John McCoy says he probably won’t live long enough to collect the $10.5 million judgment he won against the tobacco companies.

In the decade since he filed his lawsuit over the lung cancer death of his wife, Glodine, two of his children have died. The 88-year-old won the judgment in 2015, but it has been in limbo while his case awaits review by the state’s lower appellate court.

Even if he were to win that first appeal, his attorneys expect that defendants Philip Morris USA Inc. and R.J. Reynolds Tobacco Co. would follow up with appeals to the Florida Supreme Court — a tack tobacco lawyers have taken in similar cases. They may petition the U.S. Supreme Court after that, or they may at least take a few months to consider doing so.
"Appeal, appeal, appeal," McCoy said. "I don’t think I’ll be around when this is settled completely."

The situation for cases like McCoy’s is unique in Florida. Major tobacco companies enjoy special protections enacted by Florida lawmakers that allow them to hold onto their money during appeals in exchange for relatively small bonds, a fact critics say allows them to draw out the process longer than they otherwise might.

While other states have appellate bond cap protections for tobacco companies, Florida’s has the greatest impact — with roughly 3,000 so-called Engle progeny cases stemming from a mammoth 1990s class action, the Sunshine State has more pending tobacco lawsuits than all other states combined.

The rules were put into place as a safeguard against a potential avalanche of verdicts demanding multibillion-dollar appeal bonds that could force the tobacco companies to declare bankruptcy — a development that would deprive Florida of annual payments the companies make under a 1997 settlement with the state.

Although tobacco companies now acknowledge that such a doomsday scenario is far-fetched, they contend the massive cluster of Engle progeny cases still calls for a special appeal bond system. Proponents say the protections aren’t causing significant harm to plaintiffs because many of the cases are fully bonded even with the caps.

But critics of these protections say they encourage tobacco companies to make aggressive use of the appeals process and avoid settling cases, which delays payment to victorious plaintiffs and their attorneys. Meanwhile, thousands of Engle progeny cases are awaiting trials that will likely never happen in an overburdened state court system, meaning billions of dollars in claims could evaporate as plaintiffs die off.
Florida Sen. Greg Steube, a Sarasota Republican, introduced a bill in December that would have repealed the tobacco companies’ protections. But the bill languished for months before it died without debate on May 5 in the state Senate’s Regulated Industries Committee.

“You literally have people who are dying waiting to get the money that a jury awarded them,” Steube said in an interview before the bill met its end. “That’s just wrong.”

Representatives for R.J. Reynolds, Altria Group Inc. and Liggett Group, as well as attorneys from Jones Day and Shook Hardy & Bacon LLP — two firms that handle most of the tobacco companies’ Engle litigation — either declined to comment or did not respond to requests for comment.

The Engle Progeny

Even if the appeal bond protections were repealed, it would likely mean little to thousands of Engle plaintiffs.

More than 2,700 Engle progeny cases are still waiting to see trial in Florida state courts, according to a recent R.J. Reynolds financial filing. But a legislative analysis of Steube’s bill in January said just 225 cases had completed trials. The Florida court system now handles about 50 Engle progeny trials per year. In theory, these could go on until 2075, according to a report by the Public Health Law Center, an advocacy group at the Mitchell Hamline School of Law in St. Paul, Minnesota, that pushes for tobacco control.
$9 billion
Approximate total amount tobacco companies have paid Florida under a 1997 settlement

$375 million
Approximate annual payment Florida receives from tobacco companies under the deal

Nowadays, few of the remaining plaintiffs are the smokers who fell ill during the class period of 1990-96, and only the smokers themselves, their spouses and their children can bring lawsuits.

“We just can’t try all these cases,” said Scott Schlesinger of Schlesinger Law Offices PA in Fort Lauderdale, who represents McCoy. “The court system can’t take the burden.”

These cases stem from a massive class action over the addictiveness and deadliness of cigarettes led by Dr. Howard Engle, a pediatrician. The doctor alleged in the 1994 lawsuit that the companies deceived him and other smokers about the dangers of cigarettes. While Engle’s case dragged on through litigation, tobacco companies cut deals with all states in the U.S. to resolve lawsuits brought by state attorneys general over the public health costs related to smoking.

