Does ERISA apply to Plans Sponsored by Associations?

Multiplying the Fruits of Your Labor

The Pendulum Has Swung Too Far

In Memoriam

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TENNESSEE TRIAL LAWYER OF THE YEAR

Thomas Greer

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Our team has significant experience litigating both personal injury and complex cases. We value our co-counsel relationships and have achieved these results and shared success by partnering with lawyers just like you. To us, it’s not about the size of the case, it’s about achieving justice for our clients and providing an exceptional experience along the way. Team up with us for a partnership that gets results.
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Did You Know...
TTLA has a Paralegal Listserv?

To be a member of this listserv you must be a paralegal or a legal assistant of a TTLA member and a TTLA Paralegal member.

If you know other paralegals or legal assistants that would like to be a part of this network, please invite them to join TTLA. Upon receipt of their membership application, they will automatically be added to the listserv.

TTLA provides an annual education program for plaintiff paralegals and legal assistants. In 2019, we had over 100 attendees. They had a great time networking with one another and receiving legal education to assist them with their job duties.

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Rise UP!

My grandfather told me as a boy while I rode with him on his tractor around his farm... “Strong trees don’t just grow that way. They faced a lot of storms and survived for the better.” Times are tough. Adversity has been, and always will be, a part of being a mortal soul on this earth. It seems the current “new normal” is throwing changes at us faster than we can comfortably adapt. As I write this, jury trials I was so looking forward to trying in January 2021 have just been cancelled. My jury trial calendar normally holds about 6-8 cases per year, and is now filled with 15 between February 2021 and July 2021. And most of those are likely to be post-poned due to COVID-19. This simply means that our clients are not getting their shot at justice anytime soon. And justice delayed is... you know the answer.

Meanwhile, the insurance companies have figured it out by now. There is NO ACCOUNTABILITY. And since there are no jury trials currently going forth, there is not squat we can do about it presently. So they are flat out denying claims wrongfully, and, more commonly, low bailing claims across the board. The 7th Amendment is a powerful motivator for both sides to resolve their differences. But when that hammer has been squelched, and there is no bad faith penalty in Tennessee for making unreasonable offers, the system comes to a screeching halt. Cases are stagnating and our inventory is growing (and growing stale). The insurance companies know a large percentage of our clients are hurting financially and they are lowballing all of them in the hopes that desperate clients will take their insulting offers. BUT... there is hope on the horizon. With hopes of a vaccine and perhaps some herd immunity over time, we will get back to interacting more fully living life. Hopefully soon our cases will be moving again. And if recent trials and research from other jurisdictions are any indication of the future, we indeed have a lot to look forward to. Everything that keeps us safe in current times is part of a larger safety system. And when those systems are broken or non-existent, the harms are readily evident. When we expose the safety systems failures in our cases and put them at the forefront for all to see, I firmly believe obtaining a full cup of justice will be easier to obtain via jury verdicts. Regardless of your political point of view, safety for ourselves, our family, and our community, is paramount. Breakdowns in safety systems are deadly, and our jurors know this. Especially now.

So, until we get a chance to fully test my hypothesis and bring it to fruition, there are several things we must be doing now. The amount of free CLE programs over the past 6 months has been vast. I have been soaking them up and have put a lot of new arrows in my quiver that I cannot wait to unleash. We must also be preparing for those upcoming trials by focus grouping and preparing for trial now. If you simply do what you have been doing up to this point and you are not investing in yourself to make yourself a better trial lawyer, this past year is going to be wasted time. Get busy and do the extra work now to invest in yourself. The opportunities have never been better in my opinion. Your clients will be thankful you did.

Defense lawyers are so busy competing for business that they are willing to cut each other’s throats to prevent their competitor defense lawyers from doing a better job than they themselves might do. As trial lawyers, we are networked together. We help our brothers and sisters out every day to advance our common cause. We share documents, depositions, and intel. This trial lawyer perspective of cooperation is one of the building blocks of our organization, and what continues to allow us to be a great force. And in these times, I believe we are as strong as we have ever been.

I am truly thankful to be a part of this great organization of my fellow brothers and sisters. I hope each one of you has a safe and happy holiday season. Keep fighting for our worthy and noble cause and, when this pandemic is over, let’s be better and stronger because of it.

"If we had no winter, the spring would not be so pleasant; if we did not sometimes taste of adversity, prosperity would not be so welcome.”

- Anne Bradstreet

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Adversity Is Opportunity In Disguise
Thomas Greer is the recipient of the 2020 TTLA Outstanding Trial Lawyer of the Year award. This award is given annually to honor an attorney who demonstrated superior skills and outstanding achievements in civil justice during the previous year.

Thomas has spent his entire legal career representing people against corporations and insurance companies. Thomas is a partner in the Memphis based law firm of Bailey & Greer. His true passion as a lawyer is trying cases, where he has obtained many impressive verdicts and is often called upon by other attorneys to be lead counsel at trial. As a long-time TTLA member, Thomas served in various leadership positions and was TTLA President at the relatively young age of 37. Thomas can always be counted on to lend his time, energy, and resources in the fight against special interest groups, insurance companies, and large corporations, as they relentlessly and systematically attack the civil jury system.

Thomas, a self-described family man, is married to his college sweetheart, Tiffaney, and is the proud father of four daughters: Caroline (11), Eloise (8), Juliet (3), and Penelope (2). His home is filled with love, laughter, and an unbelievable amount of barbie and LOL dolls. They enjoy family walks and bike rides around the neighborhood, Friday night pizza cooked on the Big Green Egg, and family vacations.

Hobbies/Interests:
Strumming guitar, playing harmonica and signing (none of which I’m very good at), vacations with my family, exercising, watching movies, and cooking out.

What would you say to a young lawyer who aspires to be a trial lawyer?
If you graduated law school and passed the bar exam, you have the capacity to be a great trial lawyer. Trying a case is nothing more than a set of skills that can be learned with lots of hard work and practice, but to be clear, it’s not for everyone. I feel an awesome responsibility, almost overwhelming pressure, and downright fear at the start of every case I’ve ever tried.

What can more experienced lawyers do to help the next generation of trial lawyers?
This one is easy. Mentor as many young and aspiring trial lawyers as you can and encourage them to join TTLA. My rule is simple, as long as you are representing injured people and not insurance companies, my door is always open. The only strings I attach to my willingness to help is that you must join TTLA. Through mentoring, both informally and through TTLA’s mentoring program, I’ve met so many great people, many of whom have become friends. I hope I’ve had at least a small part in the success of others.

What are the characteristics of a great trial lawyer?
I don’t consider myself great at anything, but when I think about the great trial lawyers I know and respect, three things come to mind: true compassion for the client, a competitive spirit, and the desire and ability to learn and try new things. First, great trial lawyers get to know their clients. They find a way to like, respect, and understand their clients. Sometimes that’s hard and sometimes that’s easy, but you have to find a way to do it. Second, the adversarial nature of our system means that you have to love winning and perhaps more importantly, hate losing. I think a competitive spirit is at least part of what drives great trial lawyers. Finally, I’m constantly impressed and amazed to see lawyers who have been practicing for decades learning new skills and trying different methods and approaches. It truly is the “practice of law,” and if you’re trying a case exactly the same way you did ten or even five years ago, you’re probably doing it wrong. The trial lawyers I admire have a natural curiosity for learning and the courage to try new things.

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.
ERISA, or the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 is a federal law that applies to employee benefits, including insurance, such as disability, life, and health insurance, offered at work. ERISA traditionally applies to benefits purchased from employers or unions, but not to benefits purchased from professional associations.

If ERISA applies to an insurance policy offered at work, the applicable rules give a host of advantages to insurers and employers, giving insurance companies who deny benefits an incentive to argue ERISA applies.1 ERISA also allows health insurance to recover under subrogation and reimbursement rules.

A recent rule created by the Department of Labor in 2018 expanded the application of ERISA to benefits purchased from many associations – creating a whole new universe of plaintiffs whose claims for insurance benefits would be governed by ERISA rather than state law.

Because one federal district court has struck down the rule as being an illegal expansion of the statute, this is an area of the law that is ever developing and changing, making it even more important for plaintiffs – and plaintiffs’ attorneys – to understand when ERISA might apply to a claim.

