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Tennessee ethics rules permit the payment of referral fees in contingent fee cases.
As things begin to move toward pre-covid conditions, it is interesting to watch the reluctance of many in the court system to get back to the hard work of moving cases forward. I recently attended a motion hearing (that took over 90 days to set) in which most of the motions presented were for scheduling orders. It would have been much more efficient for the lawyers to agree on their own schedules instead of waiting on the court to do that work for us. The prudent lawyer should plan to set deadlines at the start of their representation, with the ultimate deadline being the trial date.

On another note, we all need to acknowledge the tremendous impact the Tennessee Legislature has on our judicial system. Over the years, legislators have taken away injured workers’ rights to compensation. They have also capped damages, which I firmly believe impedes on the Constitutional right to a jury trial. As the Legislature becomes more and more defense oriented, it becomes incumbent upon us to get to know and communicate with our local representatives. We can help educate them on the broad, and sometimes underestimated, impact legislation will have on citizens.

We know that legislators are much more receptive to their own constituents than those from outside their districts. While we have encouraged lawyers to develop relationships with their legislators for years, many of us just did not know how to do so. With this in mind, Brad Burnette and Lauren Brinkley have spearheaded efforts to get our members to develop relationships with their local legislators. Brad and Lauren simply suggest that we take our legislator to lunch. They advise us not to try to lobby or convince legislators of their positions. The goal is to have a leisurely lunch and get to know the legislator, their ideas and their backgrounds. In other words, develop a relationship.

Finally, I would note that our membership numbers are growing. This is primarily due to the efforts of Josh Cantrell, our membership chair, and Suzanne Keith, our executive director. Josh holds membership drive meetings quarterly and many folks assist him in finding new members and encouraging old members to stay active in the organization. Suzanne has been reaching out to law students to educate them on the benefits of becoming a member of the Tennessee Trial Lawyers Association. I would also challenge each of you to be active participants in recruiting new members so we can continue our important work.
On June 17, 2021, at its Annual Convention in Memphis, the Tennessee Trial Lawyers Association, named Chattanooga truck crash attorney Danny Ellis, the recipient of the TTLA Trial Lawyer of the Year Award. The award is for a trial lawyer who is an advocate of a noble cause, and who demonstrated superior skills and achieved an outstanding result for a client against great obstacles. In bestowing the award, the TTLA stated, “is certainly deserving of the award for all that he did to help his clients and fellow attorneys during the time of the pandemic. We are proud of his outstanding leadership in representing his clients in serious cases.”

Danny handles truck crash cases across the nation as a key member of Truck Wreck Justice, PLLC. Since joining Truck Wreck Justice, Danny’s litigation practice focuses exclusively on commercial motor vehicle litigation and catastrophic injury cases. Danny is Board Certified in Truck Accident Law by the National Board Trial Lawyers Association. While at Truck Wreck Justice, Danny has obtained multiple 7 figure settlements for his catastrophically injured clients in several states.

Mr. Ellis learned the value of compassion and sacrifice from his parents, two devoted Christians who spent their prime years of life operating orphanages and children’s homes and fostering children who had no family to care for them. As a result, he has a special passion for helping children who have been deprived of the protection and guidance of their parents having served as a board member of the Tennessee Children’s Home.

Away from the office, Mr. Ellis’ dedication to his community and helping children in need still shines through. He most recently served as President of the Signal Mountain Soccer Association. Currently, Danny serves as a deacon at the Signal Mountain Church of Christ, where he and his family attend.

The TTLA Outstanding Trial Lawyer Award will be given annually to an attorney or attorneys who, within the past year, have demonstrated superior skills as a trial advocate for their clients, have achieved an outstanding result for a client against obstacles, have shown inspired devotion to improvement of the civil justice system or have worked tirelessly to combat the significant threats to the civil justice system.

Criteria: Must have made an extraordinary contribution to the cause of civil justice and adhered to the highest principles of the legal profession. Must be a licensed attorney and member of the Tennessee Trial Lawyers Association.
A typical group insurance policy is usually one for which a
between individual and group policies.
step to identifying franchise policies is knowing the difference
ities of both individual policies and group insurance. The first
first group policies, however, if the second policy is a fran-
she policy, then the offset will not always apply. This article
discuss how to spot a franchise policy when compared to an
individual or group policy.

The Employee Retirement Income Security Act (ERISA) applies
to most group insurance policies that people get from work or
through a union. ERISA welfare benefits usually include health
insurance, disability insurance, and life insurance. Most people
have these benefits through their work. They might also have
other insurance policies that they purchased on their own. Other-
ners might have bought a disability policy through a professional
or other organization they are members of, like the American
Psychological Association, American Dental Association, or
a policy offered to them through their credit card company.
These plans are all unique types of disability insurance, al-
though they might have some similar characteristics.

The typical group disability policy that a claimant gets from
work commonly provides a monthly benefit equal to a percent-
age of the person’s pre-disability income but offsets for other
income and types of benefits that a claimant might receive. For
example, many group policies provide that a claimants’ benefit
will be reduced by the amount he receives from social security
and other relevant information to the insurance company. In some
group policies, the employer or plan administrator ultimately
makes the final decision on entitlement to benefits, and the
insurer simply serves to administer the plan and pay claims.
ERISA almost always applies to these group policies, unless
the employer is a government entity or religiously affiliated
organization.

On the other hand, individually purchased insurance policies
have different characteristics. Typically, an individual will buy
a disability policy from an insurance agent on their own, with
no involvement from any other group. Customers deal directly
with the insurer when it comes to paying for the policy. There is
no middle man like the employer in a group insurance situation.
The policyholder pays premiums directly. Another difference
is that the name of the policyholder is the policyholder instead of
group insurance, the group is the policyholder. When he files a claim, the
policyholder does not deal with an administrator other than
the insurer. The individual has greater freedom to set the policy
terms because he bargains with the insurer rather than a third
party establishing the terms of the cover-
ance policy benefits are reduced by the income received from
social security.

