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## **Tobacco Cos. Urge Fla. Appeals Court To Move Engle Case**

By **Nathan Hale**

Law360, Miami (November 19, 2013, 3:46 PM ET) -- Tobacco companies told a Florida appeals court Tuesday that a trial judge erred in ruling that an Engle progeny case should proceed in Miami-Dade County, saying statutory factors dictate a transfer to Duval County.

Counsel for R.J. Reynolds Tobacco Co., Philip Morris USA Inc. and Lorillard Tobacco Co. told the three-judge panel that Miami-Dade County is not a convenient forum for the underlying wrongful death case brought by plaintiff Lesia Mooney on behalf of her late mother Barbara Meacham, who died from lung cancer as a result of smoking cigarettes.

The appellants said the only connection to Miami-Dade County is Mooney's choice of venue. She lives in Jacksonville, Meacham was diagnosed and treated for her illness there and most of the Mooney's prospective witnesses, including family members, also live in surrounding Duval County in northern Florida or out of state.

"Regardless of which of the witnesses are going to testify or not, none of them are here," appellants counsel Andrew Brenner of Boies Schiller & Flexner LLP told the court.

The suit is one of thousands stemming from the so-called Engle class action — named for plaintiff and physician Howard Engle — which the Florida Supreme Court decertified in 2006, overturning a \$145 billion award.

The state's highest court upheld the class action jury verdict on common issues relating to the defendant tobacco companies' conduct, but

decertified the class for liability and damages purposes, allowing class plaintiffs to sue individually. The ruling allowed as many as 700,000 class members to sue using the jury's liability findings.

Mooney alleged Miami as a proper venue because the original class action named Miami-based Vector Group as a defendant, but she did not name Vector Group as a defendant in her complaint, the tobacco companies said in their brief.

Brenner contended that the Third District's 1996 ruling in *Westchester Fire Insurance Co. v. Fireman's Fund Insurance Co.* established it was the policy of the court to literally apply the doctrine of *forum non conveniens* and require transfer of cases when a case has little connection other than a plaintiff's choice of venue and the parties and witnesses reside elsewhere.

Mooney's counsel, David J. Finger of The Ferraro Law Firm, argued that the appellants have not met their burden, as the movant, in proving Miami would be an inconvenient forum for the case and emphasized that the trial judge had agreed that it was too early in the proceedings to determine convenience because it is not known which witnesses are going to prove most important to the case.

"I submit it would be counterproductive to move the case to Duval County, then take the depositions of these witnesses and find they say, 'We don't remember anything,'" Finger said.

The appeals panel questioned if the argument of timing could simply be turned around later such that if discovery takes place in Miami then the plaintiffs would later argue that the case should not move at that point because it had proceeded there for several years.

Brenner also seized upon that point, saying: "It's sort of the Goldilocks principle here — it's too old, it's not old enough."

Judge Leslie B. Rothenberg expressed concern whether the trial judge had fully considered all of the factors to determine forum convenience and looked not only at the convenience for the parties and the witnesses but also if moving the case is in the "interest of justice."

Judge Kevin Emas also asked if in considering convenience, whether the court could consider more than just geographic convenience.

Finger argued that all three factors still favored keeping the case in Miami because the state of the docket must be considered and restarting in another county might send the case to the “back of the line” in a new judicial circuit.

He acknowledged that he did not know the details of the Duval County court, but again said that was the other side's burden to prove.

Judge Linda Ann Wells questioned how the tobacco companies' argument would fit with plaintiffs' privilege to select a venue within the state and she also pulled the conversation back to note that the appellants' argument must clear a higher hurdle before the appeals panel, which is confronted with the question of whether Circuit Judge Stanford Blake abused his discretion and if no reasonable person could come to the conclusion he reached.

Judges Linda Ann Wells, Leslie B. Rothenberg and Kevin Emas sat for the Third District.

Philip Morris USA Inc. is represented by Andrew Brenner, Mark J. Heise and Stephen N. Zack of Boies Schiller & Flexner LLP and Geoffrey J. Michael of Arnold & Porter LLP.

R.J. Reynolds Tobacco Co. is represented by Benjamine Reid and Olga M. Vieira of Carlton Fields PA and Charles R.A. Morse of Jones Day.

Lorillard Tobacco Co. is represented by Elliot H. Scherker and Julissa Rodriguez of Greenberg Traurig PA.

Mooney is represented by David J. Finger of The Ferraro Law Firm.

The case is R.J. Reynolds Tobacco Co. et al. v. Lesia Mooney et al., case number 3D13-1176, in the Third District Court of Appeal of the State of Florida.

--Additional reporting by Sean McLernon. Editing by Chris Yates.