Liggett Group settled with Florida and several other states in 1996, and the following year, Florida reached its deal with the four biggest tobacco companies at the time — Philip Morris, R.J. Reynolds, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. The settlement required the companies to pay the state hundreds of millions of dollars each year to cover its tobacco-related health care expenses. The rest of the states reached deals by 1999.
Philip Morris later rebranded itself as Altria Group, and Brown & Williamson and Lorillard were later acquired by R.J. Reynolds, which also inherited their liabilities.

Engle’s lawsuit, with an estimated 700,000 class members, resulted in an epic trial that began on July 6, 1998, and concluded on July 7, 1999. Jurors found that cigarettes were addictive, defective and unreasonably dangerous. They found that smoking caused 19 diseases. And they found that tobacco companies lied about the risk of their products.

The decision led to a second phase on damages, which lasted from November 1999 to July 2000. The verdict: about $12 million in compensatory damages for the class representatives and $145 billion in punitive damages against the tobacco companies.

The size of the verdict worried Florida lawmakers that the companies would go bankrupt and become unable to afford their payments to the state under the 1997 deal. This prompted the legislators to pass a law in 2000, before the trial court entered the judgment, to cap appeal bonds at the lesser of $100 million or 10 percent of a defendant’s net worth. This allowed the tobacco companies to safely appeal the $145 billion judgment with a $100 million bond.

In 2006, the Florida Supreme Court upheld a lower court ruling that decertified the class and voided the award, but the justices gave the estimated 700,000 former class members a year to file individual lawsuits relying on the jury’s findings. About 8,000 of the eligible Engle class members sued, some in state court and others in federal court. Nearly all of the roughly 4,000 federal cases have since been resolved, with tobacco companies cutting a $100 million deal to end 400 of them in 2015.
But as the Engle progeny trials began in 2009, Florida state legislators became concerned that the tobacco companies were in danger of being financially destroyed by the sheer volume of pending cases. So that year, they created a special appeal bond cap system to protect the tobacco companies' ability to appeal.

The maximum total bond for all defendants in all Engle progeny cases was set at $200 million, with a cap of $5 million per case. Once the case is bonded, the statute requires that the trial court automatically stay the execution of the judgment until all appeals are complete.
In contrast, other defendants in Florida’s civil court system would need to post an appeal bond equal to the amount of the judgment plus two years of interest, up to $50 million. Even then, the judgment is only stayed until the state’s lower appellate court reaches a decision.

The tobacco companies’ bond cap and automatic stay were set to sunset on Dec. 31, 2012. But lawmakers in 2011 repealed the expiration date, saying that “maintaining those [settlement] revenues is critical to the health of this state’s residents” and that letting the law expire would “undermine financial support for the state’s Medicaid and other critical health programs.”

Encouraging Appeals?

The bond cap and the automatic stay of judgments incentivize tobacco companies to make liberal use of the appellate process and abandon efforts to settle, said Celene Humphries of Tampa’s Brannock & Humphries, who is one of a few appellate attorneys who regularly represent Engle progeny plaintiffs.

In many cases, the companies have either appealed cases to the U.S. Supreme Court or waited until the end of their 120-day grace period to decide they wouldn’t seek certiorari, Humphries said.

“They make the appellate process take longer than I’ve ever experienced in any other case,” Humphries said. “They purposely drag it out.”

Though plaintiffs attorneys might bemoan the tobacco industry’s frequent appeals, judges have often found the industry’s arguments to have merit. Awards are commonly reduced or overturned in Florida’s state appellate courts.

For instance, R.J. Reynolds in February won a new trial in a case where jurors had awarded $23.6 billion in punitive damages to an Engle progeny plaintiff. In that case, the trial court judge reduced the punitive award to $16.9 million, which R.J. Reynolds appealed. Florida’s First District Court of Appeal found that the plaintiff’s counsel crossed the proper boundaries of closing argument “repeatedly, flagrantly, and often in defiance of the trial court’s admonishments.”