I. Traditionally, most plans sponsored by associations do not fall under ERISA

ERISA applies to benefits offered by employers and unions, because ERISA was written to protect employee benefits. Some associations’ benefit plans fell under ERISA when those benefits were effectively employee benefits. Through interpreting the ERISA statute, courts and the Department of Labor clarified which associations were meaningfully associated with employers and the employer employee relationship so that ERISA applied.

The ERISA statute applies to “any employee benefit plan if it is established or maintained (1) by an employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) both.” 29 U.S.C. § 1003. Although this section does not mention groups or employers or associations of employers, the definition of “employer” in ERISA “means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.” This definition has been the source of litigation concerning which plans offered by employer associations should fall under ERISA. Although it is clear from this definition that some associations acting in the interest of an employer could sponsor plans that would fall under ERISA, it is not clear what it means for an association of employers to be “acting for an employer in such capacity.”

ERISA also gives the Department of Labor (“DOL”) the authority to issue rules interpreting the statute. The DOL originally set out three factors for determining whether a health plan sponsored by an association was properly covered by ERISA. If an association meets the three factors, the plan is considered a “bona fide” association and ERISA applies. If not, then the association sponsored plan didn’t fall under ERISA. These three factors are:

1. Whether the group or association was a bona fide association with a business/organization purposes and functions unrelated to the provisions of benefits
2. Whether the employers shared some commonality and genuine organizational relationship unrelated to the provision of benefits; and
3. Whether the employers that participate in the benefit program, either directly or indirectly, exercise control over the program, both in forma and in substance.

83 Fed. Reg. at 28, 914. This was done in part because ERISA was designed to apply to welfare benefit programs relating to the employer-employee relationship, rather than those that are derived from general commercial relationships. Id. By clarifying the definition given in the statute, the Department of Labor was attempting to provide a meaningful boundary between plans which would meet the definition and plans which would not.

continued to page 9B
Courts have also upheld this type of interpretation and have applied it to a variety of situations over the years. While some associations were found to be “bona fide” employer associations, (i.e. the association had a purpose other than to just offer the benefits) and thus their health plans fell under ERISA, courts have determined that other associations were not quite “bona fide” employer associations. The DOL’s original rule above makes it clear that an association that has no role other than the provision of benefits, where the association does not perform any function that is similar to the traditional employer-employee relationship is not a “bona fide” employer association.

For example, in MD Physicians & Associates, Inc., v. State Board of Ins., the Fifth Circuit analyzed whether an association of physicians’ offices that provided a benefit plan to the members of the association was an “employer” for the purposes of ERISA. 957 F.2d 178 (5th Cir. 1992). In this case, MD Physicians established a plan (the MDP Plan), which provided certain benefits to employees of subscribing employers; the group used insurance brokers and offered the plan as a commercial product to employers throughout the Texas panhandle. Id. The court emphasized that much of the analysis boiled down to whether MD Physicians was acting in the interest of the subscriber when it offered the plan. The court concluded that MD Physicians was not, because the plan gave benefits to individual employees, and wasn’t established for any purpose relating to the employers.

The court also asked whether in this case there was a commonality of interest or representational link between the employees receiving benefits and the association. The court held that there was not because outside of providing benefits the association had no commonality of interest to the employees. Ultimately, if the association was to be considered an “employer” for the purpose of ERISA applying to its health plan, the association had to be acting in the interest of employers and have some kind of common or representational interest beyond providing benefits - illustrating the boundary that has traditionally existed between association plans that are purchased by employees of employers that belong to the group and what are more traditional employee benefit plans.

II. A DOL rule promulgated in 2018 expanded the application of ERISA

In 2017, President Trump issued an executive order which ordered the Department of Labor to issue rules expanding the reach of ERISA and the Patient Protection and Affordable Care Act (“ACA”) 42 U.S.C.A. §18001 by bringing more health plans sponsored by groups of employers under those regulations. The stated goal was to increase the number of small businesses that are able to bring their employees affordable health care with costs on a level similar to the costs for employees in larger businesses. The other goal was to decrease the cost of health insurance plans for individuals who owned their own businesses.

The final rule ultimately relaxed the DOL’s prior guidance to expand the definition of “employer” or “association of employers” to allow more associations to qualify as “bona fide” than would have previously. Ultimately, the result is that associations who only have nominal purposes besides providing benefits and whose function bears little resemblance to the employer - employee or union – member relationship that ERISA usually governs could now offer benefits that would be covered by ERISA rather than state law. The final rule was codified at 83 Fed. Reg. 28912 and one key feature is that even a group with a single business purpose beyond the provision of health care benefits to its members can meet the purpose test. Another key feature of the rule is that the commonality of interest can be as tenuous as a geographic link.

For example, a farmer with no other employees that belonged to a co-op of other farmers in the same geographic area who all had no other employees and purchased his healthcare plan from the co-op would not have been a participant in an employee benefit program for ERISA purposes. The farmer is, for all intents and purposes, an individual who purchased a health plan from a group he belongs to, not an individual who receives his benefits as part of his employment arrangement. This bears little resemblance to the traditional employee-employer relationship, where one thinks of employee benefit plans as being part of the compensation an employee receives in exchange for his labor. The farmer in this case is his own employer, so to speak, and the co-op is simply a group of other individuals like him, that have provided the plan as a way to reduce costs to each single “employer.”

However, under the new regulations, it is likely that the co-op’s plan would be an employee benefit plan. Even if the co-op was formed primarily for the provision of health care plans to its members, but served any other business purpose, the plan would meet the purpose test of the new rule. If the group shared no other commonality other than all being located in the same area, they would still meet the second prong of the test, where in the past, the geographic link was not enough to meet this. Finally, the last feature is that the “control” test is also relaxed; where the prior guidance required the group of employers to exercise some actual control over the program, the new guidance allows this to encompass groups where the employers do not exercise more than nominal control over the operation of the association.
III. Consequences for insurance, insurer negligence, bad faith and subrogation cases

The new rule expands the universe of insurance policies that fall under ERISA. So, for members of the farmers’ co-op discussed, under the new DOL rule, the rules under the federal ERISA law would apply, not state law. States typically have better laws for people who have been denied insurance benefits than ERISA does; while ERISA’s stated purpose was to protect employees, the deference that plan administrators receive on review often gives them an advantage over plaintiffs. ERISA case law also generally only allows limited discovery into conflict of interest, and often only if plaintiffs can make a preliminary showing of bias. Also, courts have repeatedly held that ERISA plaintiffs have a fairly limited selection of remedies to choose from. Usually, a claimant is only entitled to the benefits under the plan and perhaps one of a few equitable remedies.

So, in claims for benefits under a policy, the plaintiff might avail himself of more friendly state law if ERISA does not apply. State breach of contract law would allow the plaintiff to get discovery, for example, or to receive other remedies besides the handful available in ERISA cases.

Under ERISA, there are no punitive damages, and no bad faith. In the above example of a farmers’ co-op, if the farmer were to be in Tennessee, and have a claim for bad faith refusal to pay prior to the DOL’s rule going into effect, he could avail himself of Tennessee’s bad faith statute and receive the statutory damages. Similarly, in some situations, he could win a case for egregious breach of contract under Tennessee law and receive punitive damages. Both of these remedies are unavailable to the farmer if ERISA applies to his plan, however.

In cases of insurer negligence or misrepresentation, plaintiffs under state law may bring claims for those torts and receive damages. If ERISA applies to the claim, though, these remedies are unavailable. Because ERISA preempts most state laws except those “regulating the business of insurance,” the plaintiff may not receive any remedy other than ERISA’s limited remedies. In the case of negligence or misrepresentation, it is possible that the remedy which would most make the plaintiff whole is not a claim for benefits, but the remedy he will receive under ERISA is any benefits due under the contract. Therefore, the consequences to plaintiffs if ERISA applies to their claim because they purchased their benefits from an association are actually far more expansive than just the application of federal law. The fact that ERISA applies means that those plaintiffs might not be able to be made whole in the way that would best remedy their loss. In other words, because state law, with more remedies and available damages might be more able to truly compensate the plaintiff for her loss beyond just the benefits owed, the impact of this change is that in many situations a plaintiff may not be able to be made truly whole because ERISA will apply to the case.

