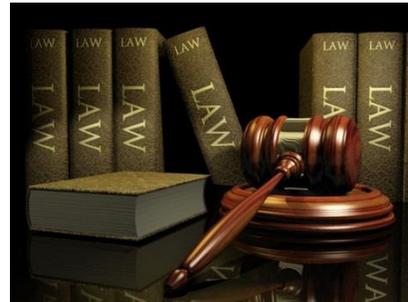


What is the “*Engle* Progeny” Litigation?

In 2006, the Florida Supreme Court decertified a massive class action lawsuit initially filed in 1994 by a Miami Beach pediatrician named Howard Engle for injuries suffered because of the health effects of smoking. This ruling, and special procedural advantages granted by the court, resulted in former class members filing thousands of individual lawsuits against cigarette manufacturers stating that cigarettes caused their respective illnesses. The suits have created a constant stream of trials in Florida’s state and federal courts, resulting in jury verdicts for the plaintiffs in the majority of cases and, with those verdicts, a string of appeals over a variety of legal issues these cases present. Although a settlement of the cases in federal court was announced, the state court trials are slated to go on for decades. This publication is an overview of the groundbreaking *Engle v. R.J. Reynolds Tobacco Co.* litigation and its aftermath.¹



The Saga of *Engle v. R.J. Reynolds Tobacco Co.*

1994 was a watershed year for the tobacco industry. In the wake of embarrassing testimony by cigarette manufacturer CEOs before a Congressional subcommittee,² an announcement by the Commissioner of the U.S. Food and Drug Administration indicating that the industry deliberately used nicotine in cigarettes like a drug,³ leaks of tobacco industry documents by whistleblowers,⁴ and the first lawsuits brought by state attorneys general against tobacco companies to gain reimbursement for smoking-related Medicaid expenses,⁵ a small Miami law firm filed a class action lawsuit against the major cigarette manufacturers: *Engle, et al. v. R.J. Reynolds Tobacco Co., et al.*⁶ The law firm filing the case consisted of a husband and wife team of lawyers, Stanley and Susan Rosenblatt. Dozens of attorneys represented the tobacco defendants.

The *Engle* plaintiffs sought \$200 million in damages on behalf of a nationwide class of smokers injured by their addiction to cigarettes. The complaint alleged that the cigarette manufacturer defendants manipulated nicotine levels and concealed information about the addictiveness of the drug. The nationwide class was certified by a Dade County, Florida judge but was later limited to Florida citizens and residents.⁷

The challenge of managing a class of upwards of 500,000 members was the daunting task facing the trial judge, Robert Kaye. He, along with case’s prior assigned judge, Alan Postman, devised a three-phase trial plan. The first phase would determine general common liability among the defendants and whether the class could recover punitive damages. The second phase would

involve full trials for the named representative class member plaintiffs and, if individual liability were established, the amount of any punitive damages. The third phase would consist of partial individual mini-trial-like proceedings for each class member to address causation issues, affirmative defenses, statute of limitations, and damages.⁸

A jury was selected for the first two phases. It was to be an exceptionally long jury duty service. The first phase began on July 6, 1998 and concluded a year later with a verdict for the class on July 7, 1999. That verdict found that smoking caused 19 diseases, that nicotine is addictive, that cigarettes were defective and unreasonably dangerous, that defendants concealed and misrepresented these dangers, that all the defendants were negligent, and finally that the class was entitled to punitive damages.⁹ This opened the door for the next phase.

The jury returned on November 1, 1999, for Phase II, which was limited to a sample of three of the representative class members to conserve time. It concluded on July 14, 2000.¹⁰ The jury issued verdicts in favor of all three of the representative class members, with compensatory damage awards averaging about \$4 million each.¹¹ After taking a break for a few weeks, the jury returned to determine punitive damages for the class. On July 14, 2000, the jury issued an extraordinary punitive damages verdict of approximately \$145 billion, to be split among the defendants according to each company’s market share.¹² The jury finally was dismissed after nearly two years and hearing more than 150 witnesses.

The unprecedented size of the verdict raised the specter of bankruptcy for the defendants.¹³ Were it not for the quick action of the Florida Legislature, which placed a cap on the appeal-bonding requirement of the lesser of \$100 million or 10% of net worth per defendant, the tobacco industry would have had to raise approximately \$164 billion in order to appeal the verdict.¹⁴ Some feared that raising such vast sums would endanger Master Settlement Agreement payments the tobacco defendants already owed to the States for their expenditure of Medicaid funds to cover the costs of citizens’ smoking-related illnesses.¹⁵

The third phase of the trial plan was never reached because the defendants’ appeal to Florida’s Third District Court of Appeals resulted in reversal of the trial court’s judgment and decertification of the class itself.¹⁶ Ultimately, the Florida Supreme Court heard the plaintiffs’ appeal and issued its decision on July 6, 2006.¹⁷ The Court affirmed the reversal of the punitive damages on the basis that punitive damages for the class could not be properly determined until compensatory damages was determined for all class members.¹⁸ It rejected the appeals court’s basis for decertifying the class but also found that the third phase of the trial calling for proceedings for each class member was not viable and, therefore, neither was the continuation of the class.¹⁹ Two of the three class members’ individual verdicts were upheld.²⁰

Birth of the *Engle* Progeny Litigation

The Florida Supreme Court did, however, provide a way forward for the former *Engle* class members by waiving the statute of limitations for those former class members for a year and permitting them to rely on several of the liability findings from the first phase of the trial in their own individual lawsuits.²¹ Applying those findings to subsequent cases involving the same issues and defendants is known as *res judicata*, which means it has already been judged.²²

Exactly how those findings from the first phase of the *Engle* trial would be applied became the subject of subsequent appeals.²³ The way it usually works in the context of trial, however, is that the trial judge will read to a jury instructions such as these from a recent case against R.J.

