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Trial Lawyers' Liability-Expansion Submarines and How They Might Be Torpedoed

by Victor E. Schwartz

Each year, trial lawyers spend hundreds of millions of dollars advertising their services to potential clients. The messaging and timing of these multimillion dollar campaigns, in some instances, seem geared not only to generate lawsuits, but also to influence the opinions of viewers who might become jurors. These trial lawyer efforts are objectionable, but at least they are "above ground." Much less is known about the trial lawyers' underwater activity—activities that can be visualized as submarines directed at expanding the liability of corporate America. These trial lawyer submarines can be torpedoed. This *Legal Backgrounder* explains how this might be done. First, however, let's explore five of the deadliest liability submarines.

Trial Lawyer Submarine One: Use Federal Regulations as a Springboard to Expand Tort Law

The first submarine enlists trial lawyers' friends in federal agencies to create regulations that can be a springboard to expand liability. It would appear that trial lawyers try to persuade federal agency officials (who are sometimes trial lawyers themselves on leave from their firms) to issue regulations that are costly in themselves, but the submarine is that the regulation will create concepts that plaintiffs' lawyers can use to urge liability-friendly state judges to expand the common law.

For example, in January 2024, the Department of Labor (DOL) rescinded a proposed rule issued under the previous Administration's DOL Secretary, Eugene Scalia. The Biden Administration DOL replaced that rule with one that expanded who, for purposes of labor regulations, is an employee versus an independent contractor.[1] This expansion may cause economic harm to businesses who rely on independent contractors, such drivers or delivery persons, if those persons are deemed employees. What's the trial lawyer submarine? The definition change can also be a springboard for plaintiffs' lawyers to persuade state judges to expand who is an employee versus an independent contractor in the law of torts, namely the area of law that defines when an entity is subject to liability. Under basic tort law, employers are subject to liability through the doctrine of respondeat superior for torts committed by employees acting within the scope of their employment, but businesses are not subject to this form of vicarious liability for negligent acts of independent contractors. The expansion of who is an employee in tort law means expansion of liability.

[1] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024) (effective Mar. 11, 2024).

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Trial Lawyer Submarine Two: Help Formulate America Law Institute Restatements of Law to Expand Tort Law

The second submarine is trial lawyers' use of an organization that is largely unknown to the public, but extraordinarily persuasive with judges, the American Law Institute (ALI). Founded by learned jurists and academics in 1923, the principal work product of the ALI are called "Restatements" of law. The authors (called "reporters") of Restatements, all academics, most, but not all, liberal pro-plaintiff leaning, look over court decisions in all fifty states and decide which, in their subjective view, are the wisest. The reporters condense even the most long-winded judicial opinions into succinct black letter "restatements" of law. The ALI publishes these restatements, which are circulated to lawyers, law libraries and, most importantly, both federal and state judges. Most judges treat ALI Restatements as holy writs, and they follow them to the letter.

In the past decade, some so-called "Restatements" restate the views of the reporters, rather than a consensus of the law. In some instances, no state court decision embodies the black letter rule embraced by a Restatement. That occurred when a Restatement suggested that trespassers should be owed a duty of reasonable care.[2] Many state legislatures exposed and corrected this effort.

A recent example of trial lawyer influence in Restatements is a current draft that would allow claims for medical monitoring.[3] A fundamental of tort law for hundreds of years is that a person must be injured to bring a claim. A person who brings a medical monitoring claim is not injured. They just might be in the future or they might not. To give a specific example, suppose a drug has a side effect that is experienced by a thousand people of the millions who took it. If the drug company is at fault and a thousand persons are injured, they will have a claim. If medical monitoring claims are allowed, however, instead of a thousand claims, the drug company could face a class action of millions of claims. The ALI draft, if approved, may provide the trial lawyers with a very cash-filled submarine.

Trial Lawyer Submarine Three: Third Party Litigation Funding

The third submarine is the enhanced use of litigation financing, often labelled third party litigation funding or TPLF. TPLF is often hidden. The plaintiffs' lawyer whose case is backed by TPLF does not disclose this third-party financing to the court or the defendant. The financing enterprises behind TPLF are not charitable organizations. TPLF is a moneymaking operation that has become a multi-billion-dollar industry, yet few know about it. Why should the defendant or, importantly, the judge in the case care? First, when TPLF is involved—whether through a non-recourse loan to the plaintiff or to the plaintiffs' law firm—the funder takes a piece of the action. This in turn can substantially raise the cost of the settlement. Second, a TPLF financier may go beyond just funding the action. It may seek to control the case and the amount of the settlement. This borders on the unethical as it is the actual plaintiff's lawyer who has a duty to exercise that judgment with the guidance of the client.

This submarine needs to surface. If defense counsel suspects that TPLF is present in a case, counsel should file a motion with the judge asking the court to inquire, at minimum, into: (1) whether TPLF is involved; (2) the identity of the funder and nature of its financial interest; and (3) whether the funder is controlling, or has any right to exercise control over, the litigation

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[2] *Restatement Third of Torts: Liability for Physical and Emotional Harm* §§ 51-52 (2012); *see also* David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser,"* 37 Wm. Mitchell L. Rev. 1448, 1481-82 (2011).

[3] Restatement (Third) of Torts: Miscellaneous Provisions, p. 30 (unnumbered section) (Am. L. Inst., Tentative Draft No. 2, 2023).