The typical group disability policy that a claimant gets from
their credit card company. These plans are all unique types of
disability insurance, although they might have some similar
characteristics.

The term “franchise” comes from the fact that by
accepting a master policy the governing entity of the
association or other organization grants a franchise to the
insurer to solicit its members, or other personnel,
and places a qualified stamp of approval upon its plan.
Ordinarily, it will permit its official letterhead to be used
upon communications to the members and often an
article or advertising will appear in its official publication
to the effect that such is an approved or sponsored plan.
The holder of the master policy and the insurer may
negotiate for modification in the terms of the cover-
age and even agree to its termination, but not without
keeping the certificate holders apprised of any changes
which are made. With that qualification, the situation
is precisely that of an insurer dealing directly with its
certificate holders, and such each insured has independent
rights against the insurer which are exactly the same
as if there were no other contracts existing between such
company and the organization or other members.

Appleman on Insurance Law and Practice.

Insureds elect to buy the insurance on their own and directly
pay the premiums, but they are usually eligible for coverage
because they are members of a professional or other orga-
nization. Appleman indicates that the most crucial aspect to
identifying franchise insurance is the way in which premiums
are paid:

If the holder of the master policy pays the premiums
due, (even if he, or, deduces such premiums or a
portion thereof from the wages of employees), it is
typically group insurance. When two or more
members are collective beneficiaries, the
holder of the master policy may, or on behalf of,
the certificate holders, and such persons are billed for and
pay their premium charges directly to the insurer, then
it is franchise coverage.

Id.

Finally, there are other types of franchise insurance besides
the classic situation described in Appleman. A modern version is a policy
that – while still franchise insurance – is usually issued
to a large group without a close relationship to the master
policyholder, such as the customers of credit card companies
who place offers in their billing envelopes. This deviates from
the classic franchise insurance situation, where a professional
organization allows an insurer to solicit its members, but both are still
forms of franchise insurance. Rather than insureds being eligi-
ble for coverage because they are members of a professional
organization, they may be insured to a group because they have a tenuous link to the group, like
having a card through a participating bank.

II. Courts Weigh In: What is Franchise Insurance?
The different perspectives on the essential characteristics
of franchise insurance have understandably led to some confusion
in the courts regarding what the essential characteristics are:

In earlier years, lawyers, legal writers, publishers, and
the courts have tended to use the term “group insur-
ance” wherever a master policy was issued to a person
or entity, including associations, with individual certifi-
cates then being issued to those whose lives or well-be-
ing are the subject of insurance. This is not, however,
an accurate usage. As will be pointed out in the next Chap-
ter, a master policy and certificate are used in franchise
insurance, in which type of coverage the administration and
legal consequences are completely different from
Group insurance. Some franchise decisions, because of
judicial language, may crop up in the discussion of earli-
er opinions in this Chapter. However, they should not be
permitted to cause confusion, and we will call attention
to situations where an intermixture of language has
apparently occurred.

Id. at 641. Admittedly, whether a policy is a franchise or typ-
gical group policy does not come up in the courts with much
frequency. Tennessee and the Sixth Circuit have no reported
cases about the difference between franchise and typical group
insurance. But this topic has come up in other states’ courts.
A few of these opinions are discussed here to illustrate court
perspectives on franchise insurance’s crucial characteristics.

These courts tend to rely on either Couch or Appleman
to understand the defining characteristics of franchise insurance.
The Third Circuit provides a list of attributes in Flahes v. Stan-

[1]Franchise insurance generally has the following char-
acteristics: (1) members of the relevant association
or entity may enroll in the plan but are not required to do
so; (2) members pay premiums directly to the insurer;
(3) members make claims directly to the insurer; and
(4) insurers agree to “waive underwriting, and take all
applicants across the board.”

Quoting Appleman 554.
Two of the better-known opinions on this issue are Hogan v. Unum Life Ins. Co., 81 F. Supp. 3d 1016 (W.D. Wash. Jan. 27, 2015) and Gutta v. Standard Select Ins. Plans, 2006 WL 2644955 (N.D. Ill. 2004). In Hogan, Dr. Hogan purchased a disability policy that she was eligible for through her membership in the American Psychological Association. Dr. Hummel could apply for coverage but was not compelled or required to do so. Dr. Hummel paid the premiums on her own; she individually and directly enrolled. Dr. Hummel received an individual certificate of coverage listing her as the insured with the master policy issued to the APA. Id. Looking at these characteristics and the definition from Flesher, the Western District of Washington concluded that Dr. Hummel’s policy was a franchise policy. The court noted that the policy did not have every characteristic, but overall, matched up with the franchise policy. The court reasoned that the policy must be group insurance, because an individual policy would not need to contain a conversion provision. Id.

In Gutta, the court decided whether the policy in question was group insurance or an individual policy. Gutta v. Standard Select Trust Ins., 2006 WL 2644955 (N.D. Ill. 2004). Dr. Gutta purchased his policy through the American Medical Association, and the AMA held the master policy. The court pointed that under the Couch definition, a franchise policy would be an individual policy issued to Dr. Gutta because of his membership in a group. Id. In this case, though, Dr. Gutta received a certificate (not a policy), paid the premiums on his own, and the certificate stated that it was subject to the master policy issued to the AMA. Id. The policy contained a provision that provided that the policy could be converted to an individual policy. Id. The court reasoned that the policy must be group insurance, because an individual policy would not need to contain a conversion provision. Id.