IV. The validity of the Final Rule is questionable, at least according to one district court

In 2019, eleven states sued the DOL in the US District Court for DC. New York v. United States Dept. of Labor, 363 F. Supp. 3d 109 (D.D.C. March 28, 2019). In that opinion, the district judge found that the final rule was unlawful under the Administrative Procedure Act for several reasons, even though Chevron principles did apply. First, the court held that the regulatory interpretation was not reasonable under ERISA because it stretched the definition of “employer” beyond the statute’s intended effect. Id.

If Congress had intended ERISA to regulate ordinary commercial insurance relationships existing outside of the employment context, one would not expect it to have framed ERISA’s scope in terms of employee benefit plans, created or maintained by employers or employee organizations for the benefit of current and former employees and their beneficiaries. See ERISA § 3; 29 U.S.C. § 1002.

Id. The court went on to say that the rule is lawful only to the extent that it helps explain what an association “acting in the interest of an employer” means; however, the rule sweeps every agent acting in the shoes of an employer into the definition of employer used by Congress when it drafted ERISA, and is nonetheless too broad to be lawful. Id. at 130; see also Int’l Bhd. Of Painters & Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546, 1548 (D.C. Cir. 1988).

Like the court’s analysis of the DOL’s interpretation of the definition of employer, the court held that the expanded “bona fide association” test was unlawful because it was so broad as to bring association plans under ERISA that were beyond the statute’s intended application. The court explained that this interpretation allows an association to sponsor an Association Health Plan falling under ERISA so long as the association has “at least one purpose other than providing benefits.” The district court explained that each provision expanding the interpretation is unreasonable. First, the rule uses a “purpose test” which essentially eliminates any limitations on which groups are bona fide associations:

The purpose test allows an association to sponsor an AHP so long as the association has “at least one substantial business purpose” unrelated to the provision of health care, even if its primary purpose is “to offer and provide health coverage to its employer members and their employees.” 29 C.F.R. § 2510.3-5(b)(1). The rule does not define “substantial business purpose,” but it creates a safe harbor “if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan.” Id. The preamble to the Final Rule provides examples of “substantial business purpose[s],” including “convening conferences.
or offering classes or educational materials on business issues of interest to the association members;” acting “as a standard-setting organization that establishes business standards or practices,” or engaging “in public relations activities such as advertising, education, and publishing on business issues of interest to association members unrelated to sponsorship of an AHP.” Final Rule, 83 Fed. Reg. at 28,918.

New York v. United States Dept. of Labor, 363 F. Supp. 3d 109 (D.D.C. March 28, 2019). The problem with the purpose test as DOL now interprets it is that it fails to set meaningful limits on the character and activities of an association. The Final Rule permits associations to form for the primary purpose of establishing an AHP, and hence the only limitation imposed by the purpose test is its undefined “substantial business purpose” requirement. The possible scope of qualifying substantial business purposes ranges from the resource intensive—e.g., setting business standards and practices—to the de minimis—e.g., publishing a newsletter on business issues. Of course, the latter is something that most associations already do and thus is not a defining characteristic of a subset of organizations that would fall within ERISA’s scope.

Next, the court examines the commonality of interest test under the Final Rule:

To form an association sponsoring an AHP under the Final Rule, employers also must display a “commonality of interest.” 29 C.F.R. § 2510.3-5(b)(5). This requirement may be met through two alternative routes: employers must either share a common “trade, industry, line of business, or profession,” or else each employer must have “a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State).” 29 C.F.R. § 2510.3-5(c)(1).

Id. at 132-133. The DOL expanded the definition of employer association by incorporating a commonality of geography into the commonality of interest test. Under this rule, a co-op of farmers in the same geographic area would likely be considered to be operating an association health plan under ERISA. However, the court found that it was fairly nonsensical to include geography as a determining factor in whether the association had a commonality of interest sufficient to fall under ERISA, which applies to employee benefits. The court explained that while ERISA allows associations who share common industrial, reputational etc. interests to form plans, it does not include organizations whose main link is geography because this interpretation of the law gives no limitations as to what groups could be included. The purpose of this test is to ensure that the associations of employers have common interests- i.e. they serve the employees’ interests. Geography is not a valid way to assess this.

The final part of the test analyzed the by the court is the control test, which requires that the employers who are members of the association exercise control over the functions and actions of the association. This test is meant to add to the commonality of interest test, but not replace it. Therefore, even if an association is controlled by its employer members, but it does not share any actual commonality of interests beyond geography, which the court held was an invalid test for commonality of interest, the association would not be reasonably considered an employer for ERISA purposes.

A secondary provision that the court analyzed that would likely cause the co-op to fall outside the definition of employer for the purposes of this rule is whether or not sole proprietors without employees count. Members of an association that are a sole proprietor would be considered “employers” for the purpose of this rule. However, the court held that this is contrary to the purpose of ERISA. The court explained that under ERISA this is generally not the definition used for employer; ERISA clearly anticipates a relationship between two parties because the definition of employee is “someone employed by an employer” and Congress did not intend to include those who employee no one other than themselves in this definition.

Although this opinion is the final word on the Department of Labor’s rule for now, the Department has filed an appeal to the DC Circuit. The district court seemed to indicate that the prior guidance was reasonable under Chevron. The consequence of this rule if were to stand, as discussed by the court, is that the rule essentially eliminates the distinction between plans and brings into ERISA's orbit plans that would otherwise not be governed by federal law.

V. The future of association health plans and how to find out if ERISA might apply in your case

In response to the New York case, the DOL has taken certain actions besides filing an appeal; see “Legal Requirements: Association Health Plans,” US Master Employee Benefits Guide, at 362 explaining:

The court vacated the final rule’s bona fide association and working owner provisions. Citing the final rule’s severability provision, it remanded the rule to the DOL to consider how the invalidated provisions affect the remaining portions of the AHP rule.

The DOL said that for an interim period of time, it will not pursue enforcement actions against parties for potential violations stemming from actions taken before the district
court’s decision in good faith reliance on the AHP rule’s validity, as long as parties meet their responsibilities to association members and their participants and beneficiaries to pay health benefit claims as promised.

The DOL also will not take action against existing AHPs for continuing to provide benefits to members who enrolled in good faith reliance on the AHP rule’s validity before the district court’s order, through the remainder of the applicable plan year or contract term.

In essence, the law remains unsettled. Especially in light of the coming transition of power in the Executive Branch, it is possible that the DOL might issue different guidance in the future. For now, if your client has a policy for health, life, disability or other benefits that was purchased through an association, it is important to try and ascertain whether ERISA might apply to their case. In general, the basic rule about whether ERISA applies is that the benefit must be an employee benefit and an employer must intend to offer an employee benefit plan. The issue with the DOL’s regulation is that it purports to expand the application of ERISA to benefits that don’t meet this basic test. So far, the New York v. Department of Labor opinion is the only opinion addressing whether this is lawful, and that court has held that this rule is invalid.

1 Case law under ERISA has developed to provide defendants with an advantage in terms of standard of review, availability of discovery and the available remedies, to name a few. For more information about the different consequences for plaintiffs when ERISA applies, see https://www.buchanandisability.com/helpful-resourcesandarticles/attorney-newsletters/

2 The full text of the executive order can be found at: https://www.federalregister.gov/documents/2017/10/17/2017-22677/promoting-healthcare-choice-and-competition-across-the-united-states

3 Although the rule itself is too long to print in its entirety, the summary provides a good explanation of the results and the language in the rule: “This document contains a final regulation under Title I of the Employee Retirement Income Security Act (ERISA) that establishes additional criteria under ERISA section 3(5) for determining when employers may join together in a group or association of employers that will be treated as the “employer” sponsor of a single multiple-employer “employee welfare benefit plan” and “group health plan,” as those terms are defined in Title I of ERISA. By establishing a more flexible “commonality of interest” test for the employer members than the Department of Labor (DOL or Department) had adopted in sub- regulatory interpretive rulings under ERISA section 3(5), and otherwise removing undue restrictions on the establishment and maintenance of Association Health Plans (AHPs) under ERISA, the regulation facilitates the adoption and administration of AHPs and expands access to affordable health coverage, especially for employees of small employers and certain self-employed individuals. At the same time, the regulation continues to distinguish employment-based plans, the focal point of Title I of ERISA, from commercial insurance programs and other service provider arrangements. The final rule also sets out the criteria that would permit, solely for purposes of Title I of ERISA, certain working owners of an incorporated or unincorporated trade or business, including partners in a partnership, without any common law employees, to qualify as employers for purposes of participating in a bona fide group or association of employers sponsoring an AHP and also to be treated as employees with respect to a trade, business or partnership for purposes of being covered by the AHP. The regulation would affect AHPs, bona fide groups or associations of employers sponsoring such plans, participants and beneficiaries with health coverage under an AHP, health insurance issuers, and purchasers of health insurance not purchased through AHPs.” The full text is available at: https://www.govinfo.gov/content/pkg/FR-2018-06-21/pdf/2018-12992.pdf

