

Florida Lawyer Says Multimillion-Dollar Tobacco Verdicts Will Spread To Other States



Starring soon in a courtroom near you?

A Florida jury handed **Scott Schlesinger** every plaintiff lawyer's dream earlier this month when it ordered R.J. Reynolds to pay his clients \$37.5 million for the death of smoker Laura Grossman from lung cancer at the relatively young age of 38.

Schlesinger's clients – Grossman's husband and two children – won't be seeing that money anytime soon, however. The verdict joins a string of plaintiff victories in Florida that have punctured Big Tobacco's reputation for invulnerability in the courtroom, but thanks to vigorous appeals and other legal maneuvering, few of the winners have collected a dime.

"There is no other litigant in the world like tobacco," **Schlesinger** told me. "There is no resolution short of trial. And a case doesn't terminate until every single appellate opportunity is exhausted."

The verdicts are piling up, however. And Schlesinger says his firm and 30 or 40 others active in tobacco litigation across the state are on the verge of taking what they're learning in Florida and attacking the tobacco industry elsewhere.

"We have established a beachhead in Florida," said **Schlesinger**, whose firm participated in the \$260 billion master tobacco settlement signed in 1998, which continues to shower hundreds of millions of dollars in fees each year on law firms across the country. "If they continue to allow us to practice trying these cases, and we get better and better, we're going to win cases in other states."

Plaintiff lawyers have an easier time suing tobacco companies in Florida thanks to a 2006 ruling by the state Supreme Court in the so-called Engle class action. That decision rejected a class representing some 700,000 Florida smokers as well as a jury award of \$145 billion in punitive damages against the industry. But it established as res judicata the jury's findings that cigarettes cause cancer, nicotine is addictive, and manufacturers sold a defective and dangerous product.

The court invited individual smokers to file suit and more than 6,000 did before a one-year deadline expired. Now their cases are working their way through the state's court system and frequently racking up tens of millions of dollars in verdicts at a pop.

"There's probably the better part of half a billion dollars' worth of outstanding verdicts and judgments against (the tobacco companies) in various stages of appeal," said **Schlesinger**, who claims responsibility for \$100 million of that although he has yet to collect anything.

Philip Morris parent Altria, in its most recent 10-Q filing, said it has paid out \$384 million in judgments and interest so far on top of its payments under the master settlement, which are more like an excise tax on cigarettes that is paid by its customers. It said it has lost 23 of 44 trials of so-called Engle progeny cases so far, but had set aside only \$6 million for additional judgments as of June 30, perhaps reflecting confidence that its lawyers can continue to put off paying the judgments it is losing in Florida.

Reynolds American RAI -0.28% has paid out more than \$100 million in Florida judgments so far and reported another \$250 million in Engle progeny verdicts that it hasn't recorded as liabilities on the balance sheet.

Both companies can afford to pay a lot more in legal expenses before they go broke. Altria, with a \$70 billion market cap, had more than \$8 billion in earnings before interest, taxes and depreciation last year, while Reynolds has a \$27 billion market cap and \$3 billion in EBITDA.

Both companies are appealing every plaintiff victory with the argument that their due-process rights are violated by not allowing them to defend against the jury findings in Engle. The 11th Circuit Court of Appeals ruled in favor of the industry on this issue in 2010, but another federal court and the Florida Supreme Court have ruled the other way. The industry plans to seek U.S. Supreme Court review.

Schlesinger, meanwhile, is honing his arguments with each trial – he's done four in the past 12 months – selecting incriminating documents from the trove the industry made public under the global settlement to convince jurors that smokers aren't responsible for making themselves sick.

The Engle plaintiffs in Florida mostly claim they began smoking before the government required stronger warnings on every pack of cigarettes in 1969. (The first warnings that cigarettes "may be hazardous to your health," went on in 1964; five years later Congress ordered the wording changed to "cigarette smoking is dangerous to your health.")

Schlesinger shrugged at the inconsistency of verdicts in Florida, and couldn't identify a consistent reason juries reject the claims of a plaintiff.

“The fact that we’re winning most of the cases is a meaningful accomplishment,” he said. “You could try a car wreck case 20 times and get different verdicts.”

Assuming the plaintiffs win 50% of the 4,000 or so pending cases in Florida, and jurors continue to hand down verdicts of \$10 million or more, the industry could face \$20 billion in ultimate liability in that state alone. Plaintiff lawyers face a tougher road in other states, where the tobacco industry can mount a more vigorous defense against claims it misled consumers about the dangers of smoking and sold a defective product. But **Schlesinger** said those defenses are still vulnerable, especially to claims that tobacco companies aimed their marketing at children who were less able to assess the risks.

“Who’s getting lung cancer today? The 40-year smoker who is a Vietnam veteran, who was smoking at 14 and they were giving him cigarettes in his rations,” he said. “A lot of these people are pre-warning, or early caution cases.”

With the Grossman case, **Schlesinger** had unusually jury-friendly plaintiffs, the family of a young mother who claimed she began smoking at 15 and left a husband and two children behind. Even so, **Schlesinger** says, he only won \$1 million in the first trial. Reynolds appealed and lost, with the second jury awarding more than 30 times as much.

“They don’t care,” **Schlesinger** said. “They have to guard the rear flank, because they kill half their customers.”

“If we continue to have this kind of success for the next three or four years, we are going to break out of Florida. Talking to people in meetings around the country about what we’re doing down here, they’ll say ‘Hey, I’ll give it a try.’”