Even still, some courts also point out additional characteristics of franchise insurance. Some courts have found that an important franchise insurance characteristic is the lack of a “buffer” between the individual and the insurer. Daniels v. National Home Life Assur. Co., 747 P.2d 1987 (Nev. 1987). In that case, the plaintiff was eligible for his policy because he was a veteran; he responded to a TV ad that announced coverage for veterans. The court described the eligible group as large and diverse and lacking a direct connection with the policyholder. The Daniels situation is a big difference from traditional group insurance. The eligible group is discrete (employees or union members) and has a close relationship with the policyholder (employer or union). In a typical group insurance situation, the employer provides a “buffer” between the insurer and the insured because they have more duties under the policy and act as a go-between, unlike in Daniels.

The case law and the treaties reflect that it is important to know whether the claimant has an individual policy or certificate, whether the policy was issued to a group, and most importantly, how the premiums were paid. Although different jurisdictions may add or subtract other characteristics, these characteristics are referred to most commonly as important for identifying franchise policies.

**IV. Conclusion: Why it Matters for Claimants**

While your client probably receives group benefits through their work, they might also have purchased a separate insurance policy through a professional or another type of organization. Their ERISA group policy probably offsets other income from group insurance policies. But the offset provision might have a provision that states “franchise insurance” or “franchise disability income insurance” or something similar is not included in the group insurance offset. If that is the case, then being able to identify their other policy as franchise insurance is critical to preventing their income from being reduced more than necessary. Although the process of figuring out whether the policy is, in fact, a franchise policy requires a little leg work, it can make a big difference for a client whose benefit is already being reduced for their social security benefit or a worker’s comp or personal injury settlement.

**ABOUT THE AUTHOR**

Kaci Garrabrant - Being a part of the disability team at Eric Buchanan & Associates is important because I have always wanted to have a career that allowed me to help others and work with a great team. The team truly works together to help our clients get the benefits they deserve, always putting the ultimate goal of helping our clients first. The team atmosphere and goal of making sure that our clients, who are already going through difficult situations as a result of medical conditions and the insurance company, are able to get their benefits and have one less thing to worry about are what make me proud to work for EBA.

I graduated with honors from the Pennsylvania State University School of Law and the University of Tennessee at Chattanooga, where I served as the Managing Editor of the TTU Legal Studies Journal. As a law student, I researched and published a comprehensive article on the history of plaintiff’s bar association representation. In 2007, I received my law degree from the University of Tennessee at Chattanooga, with a concentration in Employment Litigation and a certificate in Employment Law from the National Employment Law Project.

**For more on the exception for church plans, see Audrey Dolmovich’s past article in the TTLA magazine.**
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We talk a lot about “believing.” It is the “sine qua non” of what we do (without which there is nothing). I want to convert that indispensable ideal into something concrete. Believing is a matter of the heart. While some clients are easier to love than others, there is a constant we can always wholeheartedly believe in. That constant is the underlying cause we fight for. The universal cause we can all get behind is standing up for our clients against bad guys and their bully lawyers. Bad guys and bullies deserve a beating. That doesn’t change just because the people they hurt aren’t always perfect.

We have a name for people who fight bad guys and bullies, we call them “heroes”. We celebrate them in real life and cheer for them in stories, think about all the Superhero movies. From time to time everyone dreams of doing heroic deeds. We get to do them for a living.

Do guardians ever say, “It looks like a tough fight, or the victims are a little rough around the edges, so I’ll pass on this one, they’ll have to fend for themselves”? No, they don’t back down; it’s not in their DNA. They are courageous and unflappable. The greater the challenge, the greater the opportunity to rise up and shine.

The beginning of believing in your cases is believing in your clients. The next step is to find the reason a particular defendant needs to be brought to justice. Your law firm is like a branch of the Justice Department for righting civil wrongs. The lawyers are the League of Justice. Bad guys and bullies need to be made to pay and we are the reckoning. That need is not lessened by the number of obstacles thrown in your way, nor by the defense’s relentless efforts to make it seem as if those obstacles are a little rough around the edges, so I’ll pass on this one, they’ll have to fend for themselves?” No, they don’t back down; it’s not in their DNA. They are courageous and unflappable. The greater the challenge, the greater the opportunity to rise up and shine.

The bad guys and bullies will try to scare you off by showing photos of cones put out after a spill to suggest your client was a reckless fool and you are too if you pursue this case. Let’s get to the heart of the matter on cones. The old cone trick won’t work on us, we’re onto it. Cones almost always make spills more dangerous, not less, until the mopped floor dries. Mopping doesn’t eliminate the danger; it temporarily spreads the zone of danger. The mop leaves moisture all over the place. Putting a cone where the original spill was is misleading, it creates a false impression of safety. Cones funnel people smack into the surrounding slick area creating a trap. It’s like walking customers into a trap.

The way stores use cones is outrageous. They mop, and run, without thinking about the harm they are doing. They mean it will be seen? No, not under those circumstances. Whose duty is it to keep an eagle eye on the sidewalk? The owner. Is it open and obvious to the owner who has the duty to inspect it? Yes, of course it is. If they don’t fix it, will someone end up getting hurt? No question about it. Will the injury be bad? Probably, because the fall will be unexpected, awkward and onto concrete.

What if you were talking to a friend on the way to lunch and suddenly tripped on a raised piece of concrete, smashed your face on the pavement, breaking bones, leaving you with a loss of smell and taste for the rest of your life. Would you feel if the devious owner tried to blame you by saying the condition get so bad, it’s no longer his problem? What if you found out the owner knew about the dangerous tripping hazard and did nothing about it for months? You’d be livid and demand justice. You’d expect your chosen protector to be “all in” on your side fighting against the forces trying to turn the tables unfairly on you.

You would be pleased to learn it’s not so easy for bad guys and bullies to get away with passing the blame off on you for their wrongs. They can’t just say it’s your fault, they to prove it. It’s the person who snatched them out of the air and pummel the tormentors with their own worn-out weapons.