4 For more on this topic, see https://www.buchanandisability.com/helpful-resourcesandarticles/attorney-newsletters/erisa-supreme-court-40-years-erisa-remedies-eric-l-buchanan/

5 For a thorough discussion of when ERISA might pre-empt a case, see https://www.buchanandisability.com/helpful-resourcesandarticles/how-to-tell-if-an-insurance-claim/
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**Multiplying the Fruits of Your Labor:**

Ways to Identify How Your Individual Case Could be Indicative of a Systemic Issue

by Caroline Ramsey Taylor and Jeremy Williams

It is easy as plaintiff attorneys to get focused on exactly what the client is telling you, seeing her facts only how she sees them, hearing only her current complaints, and then only thinking about how you can help this client. However, it is important to consider alternate angles and opportunities in order to capitalize both on the highest value of your client’s case as well as ways that you might be able to help other individuals facing the same issues. By considering all of the angles for liability and recovery of damages, you set up your client for her maximum recovery and also increase the chances of developing your next case.

**Cases That May Support Expanded Litigation**

The same story plays out every day in your offices: your phone rings (and maybe forwards to your cell phone thanks to COVID-19), and it is a potential client on the other end of the call. That potential client has been harmed in some manner by a corporate entity, and needs your help. Maybe the potential client has suffered an injury from impacting the steering wheel in a car accident, has had a reaction to a cosmetic cream she applied to her face, is facing eviction from her apartment for late rent payment, was fired from her job as an assistant manager of a retail store, or is experiencing cracking in the concrete in her garage. Each of these situations may catch your attention as a case where you can help, although you immediately run through a cost versus benefit analysis in your head, comparing the case value to the cost of litigation. While you may initially think some of these cases may be cost prohibitive, each of these scenarios may also be indicative of a larger problem that impacted many other consumers or employees as well. Indeed each of these fact sets are tailor made to be turned into larger cases by attorneys who are looking for that angle. What do we mean when we say that these can become larger cases for you? Here are just a few examples of how those everyday fact sets can be converted to something much larger:

**Client Complaint:**
Injuries from steering wheel impact.

**Potential Expansion:**
Class action for design defect in the airbag deployment.

**Client Complaint:**
Injuries caused by using cosmetic product.

**Potential Expansion:**
Class action for unlawful ingredients contained within the product and separate personal injury cases for serious individual injuries caused by the unlawful ingredients.

**Client Complaint:**
Fired wrongfully from her job.

**Potential Expansion:**
Client and co-workers were misclassified as managers causing FLSA violations which could be pursued individually or potentially as a class.

**Client Complaint:**
Concrete in her foundation is cracking and she wants to sue the contractor.

**Potential Expansion:**
Class action against the manufacturer for defective concrete.

**Client Complaint:**
Evicted from apartment for late payment.

**Potential Expansion:**
Landlord sent unlawful letters to tenants and charged unlawful fees to tenants which could be recouped through a class action.

**Client Complaint:**
Cut hand on the edge of a sharp glass baking dish.

**Potential Expansion:**
Class action viable as company used cheap material that caused edges to become sharp after a couple rounds in the dishwasher.

**Client Complaint:**
Totaled car in wreck.

**Potential Expansion:**
Class action against client’s insurer for failure to calculate the total loss value appropriately.

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Some of these scenarios may very well develop into successful individual lawsuits in their own right while others may get turned down at intake without much consideration as the potential client’s damages are too small to justify pursuit of the case individually. However, the business decision you may make taking a small case that you otherwise would not have taken but for the potential to expand into a large class action or mass action could pay dividends for both the initial potential client, others similarly situated, and for your practice. Beginning to think about looking for opportunities to expand your individual cases into something more is the first step towards actually doing it. You then need to know how to identify the facts that support expanding the factual scenario being presented by your client into something larger, and how to develop your evidence in that individual case in a way that increases the value of your client’s case and that can be used to expand the case into something larger.

**How to Spot Expandable Cases**

Imagine another lawyer in your firm sends you 10,000 documents that were produced in a case and asked you to find the documents that are best for his client. The challenge? You do not know any of the facts of the case. If you do not know the facts, how would you know what documents are best? Spotting the types of cases that are expandable into class actions and mass actions is not unlike this scenario. The more information that your colleague shares with you about his client’s case, the more likely you will be able to identify the key documents for him and his client. Similarly, the more angles you are aware of for how to expand your client’s case, the more likely you are to be able to identify those opportunities.

Spotting these opportunities becomes easier as you start to train yourself to have a broader mindset beyond what the client sees. Do not assume that your client only has the issue that she points out to you in your initial consultation. Oftentimes clients are rightfully angry or frustrated and honest in on details that are not necessarily the most relevant to helping her. Listen attentively to what is said and ask questions about what the client fails to say. Always ask if your client has heard of anyone else being harmed in a similar manner. Other similar situations can help your client and will shed light on whether this is a systematic problem. Your client is clearly coming to you wanting help, but you have the potential to help her even more than she is expecting. An open mind and diligent research are the two most important tools in your toolbox to turn your individual cases into something more.

The intake of your potential client is the first opportunity to approach that individual’s problem with an open mind. The second opportunity comes after you accept that case and begin to develop a strategy for pursuing it. You should always be looking for opportunities and angles to increase the value of your client’s case, which often are also the same types of issues that lend themselves to class actions or mass actions. In many cases, your client’s core economic damages are what they are, and there is little you can do to increase the exposure to the defendant arising from them. For example, the client has incurred only a certain amount in medical bills or lost wages and is now fully healed and back to work. However, learning that the defendant had knowledge that the airbag in its cars failed to deploy in some other serious wrecks, or that its facial moisturizers were tainted with unlabeled ingredients, may give rise to a claim for punitive damages. At a minimum, these provide arguments that are great to present to jurors to aid in increasing your non-economic damages. Similarly, products that are purchased by consumers, but are defective (like that airbag or facial moisturizer), are almost always manufactured in a similar way: meaning that if your client was harmed, she is unlikely to be the only one.

In addition to realizing that the same factors that give rise to punitive damages may also indicate that others have been harmed in the same way, you also may spot a way to expand your case by just thinking about who the defendant is. Are you dealing with a landlord that owns 75 apartment buildings across the state, or a mom and pop apartment that owns one building? The larger the company, the more likely it is to have strict policies and rigid procedures to help it run efficiently. This means that when that client comes to you complaining that his eviction proceeding seemed unfair, and you review a letter that your client was sent that violates the law, you can bet that your client is not the only person that received such a letter. Such uniform policies are ripe for expansion into a class action which can benefit both your current client and any others being exposed to these unlawful acts.

The third way to spot the facts that lend themselves to expansion is to spend a few minutes looking for other complaints online about similar scenarios against that defendant or others in the industry. You might be surprised to see how much a frustrated consumer researched the root cause of a problem like what your client experienced, and put the explanation out there for all to see online. Further, the complaints you find may even explain the same problem in a different way that makes you see it differently, and perhaps clearer, than how your client explained it.

At the end of the day, in order to turn your single-event case into something more, the facts have to support it, and not every case actually does. But, once you start earnestly looking for opportunities to expand your cases, you will find some no matter the primary focus of your practice. At a minimum, after hearing your client’s complaints, research the issue to see if others are complaining of the same thing. Google, Amazon, the company’s website, and other complaint forums are a wealth of information. Further still, how you litigate your single-event case will affect its case value and could ultimately have a huge

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impact on any mass or class action case that you may pursue. The facts generated through a single case could support expansion of your theories and strengthen those mass cases before you even file them.

