

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-08273 CA 22

IN RE: THE ENGLE TRUST FUND

**REPORT AND RECOMMENDATIONS OF TRUSTEE ON DISTRIBUTIONS FROM
THE ENGLE TRUST FUND**

The Trustee, Miles A. McGrane, III submits his Report and Recommendations on Distributions from the Engle Trust Fund.

I. SUMMARY

Following processing of submissions by the Court-appointed Administrator, The Garden City Group, Inc. ("GCG"), the Trustee has approved for payment approximately 45,000 Florida Smokers'¹ submissions of over 69,700 Registrations, representing approximately 65% of the Registrations submitted. The Trustee has described the Administrative process, below, and his recommendations as to objections raised. Finally, the Trustee addresses the need for a resolution of the claims for Medicare and Veterans Administration ("VA") benefits asserted by the United States Government, Department of Justice.

II. THE GOAL OF THE TRUSTEE HAS BEEN TO ENSURE THAT EVERY ELIGIBLE FLORIDA SMOKER WITH THE REQUISITE SUPPORTING DOCUMENTATION RECEIVE AN EQUAL ALLOCATION FROM THE ENGLE TRUST FUND, WITH PARTICULAR ATTENTION AND PROTECTION PROVIDED TO UNREPRESENTED FLORIDA SMOKERS AND SURVIVORS

An historical perspective of the underlying Engle class action litigation is important to

¹All references to Florida Smokers include living Florida Smokers as well as survivors of Florida Smokers who are eligible for payment from the Engle Trust Fund on a "per-smoker" basis.

fully understand these equitable proceedings regarding distributions from the Engle Trust Fund to Florida Smokers.

The Engle Trust Fund was created by former class counsel in connection with their fifteen years of representation of Florida Smokers and survivors in the prior Engle class action, including the two-year jury trial with 157 witnesses, transcribed in approximately 60,000 pages of trial transcripts, and the over two dozen appellate proceedings.

The underlying Engle class action litigation was concluded in 2008 through the entry of a series of dispositive Orders by the Trial Court pursuant to the Mandate of the Florida Supreme Court, including Decertification of the Engle Class. The Florida Supreme Court Opinion provided that class members may file individual lawsuits with the benefit of the many liability and disease causation findings of the Engle Jury that are given *res judicata* effect in all class members' separately filed actions. The liability and causation findings that had been reversed and vacated by the Third District Court of Appeal were reinstated by the Florida Supreme Court, quashing the earlier Opinion of the Third District in all respects, except as to the punitive damages verdict and judgment. Class members did not give up any of their claims for damages against tobacco companies by seeking a distribution from the Engle Trust Fund.

However, as a result of the Decertification of the Engle Class, as directed by the Florida Supreme Court, by operation of law former class counsel no longer represented the Engle "class" or former class members because the Engle Class no longer legally existed. While disposing of the Engle class action litigation, the Trial Court did reserve jurisdiction solely to administer and make distributions from the Engle Trust Fund to approved former class members. The Court designed a straight-forward, uncomplicated administrative document submission process, with the assistance of the Trustee and the Court-appointed Administrator, GCG, that is "user-friendly" and does not require attorney representation.

The Trial Court also recognized the need, going-forward, for the Court to protect the interests of the newly decertified Class of Florida Smokers and survivors, and that has been a major part of my duties as the Court-appointed Trustee. The Court Order appointing me Trustee

directed that I “ensure absent and unrepresented rights are fully protected at all times.” The published and mailed Legal Notices similarly stated that for those Florida Smokers without private counsel, “The Court-appointed Trustee will determine how your interests will be represented.” And that is what I have done.

III. ALL FLORIDA SMOKERS HAVE BEEN TREATED FAIRLY AND EQUITABLY

The Court's instruction to me was to fairly, equitably and expeditiously make distributions to approved Florida Smokers from the Engle Trust Fund, while protecting the Fund from any fraudulent claims. The Court further instructed me to freely allow supplemental submissions to cure deficiencies, even after the Court-imposed deadlines. Not surprisingly, some of the most disadvantaged Florida Smokers, due to adverse health and poor economic conditions, often going hand-in-hand, experienced the most difficulties in obtaining and furnishing medical records and/or signatures of siblings/survivors on a timely basis. Assistance has been provided by GCG and the Trustee, whether requested or not, to thousands of Florida Smokers in curing deficient submissions. All Deficiency Notices sent by GCG have provided all Florida Smokers with additional time and the opportunity to cure their deficiencies and perfect their claims.