Trip & fall/open & obvious example

Let’s get to the heart of the matter with the open and obvi- ous defense in trip and falls. Let’s go back to the Golden Rule. When you walk to lunch downtown on a sidewalk, do you stare at your feet like you would in a junkyard? Do other people gingerly put their feet down as they navigate each step on their way to lunch? Of course not! If they did, people would be conk- ing heads all over the place, we’d have an epidemic of TBIs. It’s called a sidewalk because it’s supposed to be safe for walking. If a piece of sidewalk is sticking up, is it seetable? Yes. Does that mean it will be seen? No, not under those circumstances. Whose duty is it to keep an eagle eye on the sidewalk? The owner.

The bad guys and bullies are going to attack you and try to put you on trial. They will do everything in their power to paint you in a bad light; to suggest you’re the villain and the store is the victim. They’ll suggest you’re milking your injuries as part of a scam to make money. They may even argue there was nothing on the floor; you either faked the fall or suddenly forgot how to walk and spontaneous- ially collapsed to the ground.

Now we’re getting to the heart of the matter. As the client, you’re counting on a champion to stand up to the bad guys and bullies. As the lawyer, you’re feeling it: the righteous indigna- tion that drives you to fight for what’s right; the steely deter- mination needed to win even when the odds are against you; the surplus of adrenaline that heroes tap into as a catalyst to transform them for battle. Now that you believe in the cause, let them try to throw sticks and stones at you. You know how to snatch them out of the air and pummel the tormentors with their own worn-out weapons.

Cones for spills example

The chances of them pulling that off are slim because you did nothing wrong, nothing unreasonable. They may even argue there was nothing on the floor; you either faked the fall or suddenly forgot how to walk and spontaneous- ially collapsed to the ground.

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Cones for spills example

The chances of them pulling that off are slim because you did nothing wrong, nothing unreasonable. They may even argue there was nothing on the floor; you either faked the fall or suddenly forgot how to walk and spontaneous- ially collapsed to the ground.
Having gotten to the heart of the matter, once again I am sure this is a battle you would believe in and get behind wholeheartedly.

**Car crash example**

Let’s do the process once more, this time with a typical car crash case. The defendant wasn’t paying attention on the road and crashed into your spouse, who was trying to get home for the evening. One of the links in your spouse’s spine was damaged in the collision and will never be the same. He/she will live never be rid of this pain that was thrust into their life unnaturally. Treatments help some, but nothing will return him/her to their pre-crash baseline.

How would you feel if the perpetrator’s lawyer started going after your spouse, saying he/she wasn’t seriously hurt? What if that bully was trying to make it look like you and your spouse are part of a conspiracy to defraud the insurance company in an orchestrated money grab? What would your reaction be when they tried to exploit some past episodes of temporary back pain, like those that almost all adults have been through? Would it seem fair for the defense to use those temporary pains that went away years ago and never came back to make it seem like they were the cause of your spouse’s new, never-ending pain? Would you be pointing out that doesn’t make sense, he/she didn’t have pain for two years before the crash, the pain started at the time of the crash and never went away?

What would you think when the bully defense lawyer claimed that metal wasn’t mangled on your spouse’s car so he/she couldn’t have suffered a serious injury, knowing full well it’s not the crushing of metal that causes injury to the hinge joints in the spine, it’s the unexpected, awkward jarring? Would you be asking how can they get away with throwing different things up to see if any of them stick?

You don’t need perfect cases; you have righteous causes. Focusing on the tactics of bad guys and bullies gets to the heart of the matter. That’s where it all begins. That’s where you return to when distractions arise. It reminds you of why you fight. It reminds you of why you are right. It keeps you from losing your bearings or growing weary. Heroes don’t bow down, or wear down, they hunker down. Don’t ever lose sight of who and what you are fighting against. Don’t ever let them get away with pushing your clients around. Don’t ever let them spit on Superman’s/Superwoman’s cape.

About the Author

Keith Mitnik is Senior Trial Lawyer for Morgan & Morgan. Over the years, his list of clients included judges, elected officials, law firms, and world famous musicians. He has handled such high profile cases as the suit against Britney Spears by her former manager, the suit by Harlem Globetrotters against The Harlem Globetrotters, the civil suit against Casey Anthony, and the “Tailwind” case against CNN and Time Magazine (one of the leading defamation cases of the last decade). Mr. Mitnik has obtained a long list of verdicts in excess of a million dollars. In the last few years, he has jury verdicts of $1 Million, $1.35 Million, $2.4 Million, $2.7 Million, $5.1 Million, $18.1 Million, $27 million, $40 Million, and a $90 Million (which was the 7th largest verdict in America for 2010). He is a frequent seminar presenter for plaintiffs’ lawyers in Florida and across the country sharing his cutting edge lawsuit strategies. More information on Mr. Mitnik’s seminars and books is available here: (https://www. keithmitnik.com/)

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WASHINGTON UPDATE

I have excellent news to share with you. The Senate Judiciary Committee has approved, by a unanimous voice vote, a bill ending forced arbitration for sexual assault and sexual harassment survivors. The bill, Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act (S. 2342), is bi-partisan and passed out of the Senate Judiciary Committee with Republican Senators Graham, Grassley, Blackburn, Kennedy, and Hawley being added as co-sponsors of the bill.

An untold number of assault and harassment survivors are forced into silence and stripped of their rights by forced arbitration. This bill would restore their rights by allowing them to hold their perpetrators and the corporations who enable them accountable in court. Your support of this bill has been critical. AAJ members helped us over the course of many years to advocate for ending forced arbitration. You’ve participated in AAJ Lobby Days, called members of Congress, spoken to reporters, written op-eds, encouraged your clients to work as survivor advocates, and more. As a result, this legislative effort is broadly bipartisan and has serious momentum.

