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## Kirkland & Ellis lawyer McGaan earns another win in a tobacco case

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The lawsuit that 37 hospitals in Missouri pursued against the tobacco companies took 13 years to come to trial.

The defendants, represented by lead defense counsel Andrew R. McGaan of Kirkland & Ellis LLP, presented only three witnesses and won the case last Friday.

Those 37 hospitals in the trial in Missouri Circuit Court in St. Louis had sought \$455 million to recover the costs of treating indigent and nonpaying patients who were injured by smoking. The hospitals came away empty-handed.

"It was a long haul," McGaan said this week. He said he has represented tobacco companies now in at least eight lawsuits and won all but one.

In the one, there was a partial verdict for the plaintiffs, he said, "but we won on appeal."

"My clients don't argue that cigarettes are safe to smoke," McGaan said. "They acknowledge that nicotine is addictive and cigarette smoking is a habit that can pose serious health risks for some smokers. ...

"I'm personally comfortable with defending them," McGaan said. "Besides the challenge of representing unpopular and sometimes vilified defendants — one of the sort of high arts of trial lawyers — aside from that, I believe strongly in freedom of choice.

"People should be free to choose lifestyles even if they are unacceptable to other people. That's one of the things that makes this a great country."

The hospitals had alleged that a group of tobacco companies, including three that were clients of Kirkland & Ellis, namely R.J. Reynolds, Brown & Williamson and

American Tobacco, conspired to manipulate nicotine content in tobacco products; concealed and misrepresented information on the dangers of smoking and the addictive nature of nicotine; that they claimed for a long time smoking was healthful; and that tobacco companies targeted minors and minority groups with advertising.

Plaintiff lawyer Kenneth C. Brostron of Lashly & Baer P.C. in St. Louis said, "we maintained that ... cigarette manufacturers could make cigarettes nonaddictive but choose not to do that and that therefore their products are defective and unreasonably dangerous.

"The jurors we talked to agreed with us but found that the hospitals weren't damaged. They found the hospitals were paid for treating smokers more so than the costs that they incurred for treating smokers who didn't have insurance."

"The tobacco companies said hospitals made money on treating the 95 percent of the patients who did have insurance" or Medicare or Medicaid, Brostron said, "and that covered the costs of treating patients who didn't. It's not true, but the jury agreed with them."

After six days deliberations, the jury voted 9-3 in favor of the defendants. In a Missouri civil case, nine votes is necessary for a verdict, Brostron said.

The hospitals have until May 29 to decide if they wish to appeal.

The suit was originally filed in 1998. Jury selection began Jan. 10. Testimony began Jan. 31.

McGaan said the plaintiffs called 29 chief executive officers of hospitals or chief financial officers as witnesses and 12 experts.

Through cross-examination of the plaintiffs' witnesses, the defense team concluded it had already put on most of the information it wished to present, McGaan said.

For instance, McGaan said in his closing argument that a plaintiff expert witness admitted nicotine is natural to tobacco and is not added to it. McGaan argued that the hospitals' witnesses "admitted over and over ... they've always known that nicotine was addictive," yet hospitals used to sell cigarettes in their gift shops.

"We decided not to call any company witnesses from any defendant," McGaan said. "Instead, we put on three experts whose focus was to show the jury that, assuming we were negligent, the hospitals weren't damaged."

"Our witnesses demonstrated that the hospitals don't lose money by treating more patients. ... They grow revenue and profits by increasing patient population."

McGaan also argued in his closing statement that cigarettes and other tobacco products are legal, that cigarettes may be dangerous, but lawn mowers are dangerous, too.

In an interview, McGaan said, "There are plenty of dangerous or risky products out there." Society permits some of these, such as cigarettes, and outlaws unreasonably dangerous products, like narcotics.

Womble, Carlyle, Sandridge & Rice PLLC also represented the clients that Kirkland represented. Dechert LLP and Goodwin, Procter LLP represented Altria Group. Thompson, Coburn LLP represented Lorillard. Chadbourne & Parke LLP represented British American Tobacco. And Kasowitz, Benson, Torres & Friedman LLP represented Liggett Group.