Reynolds:²⁴

1. Smoking cigarettes causes lung cancer;
2. Nicotine in cigarettes is addictive;
3. R.J. Reynolds Tobacco Company placed cigarettes on the market that were defective and unreasonably dangerous;
4. R.J. Reynolds Company concealed or omitted material information not otherwise known or available, knowing that the material was false or misleading, or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both;
5. R.J. Reynolds Tobacco Company agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment;
6. R.J. Reynolds Tobacco Company sold or supplied cigarettes that were defective; and
7. R.J. Reynolds Tobacco Company was negligent.

As a result, the plaintiff’s burden of proof is substantially reduced. During the one year of eligibility for former class members, more than 8,000 individual lawsuits were filed in state and federal court.²⁵

The *Engle* Trust Fund

Former class members were entitled to apply for participation in the distribution of a \$600 million trust fund. That fund was established through funds provided by Philip Morris USA in return for an agreement by plaintiffs’ counsel not to challenge the validity of the appeals bond cap legislation.²⁶ Over 60,000 former class members who did not file individual lawsuits received payments of \$9,000 from the trust fund.

Elements of an *Engle* Progeny Lawsuit

Typically, complaints in *Engle* progeny cases involve four causes of action: 1) negligence; 2) strict liability; 3) fraudulent concealment; and 4) conspiracy to commit fraud.²⁷ Before any damages can be awarded, however, the plaintiff must prove membership in the former class. The first step is to prove that he or she was addicted to cigarettes and that the addiction caused one of the smoking-related illnesses specified in the *Engle* Phase I verdict. In addition, that illness must have been discovered or diagnosed by November 21, 1996, as determined by the Florida Supreme Court.²⁸

Once a plaintiff has established membership in the former class, the next task for the jury is to determine compensatory damages, including lost wages, medical expenses, and pain and suffering. The plaintiff need not prove negligence or strict liability because the defendants’ liability was determined in Phase I of the *Engle* trial. To establish liability for fraud, the plaintiff must show that he or she relied upon the defendant’s fraudulent statements or acts.²⁹ Any compensatory damages are subject to reduction based on the percent of fault for which the jury finds that the plaintiff was responsible. If the jury finds that the plaintiff was 80% responsible

for the illness, then recovery is only 20% of the verdict. If the judge allows the jury to find punitive damages, there is an additional trial phase that examines the ability of the defendant to pay, additional evidence of wrongdoing, and any mitigating evidence the defendant presents.

Successes and Failures in *Engle* Progeny Litigation

As of June, 15, 2015, there have been 141 verdicts in *Engle* Progeny trials since the first verdict in February of 2009. Of these, 90 (or 63.8%) have been verdicts for plaintiffs while 51 (or 36.2%) have been defense verdicts.³⁰ These verdicts have totaled over half a billion dollars, but only about \$200 million has been paid to date.³¹ Many of these verdicts were appealed and some were overturned, reduced, remanded for further proceedings, or dismissed.

Settlement Agreement for Federal Cases

Of the 4,000 or so cases that had been filed in federal court, many were found to have invalid claims or were dismissed.³² A rigorous trial schedule set by a federal judge charged with overseeing these cases resolved even more of these cases until only about 400 or so remained. On February 25, 2015, plaintiffs’ attorneys and defendants announced a settlement agreement for the remaining 400 federal *Engle* Progeny cases for a payment of \$100 million to be divided among the class members.³³ The settlement agreement is contingent upon the participation of each of the 400 or so plaintiffs. To date, there has been no indication that the 3,000 or so cases still pending in state court will be settled.

Conclusion

The *Engle* Progeny cases have turned Florida into a hotbed of tobacco litigation, with dozens of plaintiffs’ firms actively doing battle with attorneys representing cigarette companies every day. At the current rate of trials being held, which is about 50 per year, these cases are on track to be fully resolved by the year 2075. Such a result is rather unlikely, however. These former class members consist either of victims of smoking-caused disease who were diagnosed by 1996 or persons who represent deceased smokers’ estates. Assuming that most such diagnoses occur when victims are in their 60s and 70s, many of these plaintiffs would now be in their 80s and 90s. The reality is that their heirs may eventually lose interest or lose contact with the law firms representing them and that, unless some other procedural approach or settlement is established, the majority will never get their day in court. Yet for the many thousands who participated in the Trust Fund distribution, those who are likely to benefit from the settlement of the federal cases, and those hundred or so successful plaintiffs, the result of the class action filed by Stanley and Susan Rosenblatt more than 20 years ago has been to achieve some measure of justice from the cigarette companies.