More Positive News

AAJ remains committed to completely eliminating forced arbitration. On that front, I’m pleased to report that the House Judiciary Committee just marked up and passed out of committee H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act. All the Democrats on the committee and Republican Representative Matt Gaetz (R-FL-1) supported this bill. H.R. 963 now has over 200 cosponsors and is bipartisan with recent cosponsor Rep. Gaetz (R).

Please help move this issue forward. Encourage your members of Congress to send this legislation to President Biden’s desk by using this action item (https://mobilize4change.org/ulvvMWt) to send an email or tweet in support of the bill.

AAJ Releases New Report on Forced Arbitration

AAJ has released a new report, “Forced Arbitration in a Pandemic: Corporations Double Down,” examining the issue, is still considering a rule change.

The three major threats to victim’s rights in this space are: 1) divisive mergers; 2) non-consensual third-party stays; and 3) non-consensual third-party releases. There is legislation in both the House and Senate to eliminate abusive divisive mergers, non-consensual non-debtor stays, and non-consensual non-debtor releases in bankruptcy proceedings.

We will continue to push for more forward progress on the bill.

Federal Rules Update

Formal Comment Period: Expert Witnesses

There are two rules in formal comment period (https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment): Emergency Rules (creating new FRCP 87) and FRE 702 (Expert Witnesses). For both rules, written comments must be submitted by February 16, 2022. There are also virtual public hearings where the public testimony is heard.

• Written comments can be of any length, but please make sure you identify yourself as a lawyer with a plaintiff-side practice.

• The public hearing dates for emergency rules are: 1/6/22 and 2/4/22. The public hearing date for FRE 702 is 1/21/22. There is a 30-day notice requirement to testify virtually. Please consider signing up. Testimony is generally 5-7 minutes depending on the number of people who sign up. AAJ can help you prepare.

• AAJ has more information on the issues involved in the proposed rules, including some proposed issues for comments along with the proposed textual change and committee note explaining the change. Comments can focus on both the text and the committee note.

For emergency rules, it would be helpful to expand upon what other changes to the Federal Rules of Civil Procedure are needed for the courts to operate during a pandemic or other emergency.

On FRE 702, the corporate defense bar is seeking an opportunity to limit your experts. It is important for the jury, not judges, to determine the weight of the evidence.

Informal Comment Period: Privilege Logs and Rules for Juror Questions

This past summer, the Advisory Committee on Civil Rules requested comments informally on privilege logs and the idea of categorical logging. AAJ members pushed back. However, the Discovery Subcommittee, charged with examining the issue, is still considering a rule change. AAJ is forming a cross-practice working group to address the proposal committed. A number of changes to the Federal Rules of Evidence are also being considered, including a new rule on how jurors can submit questions during trial. More information will be available on these rule changes next year.

If you have questions about submitting a comment, testifying at a public hearing, or any other questions pertaining to federal rules, please contact Sue Steinman at susan.steinman@justice.org.

Fighting for You and Your Clients

Thank you for your continued support as we continue to make our way forward during the ongoing pandemic. AAJ remains committed to fighting for access to justice for your clients. We will keep you informed about important developments and welcome your input. You can reach me at advocacy@justice.org.
Welcome to the third and last installment of the series The Bare Bones of Bankruptcy: What Every Personal Injury Attorney Should know. Part one of this series discussed the information and steps you must take when your personal injury client files bankruptcy in order to allow them to continue pursuing their tort case. Part two of this series shared information on the steps to be taken when the personal injury defendant files bankruptcy.

The last leg of this series will share important case law to support the survivability and collectability of your client’s personal injury claim after the defendant has filed bankruptcy.

To recap, when a debt is discharged the debtor is no longer obligated or responsible for paying the debt. Additionally, the lender or person who owed the money is no longer allowed to collect on the debt. A judgment or verdict in a personal injury case is essentially a debt now owed by the defendant. As a general rule, most debts are dischargeable in bankruptcies. However, there are certain exceptions to the rule that every personal injury attorney should know in order to try to avoid this happening to you. Additionally, just because the debt is discharged as to the debtor, that doesn’t mean you still can’t pursue the insurance coverage.

InsuranceProceeds are Still Collectable

Even if a debtor receives a discharge, the underlying liability and uninsured/underinsured motorist carriers are still obligated and liable to your personal injury client. I have found that many bankruptcy attorneys are not aware of this, will fight you on the continued pursuit of your personal injury case, and may even threaten you with sanctions for violation of the automatic stay.

While you still have to obtain relief from the automatic stay if the case is still pending, the bankruptcy court will allow you to continue pursuing your case and the debtor (tort defendant) is still required to participate. Despite the fact that 11 U.S.C. § 524(a)(2) prohibits fraude from attempting to hold a debtor personally liable for a pre-petition debt, it does not preclude a determination of the debtor’s liability on the basis of which indemnification would be owed by another party.

In Morris, the Court goes on to state that although the underlying obligation is personally discharged against the debtor, his attendance at depositions and trials is not a burden alleviated by a discharge injunction when establishing liability and is under the same requirements as any other witness would be. Id. at 829. Last, the Court found that at least in Chapter 7 cases, “a creditor’s failure to file a claim or seek relief from the stay does not impact the right to pursue recovery from a third party.” Id. at 831. Even though Morris doesn’t require it, it is still strongly encouraged to obtain relief from the automatic stay and have a court order establishing the debtor’s requirement to participate in the personal injury case.