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or its resolution. Efforts to require disclosure of TPLF arrangements have been successful in some mass tort litigations.[4] Some federal courts have also adopted generally applicable TPLF disclosure requirements.[5]

State legislative efforts are underway to require disclosure of TPLF and impose safeguards over the conduct of outside funders that raises ethics concerns. Several states have enacted disclosure laws.[6] In addition, legislation is pending in Congress that addresses litigation funding by undisclosed foreign entities.[7] Finally, reform proponents are urging the federal judiciary to amend the Federal Rules of Civil Procedure to require disclosure of TPLF in federal courts. These torpedoes against the TPLF Submarine are worth consideration by all who are interested in fair and open civil justice.

Trial Lawyer Submarine Four: Expanded Use of Class Actions

The fourth submarine is expanding class actions. Class actions have their proper place in the law. They may provide a vehicle for justice for persons with small but identical claims to achieve a fair result. But trial lawyers are using class actions in a manner that goes far beyond their original purpose. Here are two class action submarines. The first submarine is to assert huge class actions against manufacturers or other entities without showing members of the proposed class even owned the product. The use of these "ghost" class action members provide the potential for huge settlements because defendants fear that the ghost class will be certified.

The second class action expansion submarine is primarily directed at automakers and may be used against other manufacturers. Class actions may include automobile owners who have never experienced a problem with their vehicle, but nevertheless claim that, had an alleged defect been known at the time of purchase, they would have paid less for their automobile or that, as a result of the alleged defect, the resale value of the car is now less.[8] This trial lawyer-created submarine can succeed unless courts can be convinced that such no-injury litigation is a speculative sham.

Trial Lawyer Submarine Five: Create a Duty in Tort Law for a Manufacturer to Market Safer Products

The final submarine submerged in a recent intermediate appeals court decision in California, *In re Gilead Tenofovir Cases*, 98 Cal.App.5th 911 (2024). That case involved a prescription medication that treats HIV/AIDS, tenofovir disoproxil fumarate (TDF). Although the plaintiffs are seeking compensation for adverse events associated with their use of TDF, they did not claim TDF is defective in its design, manufacturing, or labeling. Rather, they alleged the manufacturer was negligent because it had discovered a similar potential drug that could deliver the same benefits with a lower risk of adverse effects, but the company had not brought that product to market. The California Court of Appeal agreed, endorsing a new and unprecedented duty in tort law, namely a duty for a manufacturer to market safer technology it has in reserve.

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[4] *See, e.g.*, Case Management Order No. 61 (Third Party Litigation Funding), *In re: 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885 (N.D. Fla. Aug. 29, 2023).

[5] Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); Loc. Civ. R. 7.1.1 (D. N.J.) (adopted June 21, 2021); *see also* Standing Order for All Judges of the North District of California, Contents of Joint Case Management Statement (N.D. Cal. Jan. 17, 2023) (applicable to representative actions).

[6] *See, e.g.*, Wis. Stat. Ann. § 804.01(2)(bg); H.B. 1160 (Ind. 2024); S.B. 269 (Mont. 2023); S.B. 850 (W. Va. 2024).

[7] Protecting Our Courts from Foreign Manipulation Act, S. 2806 / H.R. 5488.

[8] *See generally* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?*, 80 Brooklyn L. Rev. 599, 633-41 (2015).

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This decision, if upheld on appeal, can be earthshaking not only for pharmaceutical companies, but for medical device, automobile, and many other manufacturers. This is first time tort law has pushed manufacturers to deliver not only a non-defective product, but a potentially safer, different product. For a variety of legitimate reasons, such as the need for further research, consumer choice in selecting safety options, the cost for consumers, or the need for regulatory approval, a manufacturer may not do so. As the Washington Legal Foundation's amicus brief urging the California Supreme Court to review the ruling recognizes, the decision will have "a disastrous effect on innovation and manufacturing." This submarine should be blasted out of the deep water.

Torpedoing the Trial Lawyer Submarines

What can the business community do to torpedo these trial lawyer liability-expansion submarines? Here are two suggestions.

Torpedo Fire 1 – Unity. First, civil justice reform organizations, trade associations, and their members must work together to torpedo all trial lawyer submarines. They should participate in legislative, amicus, and other advocacy efforts even though a particular submarine does not affect its members. For example, automotive groups should assist pharmaceutical groups.[9] The same should occur when sub attacks are reversed. Take a sound lesson from the trial lawyers themselves. They stick together against those who oppose them. Product liability plaintiffs' lawyers will testify against caps on medical malpractice claims. Plaintiffs' malpractice lawyers will oppose legislative efforts to reform product liability law. Business groups should bond together against all trial lawyer attacks.

Torpedo Fire 2 – Sunlight. Trial lawyer attacks work best underwater and in the dark. Make them surface. Use the media to show that a submarine is not only adverse to a particular corporate interest, but also the public interest. For example, civil justice groups can show how TPLF hurts pocketbooks of injured people as plaintiffs' lawyers and funders prolong litigation and siphon more of their recovery. The time for the trial lawyer submarines should end. Only you can make it happen.

[9] The Alliance for Automotive Innovation in fact joined Washington Legal Foundation, the Chamber of Commerce of the United States of America, and the California Chamber of Commerce on an amicus brief filed with a California Court of Appeal in the above-mentioned *In re Gilead Tenofovir* cases.

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