

EVALUATING THE PERFORMANCE OF THE TENNESSEE HEALTH CARE LIABILITY ACT

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INTRODUCTION

In his article, Professor Benjamin Edwards discusses how the recent controversy over Delaware's ban on fee-shifting by-laws and charter provisions presents a unique opportunity for states to compete with Delaware's monopoly on corporate charters.¹ He recommends that states should offer desirable rules unavailable under Delaware law; specifically, he proposes that states should revise their corporate laws to permit corporations to incorporate fee shifting provisions into their by-laws, which could be a lucrative revenue stream for states.² As a result, states would not only have a competitive advantage for corporate charters; they would have the capability to draft legislation in a way that generates useful information that is conducive to evaluating the efficacy of their corporate law.³

From his presentation, I have chosen to comment on Edward's premise that legislation should be drafted in a way that captures valuable data about a law's impact so that the law can be evaluated for continuous improvement.⁴ I then apply his premise to another area of corporate law in the state of Tennessee—the Tennessee Health Care Liability Act of 2010 (“THCLA”).⁵

As a health law and policy advocate, I take the position that health policy should be reflected in all policy. I am a strong proponent of tracking and reporting outcomes of legislative initiatives, especially when those laws impact large, vulnerable populations. With respect to corporate law, my comment focuses on privately held medical businesses and evaluating the performance the THCLA.⁶

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¹ See Benjamin P. Edwards, *Crafting Fee-Shifting Policy*, 20 TENN. J. BUS. L. 933 (2019).

² See *id.* at 934–36.

³ See *id.*

⁴ *Id.*

⁵ TENN. CODE ANN. § 29-26-121.

⁶ *Id.*

The THCLA falls under the umbrella of corporate law because the law governs the risk and liabilities to which corporations are exposed, which includes risks and liabilities of privately held health care organizations and physicians.⁷ The THCLA should be evaluated because of the disparate impact on medical liability litigation and claimants that has resulted in the years since the law was passed. Tennessee attorneys have criticized the THCLA because they believe the law placed the interests of providers over the interests of injured patients.⁸ Commentors also point out that medical liability cases are frequently dismissed on mere technicalities, which runs afoul of the public policy interest in hearing and adjudicating cases on the merits.⁹

This comment seeks to evaluate the performance of the THCLA and proceeds in three parts. Part I sets out the law in relevant part and discusses the law's intent. Part II assesses the law's performance and evaluates whether the THCLA, since its passage, achieved its legislative intent. Part III argues that Tennessee's legislature should amend the Tennessee Healthcare Liability Act to enable judges to hold that substantial compliance with the six pre-suit notice requirements is sufficient to overcome motions to dismiss.

I. THE TENNESSEE HEALTH CARE LIABILITY ACT DEFINED AND INTENT

Tennessee passed the Health Care Liability Act in 2010.¹⁰ The act completely overhauled how medical liability claims are handled in the state. In relevant part, the THCLA requires medical malpractice plaintiffs to satisfy six pre-suit "notice requirements," and it further requires plaintiffs to file a "certificate of good faith" with their complaints in cases in which expert testimony would be required.¹¹

The express legislative intent in proposing and passing the law was to ease the burden of medical malpractice litigation on both healthcare

⁷*Id.*

⁸ Daniel Horwitz, *The Law of Unintended Consequences: Avoiding the Health Care Liability Act Booby Trap*, 5 NASHVILLE B. J. 14 (2015) [hereinafter "Horwitz, *Unintended Consequences*"]; see also Todd South, *Medical Malpractice Suits Drop in Tennessee; 2008 Reforms Praised, Panned*, TIMES FREE PRESS (Dec. 3, 2013), <https://www.timesfreepress.com/news/local/story/2013/dec/03/medical-malpractice-suits-drop-reforms-that/125592/>.

⁹ Horwitz, *Unintended Consequences*, *supra* note 8 at 14.

¹⁰ TENN. CODE ANN. § 29-26-121.

¹¹ *Id.*

providers and injured patients.¹² Specifically, the legislature drafted the law to achieve the threefold objective “to give defendants written notice that a potential healthcare liability claim may be forthcoming,” to “facilitate early resolution of health-care liability claims,” and to “equip defendants with the actual means to evaluate the substantive merits of a plaintiff’s claim by enabling early discovery of potential co-defendants and early access to a plaintiff’s medical records.”¹³

To achieve these objectives, medical liability plaintiffs must satisfy six pre-suit notice requirements,¹⁴ and file a “certificate of good faith” with their complaints in cases requiring expert testimony.¹⁵ In exchange for complying with the pre-suit requirements, plaintiffs automatically receive a 120-day extension to the one year statute of limitations for filing suit.¹⁶ The 120-day extension was incorporated into the law to again benefit both parties because each party would have more time to “negotiate a potential settlement before contentious litigation begins.”¹⁷

Proponents of the law asserted that if THCLA passed, the state of Tennessee would benefit from the estimated 122,000 newly created jobs that would yield \$16.2 billion in economic activity over ten years.¹⁸ Additionally, Tennessee could attract more doctors to relocate to the state as well as retain its current physician population.¹⁹ According to the Tennessee Medical Association, Tennessee was in a vulnerable position because doctors who were trained in the state would inevitably leave the

¹² John A. Day, *Med Mal Makeover 2009 Act Improves on '08: The New Medical Malpractice Notice and Certificate of Good Faith Statutes*, 45 TENN. B.J. 7, 16 (2009), http://www.tba.org/sites/default/files/journal_archives/2009/TBJ0709.pdf

¹³ *Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 554 (Tenn. 2013).