RelevantPersonal Injury Debts Excepted from Discharge

It is generally presumed all debts filed under Chapter 7 bankruptcy will be discharged unless specifically objected to. U.S.C. § 523(a) outlines nineteen different types of debts that are nondischargeable. Most of these are not relevant to personal injury actions; however, there are some that every personal injury lawyer should know. The two most relevant exceptions I have used in my personal injury practice are:


A discharge may not be granted for willful and malicious injury by the debtor to another entity or to the property of another entity. This means that debts for injuries stemming from general reckless and negligent conduct are dischargeable under § 523(a)(6). See Quan, 357 B.R. 793, 798 (Bkrtcy. N.D. Cal. 2006). Willfulness and malice are two separate requirements; they are not to be merged into a single analysis. However, both must be proven for a debt to survive discharge. In re Morris, 591 F.3d 1199, 1206 (9th Cir. 2010). Last, while bankruptcy law governs what debts are non-dischargeable, bankruptcy courts should look to state law to determine whether the underlying act is a tort. In re Bailey, 197 F.3d 997, 1000 (9th Cir. 1999).

As to the willful requirement, the Sixth Circuit has adopted a strict subjective approach and while some courts have adopted an objective analysis. Under the Sixth Circuit approach, a debt is nondischargeable under § 523(a)(6) only if the debtor intended to cause harm or knew that harm was a substantially certain consequence of his or her behavior. For example, in Markowitz v. Campbell, 190 F.3d 455 (6th Cir. 1999), a debtor owed money arising from a legal malpractice claim. The creditor argued the debtor should be considered nondischargeable under § 523(a)(6)’s “willful and malicious injury” provision. The Court found that unless “the actor desires to cause consequences of his act, or ..., believes that the consequences are substantially certain to result from it, he has not committed a ‘willful and malicious injury’ as defined under § 523(a)(6).” Id. at 464.

A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse; it may be inferred based on the nature of the wrongful act. In re Ormsby, 591 F.3d 1199, 1207 (9th Cir. 2010).

Both of these elements must be proven for your client’s debt to survive discharge. It is best to work with your insurance client to get them to use those key words in your complaint scattered throughout your lawsuit as often as you can in discovery, request for admissions, depositions, etc.

11 U.S.C. § 523(a)(9) - DUI Cases

U.S.C. § 523(a)(9) does not allow for a debt to be discharged if the debt is “for death or personal injury caused by the debtor’s operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from alcohol, a drug, or another substance.” So, if the wreck was a simple fender-bender, it would be dischargeable, but if it was a result of some DUI or DWI, the debt is considered non-dischargeable.

What is the Procedure to Deem Debt Non-dischargeable?

You may need to pursue one of these exceptions if you feel your case is one that may be in excess of insurance costs or there is no insurance coverage because of the nature of the tort, etc. If that is the case, you should draft your complaint, request for admissions, and discovery in mind to be able to prove these elements for willful and malicious injury or driving under the influence as outlined above.

Deeming a debt as nondischargeable is accomplished through the filing of an adversary proceeding in the debtor’s bankruptcy case. An adversary proceeding is simply the filing of a complaint, stating the allegations that support a finding of nondischargeability under § 523(a). If there are no findings by another Court already, this is where the courts surrounding the nondischargeability will be litigated and decided on by the bankruptcy court.

However, under the doctrine of collateral estoppel, if done properly, the bankruptcy court may adopt the state court findings in your case and find the debt nondischargeable without the need of litigating it again in the adversary proceeding. While § 523(a) is silent as to the burden of proof required to prove an exception, the United States Supreme Court ruled in Grogan v. Garner that the preponderance of the evidence standard, rather than clear and convincing, is the burden of proof to be used in determining nondischargeability of debts. Grogan v. Garner, 498 U.S. 279, 288 (1991). This is so even if a state court requires a higher burden of proof for claims of fraud, etc.

In re Halpern, the Appellate Court determined that the bankruptcy court was “precluded from retrying an issue allegedly litigated in a prior proceeding only if:

1. the issue at stake was identical to the one involved in the prior litigation;
2. the issue was actually litigated in the prior litigation; and
3. the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that earlier action.

In re Halpern, 810 F.2d 1061, 1064 (11th Cir. 1987).

Keep this in mind when litigating your case in state court. If you follow the steps above, you should not have to re-litigate your case in bankruptcy court further wasting both your and the courts time and resources.

In summary, this series was meant to be the “Bare Bones” of what you must do in the event your client or the defendant files bankruptcy. As with any area of law there are some exceptions, but following the general principles given in this series will help you understand the basics so you and your client can make an educated decision on how to move forward in their case. Below are the bare bones of what must be done depending if your client files or the defendant files bankruptcy and discussed in more depth in parts 1 and 2.

Checklist if the Personal Injury Defendant Files Bankruptcy

- File Motion to Re-open if Bankruptcy case closes prior to suit initiation.
- File Motion for Relief from Automatic Stay
- File Proof of Claim (Remember Deadlines!!!)
- Review the Schedules
- Review the Statement of Financial Affairs

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Checklist if your Client Files Bankruptcy (See Part 1 for detailed analysis)

- Statement of Financial Affairs lists personal injury case (Question 9 on SOFA)
- Statement of Financial Affairs lists property loss (Question 15 on SOFA)
- Pending personal injury claim is listed on Schedule B
- Pending personal injury claim is exempted on Schedule C
- File Motion to Employ you as personal injury attorney
- File Motion to Substitute Trustee as Party in personal injury case (State Court Filing)
- File Motion to Approve Settlement Proceeds

ABOUT THE AUTHOR
Joshua Cantrell serves as an Associate Attorney at Griffith Law in Franklin, TN. He joined the firm in December 2017 as a Case Manager while completing law school and began practicing law in October 2019.

He is a summa cum laude graduate of Bryan College with a B.S. in Business Management. He received his law degree from Nashville School of Law in May 2019 graduating number seven in his class.

From 2007 to 2013, Joshua served in both the Army and Army National Guard as a paralegal. From 2011 until joining Griffith Law, Joshua served as paralegal and office manager for a consumer bankruptcy firm where he dealt with clients directly in their bankruptcy cases.

