goes To Jury

By **Nathan Hale**

*Law360, Miami (January 22, 2015, 9:42 PM ET)* -- Attorneys for Philip Morris USA Inc. and a smoker alleging the company's concealment of health risks caused his laryngeal cancer wrapped up closing arguments Thursday in the first Engle progeny case to go to trial this year, with the plaintiff asking the Florida state jury for upwards of \$29 million in damages.

The six jurors heard closing arguments Thursday, then deliberated for two hours before going home for the night. They must determine if smoking was the cause of plaintiff Jose Vila Jr.'s cancer, if he was addicted to cigarettes containing nicotine, and whether addiction was the legal cause of his illness. If they find his claims clear those hurdles, they must also decide whether Vila chose to smoke based on a reliance on the tobacco giant's statements — or, in this case, concealment — of the inherent health risks.

Philip Morris counsel Robert A. McCarter of Shook Hardy & Bacon LLP argued that the plaintiff's case failed to prove any of those points, pointing to Vila's personal decisions to smoke and not to follow up with cancer doctors as recommended. Vila had to have a laryngectomy when the disease returned in 1996, two years after it was first treated.

"Our position is that Mr. Vila is 100 percent responsible for the choices he made in life and also 100 percent responsible for the consequences of those choices," McCarter said.

Vila attorney Allan B. Kaiser of The Ferraro Law Firm PA countered that the defendant, a subsidiary of Altria Group Inc., is wrongly trying to dump all of the blame on his client after covering up the dangers of smoking from the public for 50 years.

"Think of why he was in that situation with cancer in the first place. It's because of Philip Morris," Kaiser said.

Vila's case is the first to go on trial in 2015 stemming from the landmark Engle v. Liggett Group class that won a \$145 billion verdict against the 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.

He sued the tobacco giant for monetary damages on the premise that his years of heavy cigarette smoking made him sick, claiming he had no idea that cigarettes could cause cancer thanks to Big Tobacco's marketing cover-up of smoking's adverse health effects beginning in the 1950s.

The sides clashed in closing arguments over the cause of Vila's cancer, with the defense pointing to certain factors in Vila's personal background, characteristics of his illness, and medical testimony they say indicates that human papillomavirus was the true culprit, not his years of smoking.

Kaiser accused the defense of filling its case with half-truths, but McCarter argued that a doctor who testified for the plaintiff as a rebuttal witness ultimately acknowledged that she could not rule out HPV as the cause.

The issue of addiction caused similar disagreement over competing testimony of expert witnesses.

McCarter argued that even if the jury finds Vila was addicted to cigarettes and his cancer was caused by smoking, Vila's addiction was not the legal cause of his cancer. Instead, he held that Vila made a conscious decision to smoke because he liked it and never tried to quit. Kaiser said addiction caused Vila to smoke more cigarettes, which caused more toxins to enter his body and make him sick.

Philip Morris also contends that that Vila, who was born in Cuba in 1954, moved to Spain in 1969 and then to the Dominican Republic in 1974 before settling in Florida in 1989, was not exposed to any of its marketing or other statements covered by Big Tobacco's alleged conspiracy.

McCarter also attempted to raise doubts about whether Vila really smoked the company's Marlboro cigarettes when he took up the habit at age 15, saying they were expensive and unpopular in Spain at the time. And he said the Marlboro cigarettes Vila consumed in the Dominican Republic were manufactured by another company under a license agreement, leaving only 3 1/2 years of definite exposure to Philip Morris-made products before his cancer appeared.

Kaiser said that Vila had seen Marlboro advertisements in Spain and also reminded the jury that since it is a concealment case, its instructions said Vila did not have to provide evidence of an overt statement from the tobacco company.

"You may infer Jose Vila's reliance," Kaiser said, adding, "What he relied on was their most important statement, their advertisements."

The sides also clashed on the extent of Vila's depression and whether it is rooted in his smoking and medical condition or other events in his life.

On the subject of possible damages, Vila's counsel compared his current condition to a job that no one wants and suggested compensatory damages based on a range of \$75 to \$125 per hour for the next 20 years, which would amount to an award of \$13 million to \$29 million. The jury is also to decide on whether there are grounds for punitive damages against Philip Morris.

The defense panned the suggestion, saying it amounts to paying Vila \$20 million for deciding to smoke and not quit.

"That's an absurd amount of money, particularly in light of the facts of the case, when Mr. Vila is the source of his injuries," McCarter said.

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 2013-12833-CA, in the Eleventh Judicial Circuit Court of Florida.

--Additional reporting by Carolina Bolado. Editing by Mark Lebetkin.

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