How to Obtain Evidence in Your Individual Case to Support Your Expanded Case

Once you suspect that others may have been affected in similar ways as your client, you need to find a way to confirm that suspicion. The challenge you face is: how do you get discovery regarding the defendant’s treatment of unknown third-parties? There are two primary angles you can use to develop this evidence.

The first angle is useful in practically every case, but is severely underutilized by most practitioners: a Rule 30.02(6) (or 30(b)(6) under the Federal Rules of Civil Procedure) deposition. Under Rule 30.02(6) of the Tennessee Rules of Civil Procedure and its Federal counterpart, a plaintiff may notice a deposition of a corporate defendant and provide a list of topics on which the plaintiff intends to examine the defendant. The corporate defendant must then provide a representative to testify regarding those topics. Particularly useful here is testimony you can obtain on policies and procedures that will apply uniformly to anyone (including your client) interacting with the defendant in a similar way as your client. This will solidify testimony for your client that the company engaged in unlawful practices, and also provides sworn testimony for any future case on how the corporation handles a particular scenario. This is a great opportunity to pin down the uniformity of the defendant’s conduct, whether the defendant is manufacturing a consumer product, sending form letters, or uniformly and unlawfully calculating its payment of insurance payouts. Once the corporate representative is setup to admit the uniformity of its conduct and you know how to prove the illegality of that conduct then you can easily connect those dots. Similarly, a Rule 30.02(6) deposition can be used to explore the company’s knowledge of other complaints, such as whether it knew others had been injured by the same product as your client before your client was injured and subsequently failed to act to protect your client. A company’s reckless disregard for the safety of consumers, including your client, is valuable evidence for your single-event case and alerts you that there may be more individuals injured than just your current client.

The second angle you can use to develop this evidence is to plead punitive damages if the facts reasonably support them. Often this allegation depends on the types of claims that you have brought, but can be applicable to all of the examples provided above. Anytime you can plausibly allege a claim for punitive damages, or include a claim where the defendant’s knowledge of the problem is an issue, you have opened a pathway to obtaining evidence on prior incidents regarding how others may have been impacted by the defendant’s similar conduct. Instead of using a Rule 30.02(6) deposition, for this claim you can use requests for production of documents and individual depositions of the defendant’s employees to flush out this evidence. Although this testimony may not technically bind the company in a subsequent action, the company will have a difficult time defending it. Again, think outside of the box on these depositions. If you are dealing with a defective product, do not just depose the manufacturing team about its processes, depose the warranty team about how many claims it receives for the same types of problems as your client experienced or find a customer service representative who you can discuss complaints with, including how the company advised the representatives to deal with those complaints. Similarly, if you are dealing with an issue where your client received an eviction letter for her apartment, depose the individuals that work in the office sending out those letters. You may (or may not) be surprised to learn how little ability those employees have to deviate from the defendant’s policies and procedures.

The key to obtaining evidence of uniform conduct by the defendant rests in your ability to argue that it is both relevant and proportional to the needs of your case. Punitive damages and claims that bear on the defendant’s knowledge are two pathways to supporting your arguments to obtain this evidence. Obtaining this evidence will not only help you to grow your case into something more, but most importantly, it will also increase the value of your client’s case. A true win-win for you and your client.

ABOUT THE AUTHORS

Caroline Ramsey Taylor practices out of Whitfield Bryson’s Nashville office where she focuses on complex litigation, personal injury, product liability, and consumer class actions. Caroline is currently serving as TTLA’s Parliamentarian and is on the Board of Governors for AAJ. Caroline received her undergraduate degree from Western Kentucky University and her JD from the University of Louisville Brandeis School of Law.

Jeremy Williams is an attorney with Whitfield Bryson, LLP in the firm’s Raleigh, North Carolina office. His practice focuses on the nationwide prosecution of consumer protection class action cases. He has taken on leadership roles in large class actions and multi-district litigation throughout the country for cases related to defective construction products, understaffing of nursing homes, improper insurance claim payouts, and unpaid sales commissions. Mr. Williams earned a BS from Elon University, his MBA from North Carolina State University, and his JD from Campbell University.
Knoxville - John Davis (J.D.) Lee, age 91, passed away on September 7, 2020. J.D. was born at home with a midwife to Emma Hunt Lee and Clement Lee on May 3, 1929, in Tellico Plains, Tennessee.

J.D. grew up working on the family farm with his seven siblings. At age 17, he enlisted in the Army to join his brothers fighting in WW2. After the war, thanks to the G.I. Bill, J.D. attended Stetson University in Florida, graduated from East Tennessee State University (ETSU) where he was student body president and from University of Tennessee (UT) College of Law where he was president of the student bar association. J.D. liked to joke, “I graduated second in my law school class… of three students!”

In 1954, while still a law student, J.D. was elected as a delegate to the Tennessee Constitutional Convention. Always a hard worker and someone who genuinely liked people, J.D. opened a law office in Madisonville and made a success of himself, representing people injured or killed due to the negligence of others. Early in his career, J.D. successfully sued railroad companies on behalf of people injured or killed by trains.

As early as the 1960s, J.D. was a pioneer in bringing lawsuits against big tobacco companies on behalf of people injured or killed by cigarette smoke. He developed a national reputation as a skillful litigator who won record-setting verdicts for his clients in medical malpractice and product liability cases. In 1978, J.D. ran for the Democratic nomination for U.S. Senate.

A natural leader, J.D. was president of the 1977 Tennessee Constitutional Convention, president of the Tennessee Trial Lawyers Association (TTLA), president of the Association of Trial Lawyers of America (ATLA), and a founder/president of Trial Lawyers for Public Justice, a public interest law firm that fights for consumer rights and environmental protections. J.D. was part of a group of lawyers who represent the victims in lawsuits against Iran and others who assisted the perpetrators of the September 11 terror attacks.

J.D. was chosen as a member of the Inner Circle of Advocates, an association of the 100 best trial lawyers in America. J.D. received many professional awards, including the Lifetime Achievement Award from TTLA and the Champion of Justice Award from ATLA.

“Thank you!”

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In 1961, J.D. married Sarah Snively, a “Vol Beauty” and National Merit Scholar from Chicago who graduated from UT, and they raised their children John, David and Allison in Madisonville. In 1992, J.D. married Patrice Bell, also a ETSU graduate and a lawyer, and they raised their son James in Knoxville. J.D. loved being a lawyer for over 50 years and was proud of his family of attorneys who worked alongside him: his son David, his wife Patrice and his niece Sharon Lee, a Tennessee Supreme Court Justice.

Always adventurous, J.D. was an accomplished pilot, a horseman, and an avid outdoorsman who began running marathons in his 70s. At age 70, he hiked the Appalachian Trail straight through from Georgia to Maine, and to the very end of his life, he was planning his next big hike. J.D. lived life to the fullest and will be missed by his friends and family.

He was preceded in death by his brothers Charles Lee and Norman Lee; his sisters Jane Lee, Louise Lee and Sue McWaters. He is survived by his brother Ernest Lee of Jonesboro, Georgia; his sister Dr. Kathern Plenge of Paradise Valley, Arizona; his sons John Lee, David Lee and James Lee of Knoxville; his daughters Allison Lee of Tucson, Arizona, and Diane Kingery-Roth of Palm Springs, California; his grandson Alexander Lee of Knoxville; and his granddaughters Fiona van Haren and Nadine van Haren of Tucson.

J.D. struggled with dementia in his last years but received help from many Good Samaritans to whom J.D.’s younger self would say, Thank You! A family memorial service was held at First Presbyterian Church in Knoxville.

See the Click Funeral Home website, www.clickfh.com, for information about how to view the recorded service online.