In January, Florida’s Fourth District Court of Appeal reduced multimillion-dollar judgments against R.J. Reynolds and Philip Morris, saying the amounts should have reflected the fact that the smokers were partly responsible for their own deaths.

And in November, the Fourth District Court of Appeal threw out a $20 million jury verdict in an Engle trial, finding that the award was of a magnitude reserved for “much closer relationships between the parties and the decedents during the decedent’s illness.”

Keith Teel of Covington & Burling LLP, an attorney and lobbyist for tobacco companies, appeared in February before the Florida House of Representatives’ Subcommittee on Civil Justice to defend the tobacco industry’s appeal bond protections. Florida, he said, has a history of singling out the tobacco industry.
“There has been, I think, a suggestion that this statute that would be repealed somehow treats tobacco differently,” he said. “And the response to that is it absolutely does.”

That special treatment cuts both ways, he said. In 1994, Florida legislators passed a law barring the tobacco companies from using some of their most common and effective defense arguments at trial. The next year, the state sued the tobacco companies and benefited from its new law, ultimately resulting in the high-value settlement.

Without the Florida Legislature’s intervention after the original Engle verdict, tobacco companies would have been forced to pay a $181 billion bond — the judgment plus two years’ interest — in order to appeal, Teel testified. “Nobody could pay that,” he said. The companies would have been forced into bankruptcy, and “payments to the state would have gone away.”

He also pointed to the potential for runaway juries in Engle progeny cases — for instance, the Escambia County jury that awarded $23.6 billion to an Engle progeny plaintiff.

Since the $200 million total bond cap was enacted, most of the judgments have been bonded in full because they were less than $5 million, Teel said.

“Of the $200 million that can be out there at any one time, some portion is there for each of the claimants,” Teel told members of subcommittee. “So the question there is what’s wrong with the system. Why does it need to be repealed? And I would say to you that the answer is nothing is wrong with that system.”

The House subcommittee members ultimately rejected Teel’s arguments, voting in favor of the repeal bill 14-1 in February, though the bill eventually died earlier this month without a vote from the House Appropriations Committee.
Some of the subcommittee members said in February that their vote was less a gift to plaintiffs than a rebuke to R.J. Reynolds.
Tobacco's Appeal

38 plaintiff's verdicts are being contested in Florida state courts.

22 months is the average time elapsed since the verdict.

3 cases are before the state supreme court.

Source: SEC filings for the first quarter of 2017.
The cigarette maker had cut $30 million from its annual settlement payments since it sold three of its popular cigarette brands — Winston, Kool and Salem — to ITG Brands LLC in 2015. Reynolds hadn’t been released from its payment obligations, however, and ITG hadn’t made any payments despite assuming the payment obligations as part of the sale, according to a settlement enforcement motion filed in January by Florida Attorney General Pam Bondi.

Just before he cast his vote in favor of the repeal, Sen. George Moraitis, a Fort Lauderdale Republican, said he didn’t think Engle progeny plaintiffs should be entitled to punitive damages at all. But he was upset with Reynolds.

“I have to say, I was particularly disturbed when I first got into this that the tobacco companies had sort of backed off on some of the payments,” he said. “So that, frankly, is a lot of why I’m going to support the bill today, because I feel that we need to send a message that we gave you special status because you agreed to pay all these payments.”

Bondi argued in her motion seeking enforcement of the 1997 settlement that the state is so far owed more than $45 million in wrongfully withheld tobacco settlement payments. Her office declined to comment for this story, and the case is pending. ITG declined to comment.

It should come as little surprise that Florida is closely guarding this settlement, which has already added billions to state coffers. In total, Florida receives $350 million to $400 million every year from cigarette manufacturers. To date, those payments have totaled about $9 billion.

The money will keep flowing for as long as the companies remain in business and are able to pay it — there is no end date. In exchange, the state doesn’t go after the tobacco companies for past and future damages caused by cigarettes. The payments fluctuate annually based on inflation, the volume of cigarettes shipped domestically, and net profits, according to court documents.

In addition to their payments to the state, the cigarette makers have also sealed out hundreds of millions to satisfy Engle progeny judgments.