Tens of thousands of Florida Smokers who filed Registration Forms requested medical records from Florida hospitals and physicians during the spring, summer, and fall of 2008. This taxed the ability of many healthcare providers, particularly Florida hospitals and the Veterans Administration, to comply on a timely basis with the initial Court-imposed deadlines. GCG and the Trustee have provided extensive hands-on, continuing assistance in curing deficient document submissions and supplying missing information for thousands of Florida Smokers. We have been pro-active in protecting and pursuing the interests of all former class members.

Many survivors had strained relationships with siblings or half-siblings or had lost touch with their siblings and could not locate relatives to obtain their necessary signatures. Other survivors had difficulties obtaining the social security number of a deceased parent. Deadlines

were extended as needed, in accordance with the Court's instructions. A large number of unrepresented smokers could not obtain the required medical records and additional time and assistance were accordingly provided.

GCG received missing medical records for thousands of former class members from former Class Counsel and also utilized several Florida databases to obtain missing information (e.g. Florida residency) and also to obtain missing/deficient qualifying medical conditions and smoking history of Florida Smokers, thereby curing many deficiencies. Often times the recipients of our assistance were not even aware of the help GCG provided.

Private attorneys retained by some Florida Smokers contributed to the Engle Trust Fund by enhancing the published Legal Notice, through private counsel's further spreading the word throughout Florida about the existence of the Engle Trust Fund. For any Floridians who may have missed or did not pay particular attention to the multiple newspaper publications in every Florida County, in over 53 Florida newspapers, with the Court-Ordered Engle Legal Notice about the Engle Trust Fund, extensive lawyer advertising in newspapers, and by radio and television, were additional reminders about the Engle Fund.

A few survivors complain that attorneys' advertising and other actions "diluted" these survivors approved payments by encouraging the Registrations of Florida Smokers and survivors who would otherwise have been unaware of the existence of the Engle Trust Fund and would have missed out on receiving any distributions from Engle Fund. The survivors further argue that by permitting attorneys to cure deficient claims through supplemental submissions beyond Court-designated deadlines, including the submission of medical records or missing signatures of difficult to locate Smokers or survivors, such "cures" "diluted" these survivors' claims. Since all unrepresented Florida Smokers were afforded additional time for curing deficiencies beyond the deadlines, it is only fair that smokers represented by counsel, receive equal treatment. Significantly, no survivor has suggested to me or GCG that any Florida smoker or survivor's claim filed by an attorney and approved for payment, was without merit or fraudulent – only "untimely" since supplemental submissions were permitted after the Court-designated deadlines.

The Trustee finds these complaints to be without merit. No Florida Smoker, whether unrepresented or represented by counsel, was approved for a payment of \$9,000 without the requisite document submission form signed by the claimant. I suggest to the Court that the "dilution" objection violates the very spirit of equity inherent in the distributions from the Engle Trust Fund: To distribute the Fund to *all* eligible Florida Smokers and their survivors in equal portions. One must also remember that at the two-year trial the Florida class was contemplated by the experts to include approximately 700,000 Florida Smokers; 45,000 Florida Smokers are clearly not an excessive number of approved former class members.

Other objections are similarly without merit. Victims of second hand tobacco smoke assert that the Engle Trust Fund should not be restricted to Florida Smokers and their survivors. While I do not minimize the damage done by breathing the tobacco smoke of others, the Engle Trust Fund beneficiaries are limited to former Engle class members: Florida Smokers and their survivors. Similarly, Florida's victims of other tobacco products (e.g. cigars, chewing tobacco) object to the exclusion of all forms of tobacco products other than cigarettes. Again, this restriction (smokers of cigarettes) is required by the nature of the underlying Engle Class action.

Objections were also presented by claimants who objected to the Court's requirement of documentary proof (e.g. medical records) of qualifying medical conditions. Medical records from the 1990s and before may no longer be available from certain Florida hospitals and physicians, rendering it more difficult, and according to some, impossible, to prove claims without relying extensively on testimony or affidavits of relatives and friends. The Trustee suggests that such alternative "proof" is not sufficiently trustworthy. Approximately 45,000 Florida Smokers and survivors *did* submit sufficient documentary proof of their claims. Without sufficient documentary proof, there can be no valid basis of demonstrating Engle class membership, and a greater likelihood of fraudulent submissions.

I also find the objections that challenge and seek to expand the list of qualifying diseases and medical conditions, to be without merit. The covered diseases are limited to those specific diseases and medical conditions found by the Engle Jury to be caused from smoking cigarettes.

