

Appeals Court in Brazil Overturns US\$ 13 Bi Judgement Against Philip Morris

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In Brazil, the 7th Civil Chamber of the Court of Appeals of the State of São Paulo repealed, by unanimous vote, the judgment of the court of 1st instance that had found in favor of the indemnification claim brought by the Association for the Defense of the Health of Smokers (ADESF) against two Brazilian cigarette manufacturers.

The companies involved are Souza Cruz, a subsidiary of British American Tobacco, and Philip Morris Brasil, a subsidiary of Philip Morris International. They were found guilty of misleading advertising and had been ordered to pay 30 billion reais (US\$ 13.2 billion) in damages in 2004.

In the first judgment, the judge had determined that every Brazilian smoker should receive 1,000 reais (US\$ 439) for every year he or she had smoked. The judge arrived at the US\$ 13.2 billion by assuming an average of 10 years of smoking for each smoker.

The Court of Appeals granted the appeals of the manufacturers on grounds that the lower civil court decision had violated the constitutional principle of due process of law since it had failed to extend to the manufacturers the opportunity of producing any evidence, including expert evidence that had already been ordered by the Court of Appeals itself.

This case, which is the first lawsuit of this nature filed in Brazil, began with the filing of a class action at the 19th Civil Court of São Paulo in July of 1995.

The plaintiff is ADESF, an association initially created by three attorneys and a doctor, 14 days prior to the filing of said lawsuit, which seeks to represent all smokers in Brazil. The entity is also linked to several anti-tobacco organizations and maintains a broad network of attorneys throughout the country for the purpose of filing lawsuits against cigarette manufacturers.

The 2004 lower court early judgment, which the Court of Appeals set aside, had found in favor of ADESF's requests, which sought indemnification for "all the consumers of defendant's products" for moral and material damages attributed to tobacco, in addition to having the manufacturers include in the cigarette packages the warning already imposed by the Ministry of Health in 1999.

With the decision of the Court of Appeals, the case returns to the original trial court for production of evidence and new judgment.

All class actions of this type that have already been judged conclusively by Brazilian Courts ended without the intended liability of the manufacturers. The subject matter of these class actions is identical to that of hundreds of individual actions already dismissed throughout the country.

The São Paulo State Court of Appeals alone has already rendered more than 30 rulings rejecting this type of product liability claim.

The main reasoning of the Brazilian Courts for rejecting this type of claim is: consumers have free will to decide (or not) to smoke, since the decision to consume the product or not is a question of free choice, the widespread public knowledge of the diseases associated with cigarette consumption and the absence of defect in the product because it is a product of inherent risk, the manufacture, distribution and sale of which in Brazil is authorized and subject to severe regulations by the state.