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Joshua currently serves on the Board of Governors for the Tennessee Trial Lawyers Association and as Chairman of the Membership Committee for TTLA. He is also an active member of the Williamson County Bar Association and the American Association for Justice.

Outside of the law, Joshua loves to travel and experience new foods and restaurants. In his spare time, he enjoys taking on small wood working projects and watching sports. He tries to live life by one of his favorite quotes from Siqi Chen. “Life is short. Do stuff that matters.”
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Sameen Shabbir / 615.613.1585
sameen@tristardepos.com

Jeffery Faulkner / 407.853.3189 / jfaulkner@synergysettlements.com
Anxiety and Perfectionism

by Buddy Stockwell, Executive Director, TLAP

For many lawyers, anxiety becomes a constant companion, especially those who are driven by fierce competitiveness and perfectionism. Depending on the individual, anxiety levels can rise dramatically during law school and then continue into the practice of law. Over time, if anxiety continues to build unchecked, it can result in Generalized Anxiety Disorder (GAD), a diagnosable mental health issue. Depending on the severity of GAD, it can cause symptoms such as: restlessness or feeling keyed-up or on edge; being easily fatigued; having difficulty concentrating; being irritable; and experiencing muscle tension and sleep disturbances.

GAD affects 6.8 million adults, or 3.1% of the U.S. population. The exact cause of GAD is unknown, but there is evidence that biological factors, family background, and particularly stressful life experiences play a role.

Law is a very noble profession and is indispensable to our society’s safety and wellbeing. It is very rewarding to practice law and most lawyers I know are dedicated to providing the highest levels of professionalism and advocacy. But in carrying out our mission, we often experience significant levels of stress, especially those who litigate matters involving clients who are under severe emotional distress, such as domestic and criminal litigation.

While stress levels may vary from practice to practice, there is one common denominator that affects most all of us as lawyers: perfectionism.

Our expectation of perfection began in the heat of law school competition. Thereafter, our profession is one that demands precise attention to detail. Mistakes can be very costly to our practice. Thereafter, our profession is one that demands perfectionism. Depending on the individual, anxiety levels can rise dramatically during law school and then continue into the practice of law. Over time, if anxiety continues to build unchecked, it can result in Generalized Anxiety Disorder (GAD), a diagnosable mental health issue. Depending on the severity of GAD, it can cause symptoms such as: restlessness or feeling keyed-up or on edge; being easily fatigued; having difficulty concentrating; being irritable; and experiencing muscle tension and sleep disturbances.

GAD affects 6.8 million adults, or 3.1% of the U.S. population. The exact cause of GAD is unknown, but there is evidence that biological factors, family background, and particularly stressful life experiences play a role.

What is actually happening in a case, lawyers also try to imagine what surprises the opposition may have for them and their clients, always scanning the horizon for threats and imagining what may be coming at them next.

Being guarded and prepared is an indispensable part of practicing law but catastrophizing and being habitually pessimistic are unnecessary mindsets that can feed anxiety. Thus, it is good practice to try and stay grounded in optimism, even while engaging in the “rough and tumble practice of law.”

If you would like more information or support on managing anxiety, call TLAP at (615) 741-3238 or visit us on the internet at www.tlap.org. All calls to TLAP are absolutely confidential and you do not have to give your name.

ABOUT THE AUTHOR

Buddy Stockwell was appointed by the Tennessee Supreme Court on July 1, 2020, as the new Executive Director of the Tennessee Lawyers Assistance Program (TLAP). Stockwell comes from south Louisiana where he has been a volunteer and program monitor for the state’s Committee on Alcohol and Drug Abuse since 1993, and the Executive Director of Louisiana’s comprehensive Judges and Lawyers Assistance Program (LAAP) peer professionals’ program for the last ten years. He is a Certified Clinical Interventionist through “Law First” training at the Betty Ford Center and has personally been in recovery from alcoholism for over 37 years. Over the years he has supported hundreds of bar members, bar applicants, and family members of the bar with a wide range of substance use disorders and mental health issues. Stockwell earned a Bachelor of Science degree in Management from Louisiana State University in 1989 and a Juris Doctor degree from LSU Law School in 1993. Post-law school, he practiced in both large and small firm settings, but ultimately opened a solo practice in Baton Rouge where he focused heavily on domestic litigation until 2004 when he sold his Baton Rouge law office, home, and vehicles and he and his wife, Melissa, moved aboard a large catamaran and sailed the seas for six years, covering 19,000 nautical miles. Stockwell is a U.S. Coast Guard Licensed Captain and seasoned ocean mariner. He also served in the Navy prior to college. He is dedicated to TLAP’s mission and very excited to serve the Tennessee Supreme Court, the TLAP Commission, and stakeholders in the profession as the new TLAP Executive Director.
Take your Legislator to Lunch

This fall, TTLA President Tony Seaton started an initiative, chaired by TTLA Board member Brad Burchette, to “Take your Legislators to Lunch” designed to develop relationships with your elected officials. We are asking TTLA members to invite their legislators to coffee or lunch so that you can cultivate personal relationships with them back home.

TTLA members can be a trusted source of information for their legislators and that can only happen by developing personal relationships. Please let us know when you intend to meet with your legislators, and we will enter you into a drawing to have your TTLA membership dues paid for a year!

These personal relationships are so helpful to the TTLA lobbying team when session begins in January.

Special Session Update

The Tennessee General Assembly adjourned at approximately 1:30 am on October 30th to finish up a 3-day special session. The legislature convened in extraordinary session for just the third time in Tennessee history. The extraordinary session covered several issues related to the Covid-19 pandemic.

The omnibus Covid-19 bill filed by Lt. Governor Randy McNally and Speaker Cameron Sexton was the focus of the session and after three days of marathon meetings and backdoor negotiations the bill finally passed. The Senate and the House passed different versions of the bill (HB9077/SB9014). They had to establish a conference committee to work out their differences. The final version of the bill was a compromise between the House and Senate.