¹⁴ TENN. CODE ANN. § 29-26-121(a)(1)-(2) (2013).

¹⁵ TENN. CODE ANN. § 29-26-122(a) (2012).

¹⁶ TENN. CODE ANN. § 29-26-121(c).

¹⁷ Daniel A. Horwitz, *Tennessee’s Medical Malpractice Statute Traps Another Plaintiff*, SUPREME COURT OF TENNESSEE BLOG, (June 18, 2018), <https://scotblog.org/2018/06/tennessees-medical-malpractice-statute-traps-another-plaintiff/> [hereinafter “Horwitz, *Another Plaintiff*”].

¹⁸ *Tennesseans for Economic Growth Praise Governor Bill Haslam and Tennessee Lawmakers for Passing Comprehensive Civil Justice Reform Law*, BUSINESS WIRE (May 20, 2011) <https://www.businesswire.com/news/home/20110520005962/en/Tennesseans-Economic-Growth-Praise-Governor-Bill-Haslam>.

¹⁹ Mike Morrow, *With Signing of Lawsuit Damage Limits Haslam Caps Legislative Priority List*, TN REPORT (June 16, 2011), <http://tnreport.com/2011/06/16/with-signing-of-lawsuit-damage-limits-haslam-caps-legislative-priority-list/>.

state because of a liability environment that was “kind of toxic,” exposing physician practices to unlimited litigation.²⁰ Moreover, adopting the THCLA would improve the quality of patient care and safety, reduce medical errors, reduce infant mortality, and increase access to prenatal care because providers would not be impacted by the stress of practicing defensive medicine to avoid frivolous medical malpractice claims.²¹

II. THE TENNESSEE HEALTH CARE LIABILITY ACT PERFORMANCE EVALUATION

In applying Professor Edwards’ premise that laws should be drafted in a way that captures valuable data about a law’s impact on the market, the THCLA was a clear win for Tennessee physicians. But the law provided little to no benefit for injured patients. Additionally, data does not show that Tennessee’s economy improved because of the THCLA’s passage.²² The lack of mutual benefits flowing between providers and patients suggests that the THCLA did not perform as intended and therefore failed to achieve its legislative intent.

Medical liability claims are down, which has decreased medical malpractice insurance premiums.²³ However, the reduction in claims does not necessarily translate to a reduction in medical errors. The reduction in medical liability claims can most likely be attributed to the number of cases failing to overcome significant procedural complexities that require complete compliance in order to earn the 120-day extension.²⁴ If a plaintiff fails to completely comply with any one of the six pre-suit notice requirements, the action will ultimately be dismissed with prejudice because the error will not be discovered until the statute of limitations has expired.²⁵ Unfortunately, these procedural deficiencies are often completely unrelated to the merits of a plaintiff’s claim.²⁶ For example, one plaintiff’s

²⁰ *Id.*

²¹ Justin Owen et al., *Lawsuit Abuse Reform in the Volunteer State*, Tennessee Center for Policy Research (February 21, 2011), POLICY REPORT 11–12, <http://www.beacontn.org/wp-content/uploads/Lawsuit-Abuse-Reform-in-the-Volunteer-State.pdf>; South, *supra* note 8.

²² David Randolph Smith, *Tort Reform: Where We Stand Today: Challenging Tennessee Damages Caps* (CLE seminar Nashville 2001), <http://documents.jdsupra.com/32091e15-36ab-4e05-b6b6-b2c7cd51c1c5.pdf>.

²³ South, *supra* note 8.

²⁴ Horwitz, *Another Plaintiff*, *supra* note 17.

²⁵ *Id.*

²⁶ *Id.*

claim was time-barred for mailing his pre-suit notice via FedEx instead of the United States Postal Service.²⁷

In a more recent case, a plaintiff lost her child five days after childbirth, and the plaintiff attributed the child's death to the provider's negligence.²⁸ The plaintiff's attorney named the wrong defendant in the pre-suit notice.²⁹ The attorney attempted to amend the complaint, but the court, in its analysis, reasoned that the amendment was futile because the appropriate defendant was not named in the pre-suit notice.³⁰ Since the plaintiff could not relate the amended complaint back to the original complaint, the plaintiff could not rely on the 120-day filing extension.³¹ As a result, the claim was dismissed with prejudice.³² The Tennessee Supreme Court also made certain to state in its analysis that substantial compliance is insufficient, and that the court will not "substitute its judgement about policy matters for that of the legislature."³³

