

\$5M Punitive Award Reversed In Philip Morris Engle Suit

By **Greg Ryan**

Law360, New York (May 2, 2012, 9:01 PM EDT) -- A Florida appeals court reversed a \$5 million punitive damages award Wednesday in a so-called Engle progeny suit against Philip Morris USA Inc., ruling it was time-barred based on the date the plaintiff's deceased husband was found to have relied on the company's statements about its cigarettes.

The suit brought by the estate of Stuart Hess 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 up to 700,000 class members to sue using the jury's eight liability findings.

While the Engle ruling established that Philip Morris and other manufacturers hid the dangers of smoking from consumers, Hess' wife, Elaine Hess, still needed to show that her husband had relied on those omissions in the 12 years before he first brought claims, as per a statute of repose, according to the court. Stuart Hess died of lung cancer after chain smoking for decades.

Because the jury found Hess' husband had relied to his detriment on Philip Morris' omissions only outside the 12-year window, the statute of repose bars Hess' punitive damages award and the fraudulent concealment claim it was based on.

"The triggering event set forth in the applicable statute of repose, 'the date of the commission of the alleged fraud,' necessarily includes reliance by the plaintiff," the court said. "If it did not, a plaintiff would still be able to seek recovery from a defendant based on the defendant's defrauding of third parties after the 12-year repose period applicable to the plaintiff."

The court affirmed the remainder of the lower court's judgment, however. It upheld the lower court's application of the Engle findings on each of the three claims brought by Hess, including strict liability and negligence claims.

A jury awarded Hess \$3 million in compensatory damages and \$5 million in punitive damages in February 2009, though a judge reduced the compensatory damages to \$1.26 million based on the jury's finding that Stuart Hess was 58 percent responsible for his injuries.

Philip Morris appealed the judgment on three bases: that the court had misapplied Engle, that it should not have denied a motion for judgment as a matter of law on the fraudulent concealment claim filed after the verdict, and that it should have remitted the punitive damages award because it was excessive.

Elaine Hess also appealed part of the lower court's judgment, arguing it should have not have reduced compensatory damages based on her husband's comparative fault.

Hess' counterclaim was denied as moot following the reversal of the fraudulent concealment claim judgment, as was Philip Morris' appeal regarding the denial of its motion for remittitur.

A Philip Morris representative and an attorney for Hess could not be immediately reached for comment on the decision.

Judges Dorian K. Damoorgian, Mark E. Polen and Robert M. Gross decided the appeal.

Philip Morris is represented by Miguel A. Estrada of Gibson Dunn & Crutcher LLP, Patricia A. Melville, Andrew S. Brenner and Luis E. Suarez of Boies Schiller & Flexner LLP, and Gary L. Sasso of Carlton Fields.

Hess is represented by Bruce S. Rogow and Cynthia E. Gunther of Bruce S. Rogow PA, Gary M. Paige and Adam Trop of Paige Trop & Ameen PA, and Alex Alvarez of the Alvarez Law Firm PC.

The case is Philip Morris USA Inc. v. Hess, case number 4D09-2666, in the Florida District Court of Appeal, Fourth District.

--Additional reporting by Evan Weinberger. Editing by Kat Laskowski.