J.D.’s family requests that, instead of sending flowers, folks make a donation to the J. D. Lee Scholarship Fund for a UT College of Law student c/o Tennessee Judicial Conference Foundation, 629 Woodland Street, Nashville TN 37206.
RESOLUTION
American Association for Justice
Board of Governors
Honoring the Life and Service of John Davis (J.D.) Lee

WHEREAS, J.D. Lee served as AAJ President (then ATLA) from 1972-73 and was an AAJ member for more than four decades; and

WHEREAS, J.D. Lee’s path to the courtroom started on a family farm in Tennessee, where he worked alongside his seven siblings until he left at 17 to join the Army and after WWII through the G.I. Bill, graduated from East Tennessee State University (ETSU) and the University of Tennessee College of Law; and

WHEREAS, J.D. Lee was a brilliant trial lawyer who worked tirelessly to help those injured and the families of those killed by the negligence of others resulting in record-breaking verdicts for his clients in train crashes, medical malpractice and products liability cases, and who was a pioneer in tobacco litigation going up against Big Tobacco beginning in the 1960s, and also represented victims in lawsuits against Iran and others who assisted those responsible for the September 11, 2001 terror attacks; and

WHEREAS, J.D. Lee was one of the founders and the first president of Trial Lawyers for Public Justice (now Public Justice) and a past president of the Tennessee Trial Lawyers Association (TTLA), the National Board of Trial Advocates, and the Monroe County Bar Association, and a Fellow and former Board member of the International Academy of Lawyers; and

WHEREAS, J.D. Lee was selected as a member of the Inner Circle of Advocates and received numerous awards for his achievements and contributions, including the Lifetime Achievement Award from TTLA and the Leonard M. Ring Champion of Justice Award from ATLA that recognizes an AAJ member who is of outstanding integrity and overall character and who has demonstrated a devotion to human and civil rights; and

WHEREAS, J.D. Lee has been honored and recognized by the Tennessee Judicial Conference Foundation, which has started a scholarship in J.D. Lee’s name to be awarded to a University of Tennessee College of Law student who wants to practice personal injury plaintiff law; and

WHEREAS, J.D. Lee whose passion and focus extended beyond the courtroom, was an adventurous outdoorsman, an accomplished pilot, who began running marathons in his 70s and who at the age of 70 hiked the Appalachian Trail;

NOW THEREFORE, BE IT RESOLVED that the members of the American Association for Justice express their heartfelt appreciation and gratitude for the life and work of J.D. Lee, and extend their deepest condolences to J.D.’s family, including his sons John, David, and James; daughters Allison Lee and Diane Kingery-Roth; niece Sharon Lee (a justice on the Tennessee Supreme Court); three grandchildren; and his siblings Dr. Katherin Plenge and Ernest Lee.

Tobi L. Millrod
President

Linda Lipsen
Chief Executive Officer
As trial lawyers, we understand the adverse impact the pandemic has had on our clients seeking justice in a timely fashion, with most courts limiting in-person appearances and only some allowing trials to go forward. This summer, one judge in Dayton, Ohio, allowed an in-person jury trial in a medical negligence case. Here is a summary of how we did it.

**Before trial.** A week before trial, the clerk’s office called potential jurors who had received a summons; and asked if they were willing to attend in-person and informed them that masks would be required 100% of the time. Jurors were educated on other protections, and any jurors who stated that they were still uncomfortable attending the trial were excused. Jurors who thought it was a violation of their constitutional rights to force them to wear a mask were also excused.

**The courtroom setup.** Plexiglass was placed around the bench, the witness stand, and the clerks’ desks. There was no plexiglass at the counsel tables. The courtroom had a medical-grade, mechanical air filtration system similar to what is used in hospital ORs, which ran at all times. The machine’s noise level was similar to that of a window air conditioner and created some difficulty hearing people speak, but it was not insurmountable. During lunch breaks, courthouse staff used disinfecting wipes on areas touched often, such as door handles, and we were told that a deep cleaning was done in the evenings. As a precaution, I carried a container of disinfecting wipes that I used daily on our table, chairs, and the podium.

**Jury selection.** When the jury panel was seated, the judge instructed all jurors, parties, and counsel to wear masks at all times during trial unless speaking. The jury panel was split into two groups and placed into two courtrooms to allow for social distancing. The clerk randomly selected jurors from the pool and sat 25 of them in our courtroom, while the second group of 20 jurors watched by video in an adjacent courtroom. The clerk placed signs on the seats instructing the jurors where to sit, allowing for space between each juror.

In the main courtroom, counsel used their strikes for cause and peremptory challenges. If additional jurors were required, the court would have pulled from the second room. Three of the plaintiff’s five motions to strike for cause were granted, none of which were COVID related. When counsel spoke from behind the podium, they were not required to wear masks. Jurors had to wear masks when responding, which made it somewhat difficult to hear but not insurmountable.

**The trial.** Before the trial started, the clerk asked the selected jurors whether they were comfortable sitting directly next to one another in the jury box. Three raised their hands expressing some concern, so additional seats were added to allow for more space between the jurors. (Ohio has six-person juries with an alternate, which allowed for most jurors to sit in the jury box with a few just outside.) As jurors came and left during the trial, the bailiff required them to social distance, and the jurors were split between two jury rooms during breaks. For more space, the jury was allowed to deliberate in the courtroom.

Some objections were taken from the table—the jury could hear and this defeated the purpose. However, some sidebars were taken with all counsel wearing masks. Counsel tried to anticipate objections as much as possible and bring them to the judge’s attention in chambers to avoid sidebars and objections in front of the jury.

Even behind the plexiglass, the witnesses were sufficiently close to the jury to be heard. Witnesses were not required to wear masks on the stand but were required to wear them off the stand and throughout the courthouse.

**Presenting exhibits.** The court ordered that exhibits be shown using the courtroom’s AV system to prevent documents from being handled by the jurors. This courtroom had a good AV system with HDMI inputs at the counsel table, an ELMO-type device, and a dropdown screen with a projector large enough for the jurors to see exhibits sufficiently. We used an AppleTV with our wireless network connected to iPads and a MacBook Pro to present evidence. Defense counsel hired staff with laptops using TrialDirector or Sanction.

The experience was unique but satisfying. All parties felt that the trial was done in a safe manner that allowed them to have their day in court.

continued to page 23B
ABOUT THE AUTHOR

Tad Thomas is the founding partner of Thomas Law Offices with offices in Louisville, Kentucky, Cincinnati, Ohio and Chicago, IL. He and his firm practice solely in the area of civil litigation with a primary focus on medical device and pharmaceutical products liability, motor vehicle, trucking and motorcycle collisions and nursing home neglect and abuse. Mr. Thomas is a nationally recognized lecturer and has conducted seminars across the country on legal technology, social media, depositions and ethics. He is currently the national Vice-President of the American Association for Justice and serves on the Executive Committee, the Board of Governors and many other committees, sections and litigation groups. He is a cum laude graduate of Salmon P. Chase College of Law at Northern Kentucky University and obtained his undergraduate degree from George-town College.
TTLA BOARD MEMBER MATT LONG

2020 has been a hard year for everyone, but on July 19, 2020, I received the gut-wrenching news that my friend and mentor, Matthew B. Long, passed away. He was a force to be reckoned with and was taken from us too soon. Matt graduated from LMU Duncan School of Law in 2013 and started his legal career working with Gilreath & Associates, and in January 2017, Matt moved to Nashville to open the Tennessee division of The Roth Law Firm. Matt yearned to open his own firm and in August of 2019, he returned to Knoxville and started the Law Office of Matthew B. Long.

I was fortunate to meet Matt at the TTLA conference in Destin, Florida in the summer of 2016. We spent our mornings in CLE and our afternoons drinking cocktails by the pool and sharing hilarious stories. We laughed, we cried, and we became instant friends. His intelligence, dedication, and passion for life truly inspired me, as did his passion for justice.

As I worked my way through law school, Matt quickly became a mentor as well as a friend. He would revise my papers and discuss legal theory at the drop of a hat. He would always answer my call and would strive to help in any way he could. He was so supportive of my law career and was present at every major event between 2016-2020. He attended my law school graduation, helped

continued to page 25B
co-host my engagement party, traveled to South Carolina for my wedding, and was the first to call me to congratulate me when my bar results were posted in October 2018. He spent countless hours helping me to prepare for my first trial, and then celebrated with me after I received a favorable verdict. He provided guidance and advice on being a business owner and helped me through every tough situation I faced.

I’ve never met another like Matt. In his short 37 years of life, he accomplished more than most people I know achieve in a lifetime. He lived on a houseboat overlooking the beautiful downtown Knoxville and then moved to a high-rise in downtown Nashville. He obtained his law degree. He flew a plane. He took many cases to trial and received favorable verdicts. He was a son, a brother, a boyfriend, and a best friend. He touched the lives of everyone that he encountered. He was full of life and cared deeply for everyone he knew. There will never be another Matthew B. Long.