Notable <i>Engle</i> Progeny Verdicts ³⁴	
<i>Boersma v. R.J. Reynolds</i>	\$41.1 million
<i>Boatright v. Philip Morris</i>	\$35 million
<i>Schleider v. R.J. Reynolds</i>	\$21 million
<i>McKeever v. Philip Morris</i>	\$17.4 million
<i>Ryan v. R.J. Reynolds</i>	\$46 million

<i>Grossman v. R.J. Reynolds</i>	\$33.5 million
<i>Calloway v. R.J. Reynolds and Philip Morris</i>	\$67.65 million
<i>Smith v. R.J. Reynolds</i>	\$27 million

Last updated: September 2015

Notes

- ¹ The information contained in this document is not intended to constitute or replace legal advice.
- ² Philip J. Hilts, *Tobacco Chiefs Say Cigarettes Aren’t Addictive*, N.Y. TIMES, April 15, 1994, at A1.
- ³ Philip J. Hilts, *U.S. Agency Suggests Regulating Cigarettes as an Addictive Drug*, N.Y. TIMES, Feb. 25, 1994, at A1.
- ⁴ Philip J. Hilts, *Tobacco Company was Silent on Hazards*, N.Y. TIMES, May 6, 1994, at A1.
- ⁵ Michael Janofsky, *Mississippi Seeks Damages from Tobacco Companies*, N.Y. TIMES, May 24, 1994, at A12.
- ⁶ Amended Class Action Complaint For Compensatory & Punitive Damages, *Engle v. R.J. Reynolds Tobacco Co.*, No. 9408273 CA (20) (D. Fla. Oct. 31, 1994), <http://legacy-dc.ucsf.edu/tid/wbn15f00>.
- ⁷ *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).
- ⁸ *R.J. Reynolds Tobacco Co. v. Engle.*, 122 F.Supp. 2d 1355 (S.D.Fla. 2000).
- ⁹ *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006).
- ¹⁰ *R.J. Reynolds Tobacco Co. v. Engle.*, 122 F.Supp. 2d 1355 (S.D.Fla. 2000).
- ¹¹ Catherine Wilson, *Tobacco Loses First Class Action Suit*, THE COM. APPEAL, Apr. 8, 2000, at A1.
- ¹² Rick Bragg, *Tobacco Lawsuit in Florida Yields Record Damages*, N.Y. TIMES, July 15, 2000, at A1.
- ¹³ Mark Gottlieb & Richard Daynard, *Will Big Tobacco Seek Bankruptcy Protection? A \$145 Billion Verdict Poses The Question*, 26(2) WM. & MARY ENV’T LAW AND POL’Y REV. 359 (2001).
- ¹⁴ H.B. 1721, 102th Leg., Reg. Sess., 2000 Fla. Laws ch. 128.
- ¹⁵ Henry Weinstein & Myron Levin, *States Brace for the Threat of Tobacco Suit Bankruptcy*, L.A. TIMES, Mar. 20, 2000, at A1.
- ¹⁶ *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003).
- ¹⁷ *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² *Res judicata*, BLACK’S LAW DICTIONARY (10th ed. 2014).
- ²³ E.g., *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. Dist. Ct. App. 2010); *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013). For a recent opinion with potentially far-reaching implications, see *Graham v. R.J. Reynolds Tobacco Co.*, 2015 U.S. App. 2015 WL 1546522 (11th Cir. 2015).

²⁴ *Baker v. R.J. Reynolds Tobacco Co.*, 2015 WL 671192 (Fla. Dist. Ct. App. 2015).

²⁵ Mary Ellen Klas, *Legislators Roll Out Bill to Snuff Damages for Tobacco Victims*, MIAMI HERALD, Feb. 18, 2015, <http://www.miamiherald.com/news/state/florida/article10642436.html>.

²⁶ Gordon Fairclough, *Three Tobacco Firms to Post Bond In Florida's Engle Class-Action Suit*, WALL ST. J., May 8, 2001, at A3.

²⁷ J.B. Harris, *Trying and Winning an Engle Progeny Case*, 4(3) ATT'Y AT-LAW MAG. 19 (2014), <http://www.attorneyatlawmagazine.com/miami/trying-winning-engle-progeny-case>.

²⁸ *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006).

²⁹ Harris, *supra* note 27.

³⁰ Data tabulated by Edward L. Sweda, Jr. at the Public Health Advocacy Institute from information based on information provided by plaintiffs' attorneys.

³¹ Carlyn Kolker, *The Tobacco Litigation that Wouldn't Die*, THE AMER. LAW., May 25, 2015, <http://www.americanlawyer.com/id=1202724025539/The-Tobacco-Litigation-That-Wouldnt-Die?slreturn=20150526174250>

³² *Id.*

³³ Richard Craver, *More Engle Cases Dropped in Florida, Including at Least 11 Involving Reynolds*, WINSTON-SALEM J., June 4, 2015.

³⁴ Compiled by Edward L. Sweda at the Public Health Advocacy Institute.