As of March 31, R.J. Reynolds had paid nearly $450 million in state and federal Engle progeny cases involving Reynolds or Lorillard cigarettes, including $327 million in compensatory and punitive damages and $121.5 million in attorneys’ fees and statutory interest, according to its latest quarterly and annual filings with the U.S. Securities and Exchange Commission.

Philip Morris had paid $83 million in state and federal Engle progeny judgments, as well as interest totaling $21 million, as of March 31, according to its latest filings.

Liggett, meanwhile, had paid about $39.8 million, including interest and attorneys’ fees, to satisfy nine state court judgments as of March 31, its most recent filings show.

The companies’ most recent quarterly filings were made available earlier this month.

Reynolds and Philip Morris also have on appeal a combined 38 Florida state court cases with
judgments totaling more than $509 million, according to a Law360 analysis of court documents and SEC filings. Three of the cases are before the Florida Supreme Court.

Florida state appellate courts in March and April upheld five other judgments against tobacco defendants totaling $55 million. Those recent rulings may also be subject to further appeals.

A Typical Trial

During his three-week Engle trial, McCoy spent two days on the stand. He regaled jurors about his first date in 1944 with a dark-haired girl from high school named Glodine — how they went to see the classic thriller “Gaslight” at a theater in Queens and how Glodine insisted on sitting in the balcony section, where she could smoke. They had seven sons and a daughter and moved to Florida.

She had a heart attack in 1991 and then quit smoking cold-turkey, he testified during the trial. During the 1996 Christmas shopping season, John took her to Naples, an upscale beach town in Florida known for its shops and resorts. They had barely arrived at a mall before she felt too ill to walk around, so John took her back to the hotel. He was content to just watch TV and rest with her, he testified.

That’s when the cough started.

PENDING CASES
IN FLORIDA APPEALS COURTS

R.J. Reynolds  Philip Morris

33 19

Some cases have multiple defendants
Source: SEC filings for the first quarter of 2017

“I don’t know if anybody ever heard a cancer cough,” McCoy told jurors. “It’s terrible. My God almighty, I said, ‘OK, let’s go. We’re going home.’”

McCoy took his wife to see a doctor. When the doctor saw the X-ray image of her lungs, McCoy heard the doctor cry out, he testified. Glodine wasted away under radiation treatment, but the
cancer kept spreading to her other lung and her lymph nodes. Glodine, who was 70 and had been married to John for 53 years, died on July 12, 1997.

“I died, too,” he told jurors. “Believe me. I died, too.”

The trial was not unusual as Engle progeny cases go. McCoy’s testimony was fairly typical, as was the tobacco companies’ retort that the smoker was to blame for her own death.

R.J. Reynolds attorney Jeffrey Furr of King & Spalding LLP told jurors during closing arguments that Glodine McCoy wasn’t addicted to nicotine — she merely enjoyed smoking and didn’t want to stop. He said she was always capable of quitting if she wanted, and once she had her heart attack, she immediately went through with it.

Jurors awarded John McCoy $1.5 million in compensatory damages for the wrongful death of his wife. They hit the tobacco companies with an additional sum of $9 million in punitive damages. However, they found Glodine herself 35 percent responsible for her death. R.J. Reynolds and Philip Morris urged the court to throw out the verdict and grant a new trial or enter judgment in their favor, saying McCoy failed to prove his case, among other arguments. The court did not, and the companies appealed.

McCoy’s case may well take years to finally resolve. His case and others like it take years of pretrial work and then often a three-week trial. Jonathan Gdanski, a Schlesinger Law attorney who represented McCoy, said it isn’t uncommon for costs to run up to $200,000 or more just to get through the trial.

Many firms have an inventory of Engle progeny cases they can’t afford to bring, even if the courts could handle more, he and other plaintiffs attorneys said. That means fewer cases will make it to trial before plaintiffs take their claims to the grave.

“This is the cost of doing business for tobacco,” Schlesinger said. “To them, we're just a petty annoyance.”

“You could live to be 95 years old, but that’s not long enough to see justice against tobacco.”

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