Although the pain of losing such an amazing person is still felt, I strive everyday to channel him and his legacy. He would not want his loved ones to sit around and be sad. He would want us to get out of bed each day and live life to the fullest, because that is what Matt did. When faced with the pressures of 2020 and the continuing everyday life struggles, be like Matt and live the LONG life.

Allison Hotz Ankrom
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The Pendulum Has Swung Too Far: The real impact of the 2014 Workers Compensation Reforms

by Rocky McElhaney and Virginia King, Rocky McElhaney Law Firm

In 2014, Republican Governor Bill Haslam and his legislature passed Tennessee House Bill 0192, drastically altering a system that has protected Tennessee workers and business owners for almost a century. As a direct result of that bill, about half of every dollar you pay in workers comp premiums today goes in the pockets of insurance companies; injured workers are more likely to be denied the benefits of those premiums and more likely to face financial ruin; and insurance companies are richer than ever. The pendulum has swung too far, and the balance has tipped in favor of the powerful.

How did this happen? What changed? How is workers’ compensation supposed to function? To answer these questions, you need to know a bit about how workers’ compensation began.

It began with a fire.

The origins of U.S. workers’ compensation laws, and other workplace safety legislation, trace back over a century to a tragedy that sparked outrage across the country. Up until the early 1900s, the scales were tipped heavily in favor of business owners. Workers unions were emerging, but the average employee had few rights or protections under the law.

In 1911, the Triangle Shirtwaist Factory was the largest shirtwaist manufacturer in New York City and was housed on the top three floors of the ten-story Asch Building. The company employed over 500 workers, most of whom were female immigrants in their teens who worked 12-hour days every day of the week. It was a sweatshop with young women packed side-by-side behind lines of sewing machines, making shirtwaists — a popular garment of the time.

On March 25, a fire broke out on the eighth floor, and an operator there phoned the tenth floor to warn them. Most of the executives, whose offices were located on the tenth floor, escaped the blaze.

There was no telephone on the ninth floor. The first warning the 200 workers there had was the smell of smoke and the sight of the fire itself. The young women rushed for the exits, but the doors were locked. The only accessible fire escape collapsed beneath those trying to flee. Firefighters responded, but their ladders only reached the sixth floor. Around 60 workers jumped from the ninth floor to their death in order to avoid burning alive. After the blaze, firefighters found the bodies of women piled atop each other, many with their fingernails torn off having clawed the walls in their desperation to escape. In all, 146 people lost their lives.

The owners, Max Blanck and Isaac Harris, were charged with manslaughter and stood trial. It was alleged the two men kept the exit doors locked to prevent workers from taking breaks and stealing and to keep union organizers out of the factory. Blanck and Harris were acquitted and eventually settled a civil suit with workers’ families for about $75 per victim. With the $60,000 payout from their fire insurance, Blanck and Harris actually made a profit off the tragedy.

News of the horrible fire, the loss of life, and the factory conditions that led to it spread quickly across the nation, spurring outrage and new legislation. Businesses were required to provide safer workplaces, fair pay, and reasonable hours.

Numerous states passed laws related to worker injuries, collectively dubbed, The Great Compromise, designed to balance the scales between employers and employees. These new laws aimed to provide increased protections for workers and their families while preventing business owners exposed to tort claims from facing complete financial ruin. In other words, under The Great Compromise, workers injured on the job would essentially give up their right to sue in exchange for their employer’s agreement to pay their medical bills and enough of their wages to help them get by while they recovered, even if the business was at no fault for the injury. Tennessee passed its workers’ compensation law in 1919. The compromise remained in place for over 100 years.

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The 2014 Reform Act

In 2014, Republican Governor Bill Haslam claimed Workers’ Compensation (WC) laws needed reforming. Governor Haslam vowed the 2014 reforms he and his legislature passed were designed to resolve claims in a process that was faster and fairer.

Now, six years later, the results are in. The scales have tipped, but this time they’ve tipped in favor of the insurance companies that provide coverage to Tennessee employers. This time, the evidence of the inequality is not as overt or dramatic as a fire. Nor is the tragedy sensational enough to grab headlines across the nation or engender enough public outrage to spur lawmakers into action. This time, the tragedy is happening almost silently to individual workers across the state, felt keenly by those who suffer and the attorneys who represent them, but visible only in the statistics and the stories of the forgotten workers. The stakeholder that was supposed to benefit from the 2014 Reform – the employers – also have not benefitted as expected with respect to premiums, as they have bounced up, not down.

Governor Haslam’s 2014 reforms closed the doors of the courthouse, put politically-appointed bureaucrats in charge of the claims process instead of judges elected by the people, reduced indemnity benefits paid to workers in nearly all cases by at least half, made it easier to terminate employees, heightened the threshold for injuries, and put insurance adjusters in control of the speed of medical claims. The system is rigged, at every turn, in favor of insurance companies, leaving thousands of injured workers financially ruined and robbing business owners who’ve paid millions of dollars to protect them.

Governor Haslam claimed his reforms would fix a broken system, speed up claims, reduce costs to employers, and balance compensation. Six years of data tells a different story. Industry studies show the following trends:

1. Employer premiums provide less coverage
2. Workers receive fewer benefits
3. Insurance companies, physicians, National Council on Compensation Insurance (NCCI), and even Tennessee Department of Labor (TDOL) contribute to creating obstacles insurmountable for most Tennessee workers;
4. Workers receive less benefits if they return to work, and even less if they are unable or not permitted to return
5. Workers are unable to find counsel willing to take their cases, are less likely to win their claims, and must fight harder to lose.

The Real Story

Employers are paying more while their workers are receiving less.

NCCI and TDOL claim Tennessee employers are benefitting from the 2014 Workers’ Compensation Reform, but the evidence says otherwise. Although already declining worker’s compensation insurance premiums continued to decrease immediately following the 2014 reform, they spiked higher than pre-reform levels in 2018 and 2019:

By 2017, the Tennessee Department of Commerce & Insurance noted that since Tennessee introduced 2014 reforms, NCCI filings have totaled loss cost reductions of more than 36 percent. So, within three years of the reforms, total payments to injured workers were down 36% and premiums went up in 2018 and 2019. Who is winning?

Illinois’s legislature passed a similar worker’s comp reform bill in 2011. In its wake, they have likewise seen the same decrease in payments to injured workers, higher premiums, and increased insurance profits. As one commentator noted:

The savings in workers’ compensation costs derive from a 30% cut in payment to medical providers for services rendered to injured workers, decreasing awards to injured workers that compensate them for their permanent disability, capping awards for work-related carpal tunnel syndrome and limiting the length of time a person may receive an award for wage differential benefits, among other limitations. These cuts have resulted in savings of well over 750 million dollars, yet the insurance carriers have pocketed these savings as profit instead of passing the savings along to businesses and consumers in the form of rate reductions.

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**Insurance companies are getting rich off of unpaid benefits.**

On average, Tennessee insurance company profits have almost doubled since the passage of the 2014 workers comp reforms. According to a study by the National Academy of Social Insurance, in 2012, insurance companies were spending $0.71 for every dollar paid in premiums resulting in a $0.29 cent-per-dollar profit. By 2016 (the last year for which we have data), insurance companies’ profits had increased to $0.52 per premium dollar collected.

![Table 12: Workers’ Compensation Benefits, Costs, and Coverage](image)

**Workers indemnity benefits have decreased between 70%-81% since the 2014 Reforms.**

Studies show Temporary Total Disability payments to injured workers dropped from $4.5 million in 2012 to less than $800,000 in 2019.

As the Tennessee Department of Labor and Workforce Development (TDOL) chart below shows, in 2016, the mean Temporary Total Disability Benefits paid decreased by 70% compared to the pre-reform mean. Mean medical expenses/benefits dropped by 63% for those who returned to work and by 70% for those who did not return to work. Mean Partial Permanent Disability benefits dropped by 73% for those who returned to work and by 81% for those who did not return to work.

**Mean Amount of Temporary Total Disability Benefits Paid:**

![Mean Medical Benefit/Expense - Employee Returned to Work](image)

![Average Medical Benefits/Expenses - Employee did not Return to Work](image)

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Average PPD Benefit Amount – Employee Returned to Work:

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<th>Year</th>
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Average PPD Benefit Amounts – Employee did not Return to Work:

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Injured workers are losing at trial and even more at appeal.