While more recent medical science may have expanded that list, the qualifying diseases and medical conditions for participation in the Engle Trust Fund should be restricted to those specifically found by the Engle Jury to be caused from smoking.

A few victims of tobacco who reside outside of Florida object to limiting the Engle Trust Fund to Florida Smokers and survivors. Again, that restriction is necessary to comport with the Engle class in the underlying Engle class action. Originally the complaint was filed in May, 1994 as a nationwide class action but was later reduced and restricted to Florida Smokers and survivors by the Third District Court of Appeal of Florida, in its January, 1996 Opinion affirming class certification but limiting the class to Florida citizens and residents.

Finally, I find the objections from attorneys who have been unable to locate their clients to sign the Document Submission forms, to be without merit. Certain counsel were retained by smokers years earlier to represent them in claims against tobacco companies. However, I cannot approve any payments from the Engle Trust Fund without a beneficiary's signature on the Document Submission Form. I have not and will not approve the disbursement of any Engle Trust funds to be held in an attorney's trust account pending location of smokers or survivors. No signature, no payment.

IV. THE GARDEN CITY GROUP ADMINISTRATION PROCESS

Some statistics may help the Court understand the magnitude of the administrative process.

Initially, GCG received over 69,700 Registrations. Through January 4, 2009, the website that was constructed pursuant to the Court's instruction received 193,391 visits. The call center received over 105,504 calls (totaling over 328,620 minutes). GCG mail room personnel have sorted over 100,000 envelopes and packages and have scanned in excess of 1,500,000 sheets of paper.

The payments to approved Florida Smokers and their survivors commenced on October 3, 2008, substantially ahead of schedule, and payments have continued from GCG on a "rolling" basis for the approximately 45,000 Florida Smokers' submissions that have been approved or are

in the process of being finally approved for payment of the initial \$9000 allocation.

During the week of December 14 through December 19, 2008, I traveled to the Seattle offices of GCG to review all Florida Smokers' document submissions that were still deficient, including any objections. From total Registrations of over 69,700, approximately 45,000 submissions have now been approved, or are in the process of being approved for payment, representing approximately 65 percent of the original Registrations. All approved Florida Smokers have already or will be paid shortly the initial allocation of \$9,000 each.

The outstanding organizational and administrative skills of GCG and particularly of Jennifer Keough and Lance Blair cannot be overstated. The dedicated services of GCG enabled tens of thousands of Smokers' submissions, many quite bulky, to be reviewed and analyzed quickly and efficiently. As noted, approximately 1.5 million pages of documents were reviewed and analyzed expeditiously, including many hand-written letters. GCG representatives, including Jennifer and Lance, spoke to thousands of Florida Smokers and survivors through the toll-free lines established.

V. THERE IS A NEED FOR A RESOLUTION OF THE MEDICARE AND VA CLAIMS ASSERTED BY THE UNITED STATES GOVERNMENT, DEPARTMENT OF JUSTICE, BEFORE FINAL DISBURSEMENTS FROM THE ENGLE TRUST FUND ARE MADE

During the past several days GCG has received a series of letters addressed to the Engle Trust Fund from CMS, Centers for Medicare & Medicaid Services, advising of Medicare's claims of rights of recovery from beneficiaries of the Engle Trust Fund. I am aware of claims of the Department of Justice from an earlier meeting with representatives from the DOJ and Medicare. A quick resolution of all Medicare and VA claims will ensure no interruption of government benefits for any Engle Trust beneficiaries and will avoid lengthy, protracted litigation that will be complex and expensive, since involving an analysis of government (Medicare and VA) benefits received by 45,000 Florida Smokers. I will report back to the Court before the end of January with my progress in reaching a tentative resolution of the claims, subject to Court approval. I must very reluctantly recommend to the Court that there be a brief

postponement in distributing the second payments to approved Engle Trust Fund beneficiaries pending a resolution of the DOJ matter.

VI. CLOSING COMMENTS

As noted above, the administration of the Engle Trust Fund has been a team effort. It would have not have been possible to achieve what has been accomplished, in such a short period of time, without the assistance of a number of people.

The individuals at GCG (all of them) and specifically Jennifer Keough and Lance Blair proved to be caring experts at what they do. Claimants were not viewed as mere files or numbers to be processed. On innumerable occasions Jennifer and Lance spoke to interested third parties such as bank loan officers to delay home foreclosures or to creditors to postpone other proceedings, advising them that a distribution from the Engle Trust Fund would be forthcoming.

Your Trustee thanks each of these individuals for the efforts expended on behalf of the beneficiaries of the Engle Trust Fund.

Respectfully submitted this 12th day of January 2009.

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