There were several other bills that passed as well including allowing partisan school board elections, limitations on the length of state emergencies, local health director authority, and powers of the District Attorney.

Below is a brief summary of the Covid-19 omnibus bill:

- **Vaccines**: Prohibits a governmental entity or public school from mandating or compelling a person to show proof of a Covid-19 vaccine. The bill also prohibits a private business, governmental entity, or school from taking any adverse action against a person for declining to show proof of a Covid-19 vaccine.

- **Mask Mandates for Government Entities**: Sets strict standards for how and when a governmental entity declares a mask mandate. It allows for a mask mandate in “severe conditions” when the governor has declared a state of emergency for Covid-19 and the average 14-day infection rate is at least 1,000 new known infections for every 100,000 residents of the county.

- **Mask Mandates in Schools**: Prohibits a public school or school board from requiring a person to wear a face mask on school property unless “severe conditions” are met. A principal must submit a written request to the school’s governing body to adopt a policy requiring everyone on school property to wear a face covering. The mandate may not last more than 14 days.

- **Federal Funding exception**: A private business, governmental entity, school or employer can apply for an exemption if they can show that following the state law would result in the loss of federal funding, and the comptroller is responsible for assessing the exemption applications.

- **Unemployment Benefits**: Specifies that a person who was terminated or left employment because they failed or refused a Covid-19 vaccine is eligible for unemployment benefits.

Health Care Standards of Practice:

- **Quarantine**: Establishes the commissioner of health as the sole authority to determine quarantine guidelines.

- **Monoclonal Antibodies**: Health care providers shall exercise independent professional judgment when determining whether to recommend, prescribe, offer, or administer monoclonal antibodies.

- **Mature Minor Doctrine**: Requires health care providers get written consent from the parent or legal guardian before administering the Covid-19 vaccine to a minor.

- **Hospital Stays during Covid-19**: Hospitals may not restrict patients from having at least one family member present during their stay as long as they test negative for Covid-19 and are not exhibiting symptoms of the virus or other communicable disease.

Covid-19 Liability: Copied the language that was passed in the 2020 special session currently in TCA 29-34-802 and added it to this new title 14 - Covid-19. A person does not have a claim for loss, injury, or death arising from Covid-19 unless there is clear and convincing evidence of gross negligence or willful misconduct. The chapter will sunset on July 1, 2022.

Private Right of Action: A person injured as a result of a violation of Chapter 2 has a private right of action for injunctive relief, compensatory damages and reasonable attorney’s fees. Chapter 2 sets out prohibitions for government and business mandates on requirement or proof of the COVID-19 vaccine and mask mandates for governmental entities and public schools.

The House and Senate chambers will reconvene for the second session of the 112th General Assembly on Tuesday, Jan. 11.

Tony Seaton, TTLA President
Mark Chalos, TTLA Legislative Chair
Lauren Brinkley, TTLA Legislative Counsel

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FIRM SPOTLIGHT: NAHON, SAHAROVICH & TROTZ, PLC

Nahon, Saharovich & Trotz, PLC was formed in 1990 with three attorneys and two staff members. Since then, we have grown to a team of 35 attorneys and over 135 paralegals, legal assistants, and support staff, with several offices and a national presence. As a plaintiff’s personal injury law firm, we fight every day for those injured through no fault of their own, so helping people is in our “DNA.” However, we also make a point to further this mission outside of traditional business hours by giving back to the communities in which we practice. We feel fortunate that we can help make a difference in the lives of those who are in need.

Founding partners Alex Saharovich and Corey B. Trotz lead the way, having served on boards for local charities such as Kindred Place (formerly the Exchange Club of Memphis) and Facing History and Ourselves. Our lawyers are active with organizations including Memphis Area Legal Services, Boys and Girls Club of Jackson, and Thrive Memphis. We support organizations who help others such as the Memphis/Shelby County Firefighters Association, American Cancer Society, Susan G. Komen Race for the Cure, Junior League of Memphis, Soulsville Foundation, Marine Corp League, and Memphis Youth Symphony Program, just to name a few more.

Our lawyers and staff enjoy participating in service projects, including winter coat drives, holiday toy drives, and volunteer opportunities. We enjoy serving meals to residents of the Ronald McDonald House (where St. Jude patients reside), and this summer, had a great time cooking dinner for the Church Health Center, an amazing Memphis-based organization that treats over 70,000 people who do not have health insurance. One of the most rewarding days of the year for Team NST took place this May when we served over 300 meals to Memphians at Douglass Park and then cleaned the park. These service projects have fostered incredible team building and camaraderie at NST, and we hope that it also helps shed a positive light on our legal community.

Further, we believe in the value of education. Each year, NST Law awards a scholarship to a 3rd year law student at the University of Memphis School of Law who has excelled academically and demonstrates an interest in helping those who have suffered harm due to someone else’s fault. We have also awarded scholarships to members of the Black Law Students Association at several law schools, and college scholarships to high school students who are inspired to make a difference in their communities.

Whether it’s sponsoring a 5k race, serving meals to those unable to afford food, sponsoring a scholarship to help a young student pay for college or graduate school, participating in charity events and fundraisers, or volunteering with charitable organizations, NST Law looks for ways to stay connected and make our communities a better place for all.
ARE YOU LOOKING FOR AN EXIT STRATEGY FROM YOUR LAW FIRM?

IF YOU ARE INTERESTED IN SELLING YOUR FIRM, CONTACT US TODAY.

It all starts with a private phone call with our President and CEO, Tim McKey. He has consulted with hundreds of law firms throughout the country and will walk you through the process.

Call Tim at **225.383.2974** or email him at tmckey@vistact.com. Confidential communication guaranteed.