A statistical analysis of the Department of Labor and Workforce Development Appellate Decisions shows that 87% of workers comp pro se litigants lost their cases at trial. Workers with lawyers fared only slightly better with 69% losing at trial. Of those 69% who went on to appeal, 93% lost.

Injured workers are unable to gain legal representation.

One of the main goals of insurance companies lobbying for the 2014 reforms was to remove trial lawyers from the workers compensation system. Trial lawyers increase the likelihood that injured workers will successfully navigate the complex system of applying for benefits. Even after 2014, the U.S. Department of Labor found that 44% of injured workers represented by a trial attorney successfully won their claim compared to only 13% of those who tried to go it alone.

By decreasing the amount of benefits paid to injured workers, the 2014 reforms rendered workers comp cases economically unfeasible for representation. After the reforms, trial attorneys found their workers comp cases barely covered the costs of working them.

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Final Argument

Today, injured workers and the trial lawyers who still represent them face increasing difficulties posed by out-of-state doctors in cubicles second guessing industry chosen panel doctors, the obliteration of psychological and repetitive injury claims, reduced benefits, denied treatment, and unfair judgments for helpless pro se workers who can’t find a lawyer who can afford the fight. All this misery is compounded by a system where state-appointed bureaucrats often turn a blind eye while insurance companies ignore the few rules remaining.

Simply put, the pendulum has swung too far. The Great Compromise has been broken. The “new law” needs common sense changes to swing the balance back to center—changes like getting rid of UR, requiring enhanced benefits be paid at the time of the initial assessment, taking away the presumption in favor of the panel doctor’s impairment rating, and introducing stronger penalties for bad faith denials of claims and slow payments of benefits.

There’s room for compromise and, on the side of workers’ rights, a willingness to negotiate. There’s just no reason for insurance companies to even come to the table. Despite frequent attempts and outreach, not one Tennessee legislator is willing to carry a bill, and even if there were, any bill that threatened insurance company profits would not pass.

The balance has tipped in favor of the powerful, the multi-million-dollar insurance corporations with powerful lobbyists and government backers. And yet, in recent months, the nation has witnessed the birth of a new generation of activists. They’ve learned how to march, how to make their voices heard and how to drive change on important issues. Their activism inspires a new hope for a new way. Banded together in unison and message, voices of the people are often loud enough to move the seemingly unmovable. Hard working Tennesseans deserve to be heard and fairly compensated for workplace injuries. If they are to ever be again, it will likely take these new activists, it will take me, and it will take you. Will you re-join the fight?

ABOUT THE AUTHORS

Rocky McElhaney is the award-winning founder and CEO of the Nashville-based Rocky McElhaney Law Firm where he limits his practice to significant cases involving catastrophic, brain and spinal cord injury, wrongful death and commercial vehicle crashes. From offices in Nashville, Hendersonville and Knoxville, Rocky and his nationally recognized team represent injury victims across Tennessee and throughout the Southeast. Rocky is an active member and past President-Elect of the Tennessee Trial Lawyers Association. He and his wife Penny, also a trial lawyer, work together at the office on serious injury cases and at home raising four rambunctious kids, a black lab, a barn cat, a gecko and two thoroughbred racehorses named Titan and Tank. Rocky is just as comfortable coaching his sons on the little league baseball field as he is arguing for his clients before the Tennessee Supreme Court, which he has done six times, clarifying or creating law for injured people across Tennessee. More information about Rocky and his law firm can be found at www.rockylawfirm.com rocky@rockylawfirm.com

Virginia King has been a steadfast and zealous advocate for Rocky McElhaney Law Firm clients since 2019. Both an adroit researcher and a confident, perceptive negotiator she has since demonstrated her ability to level the playing field and fight for the maximum recovery in the boardroom and the courtroom. Virginia is an active member of the Tennessee Trial Lawyers Association and of the Lawyers Association for Women – Marion Griffin Chapter which endeavors to emphasize and address issues of concern to women within the legal profession. virginia@rockylawfirm.com

1 Bureau of Labor Statistics National Compensation Survey 1991 - 2014 (Credit: Sisi Wei/ProPublica)
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Member Information
Please complete all applicable sections for your level of membership and return the application to:
Tennessee Trial Lawyers Association
629 Woodland St. Nashville TN, 37206

(Please print or type)

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(Please indicate how you prefer to have your name appear on any printed nametag)

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My practice is approximately ____% Plaintiff ____% Defense (If Defense: ____% Criminal ____% Civil).

Please indicate your gender (optional): □ Male □ Female

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(*Years in practice should indicate total number of years in law practice – in any state.) (**Paralegals applying for membership must be associated with a current TTLA plaintiff attorney member.)

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- Season Pass Members in good standing are eligible for complimentary attendance at all CLE events sponsored by the association.

VALIDATION:

(Your signature below authorizes TTLA to keep you informed of association programs and benefits via phone, fax, email and USPS unless TTLA is notified otherwise.)

ATTORNEY: I am a licensed attorney and subscribe to the purpose of the Tennessee Trial Lawyers Association. I hereby apply for membership.

Signature ____________________________________________
I was referred to TTLA by ______________________________

PARALEGAL: I hereby certify that I am a paralegal who is qualified through education, training and/or experience to perform substantive legal work under the direction of an attorney. The majority of my present work (over 50%) is on behalf of the plaintiff and is in accordance with the purpose of Tennessee Trial Lawyers Association.

(Signature - Paralegal Applicant)  (Signature - Attorney Sponsor)

Please return application and dues to:
TTLA · 629 Woodland Street · Nashville, TN 37206 · Phone (615) 329-3000 · Fax (615) 329-8131
MEMBERSHIP

Your TTLA membership keeps you engaged, informed, influential and fulfilled in your everyday practice.

TTLA is your partner in facing the challenges of an evolving legal market, providing the research and education to help guide you through the coming challenges.

MEMBERSHIP BENEFITS

SERVICES
TTLA plaintiff members are offered specialized listserves and document banks. With the listserves, members can instantly get assistance from other members on how to handle specific cases, answer complicated law issues and find experts.

ADVOCACY
TTLA is consistently representing the needs of your clients in the legislature and educating Tennesseans on the importance of the justice system. With the help of the Circle of Advocates, TTLA hires several top contract lobbyists who represent TTLA on Capitol Hill. TTLA sponsors proactive legislation to promote the civil justice system as well as opposes adverse bills.

AMICUS
TTLA Amicus Curiae Committee works to keep abreast of important judicial decisions. They review cases and file briefs involving civil issues that have a far-reaching impact beyond the isolated facts of the case. TTLA also provides a moot court experience for appellate cases.

CONNECTING
TTLA hosts local networking events across the state several times a year. These events give members a chance to socialize with attorneys and judges from their area.

PARTNERS
TTLA members have access to a variety of sponsor partners who can provide services specific to civil justice issues. These include expert witnesses, financial assistance, marketing and investigations.

EDUCATION
TTLA members receive a discounted rate on top-notch continuing legal education programs including an annual conference and statewide seminars, FREE past CLE materials three years back on the website, social media recognition in Trial Lawyer of the Week and featured member blogs.

THE TENNESSEE TRIAL LAWYER
Members receive The Tennessee Trial Lawyer, a publication filled with valuable information to improve your law practice. Articles from the top plaintiff attorneys in Tennessee are published in the valuable publication.

Serving the needs of today’s lawyer
FEBRUARY 22
Legislative Update & CLE .......................................................... Online via Zoom

MARCH 18
Family Law Seminar | Memphis ......................... Holiday Inn, Downtown Memphis

APRIL 8
Family Law Seminar | Nashville ......................... Drury Plaza Hotel, Franklin

APRIL 22
Executive Comm., Board of Governors Meeting & LIFT ..................... TBD

MAY 13
Circle of Advocates Dinner ........................................ Magianno’s, Nashville

JUNE 16-18
2021 Annual Convention ........................................ Peabody Hotel, Memphis

SEPTEMBER 30
6th Annual Paralegal Seminar ..................................... Drury Plaza Hotel, Franklin

DECEMBER 2-3
Annual Review & Ethics ........................................ Carnegie Hotel, Johnson City