Each of the aforementioned matters illustrates the harsh and unjust results for plaintiffs with legitimate medical liability claims under the THCLA. Tennessee has historically acknowledged that an injured person's civil action should be heard and adjudicated on its merits in the interest of justice.³⁴ But dismissing cases for failure to strictly comply with the THCLA's procedural pre-suit notice requirement deprives injured patients of a legal remedy for medical negligence, and providers who are negligent are shielded from any accountability for their actions.³⁵

²⁷ Horwitz, *Another Plaintiff*, *supra* note 17 (citing *Arden v. Kozawa*, No. E2013-01598-COA-R3-CV, 2014 WL 2768636, at *8 (Tenn. Ct. App. 2014) ("Having found that the sole acceptable method of mailing pre-suit notice would be through the U.S. Postal Service, we conclude that [plaintiff's] mailing through Federal Express Priority service was improper and ineffective.")).

²⁸ *Runions v. Jackson-Madison Cty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 81 (Tenn. 2018).

²⁹ *Id.* at 79.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 86.

³³ *Id.* at 79.

³⁴ Horwitz, *Another Plaintiff*, *supra* note 19 (citing *Brown v. Samples*, No. E2013-00799-COA-R9-CV, 2014 WL 1713773, at *8 (Tenn. Ct. App. 2014) (collecting cases and holding that "Tennessee courts have long recognized that the interests of justice are promoted by providing injured persons an opportunity to have their lawsuits heard and evaluated on the merits").

³⁵ South, *supra* note 8.

Not only are injured patients deprived of a legal remedy for negligent treatment, they are also deprived of legal representation, because attorneys are forced to be more selective in the type of medical liability cases they accept.³⁶ Some law firms and attorneys have exited the medical liability practice all together because they fear making fatal mistakes that could potentially result in a legal malpractice claim against them.³⁷ This fact may offer another alternative explanation for why medical liability claims are down. Considering the amount of time and expense that attorneys invest in bringing medical liability claims, they already have to be discerning about the cases accepted, and there is often a risk that the attorney will walk away with nothing if he or she loses the case.³⁸

When considering the burden placed upon patients, one is challenged to support the current iteration of the THCLA. The disparate impact on injured patients is not worth the so-far unshown goals of improvements to economic impact, patient care and safety, and infant mortality rates.³⁹

III. THE TENNESSEE HEALTH CARE LIABILITY ACT SHOULD BE AMENDED

According to Professor Dwight Aarons, a professor at The University of Tennessee College of Law, Tennessee's legislators, given the strict requirements of the law, could reasonably foresee the consequences of inaccurate interpretation of the law and legislative intent, yet there has been no outrage or movement to correct the procedural barriers or the misinterpretation by judges.⁴⁰

Thus, in light of how trial and appellate judges interpret the THCLA to require strict compliance with the pre-suit notice requirements, the legislature needs to step in to evaluate the THCLA and instruct the judiciary that substantial compliance with the pre-suit requirements is sufficient to grant plaintiff's attorneys the 120-day extension. The Tennessee legislature should begin by researching and identifying the number of valid medical liability claims that substantially complied with pre-suit requirements but were dismissed for technical requirements not related to the

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ David Randolph Smith, *Tort Reform: Where We Stand Today: Challenging Tennessee Damages Caps* (CLE seminar Nashville 2001), <http://documents.jdsupra.com/32091e15-36ab-4e05-b6b6-b2c7cd51c1c5.pdf>.

⁴⁰ Interview with Dwight Aarons, Associate Professor of Law, The University of Tennessee College of Law, in Knoxville, Tenn. (September 11, 2018).

merits of the case. If the legislature finds that a disproportionate number of cases were dismissed for failure to comply with technical requirements, the law should be amended. This is true especially if the legislative intent of the law was to serve the interests of both providers and injured patients.

CONCLUSION

If plaintiff complaints are not heard and are permanently barred from recovery based on a mere technicality, the legislature's goal has not been achieved. The objective of the THCLA was to improve medical liability litigation for both healthcare providers and injured patients. However, patients have not benefited from any of the law's proposed efficiencies because their lawsuits are dismissed before the summary judgement phase. Based on the available data, one can surmise that the frequent dismissal of cases indicates that the law is out of step with the statute's proposed objective. The Supreme Court of Tennessee appears to be reluctant to interpret the statute to permit, as one attorney recommended, substantial compliance.⁴¹ Therefore, this may present an opportunity for the Tennessee Legislature to amend the statute to permit substantial compliance.

Consideration must be given to the plaintiff victims in these matters; not just defendant physicians. Moreover, amending the law to redress an unintended effect would not cause undue harm or prejudice to providers, especially when 80% of all medical malpractice lawsuits are won by the healthcare provider in Tennessee.⁴²

From a research perspective, Tennessee may be able to determine whether providers are providing better medical care and practicing less defensive medicine, which could reduce medical liability claims or whether the reduction in claims is the result of agile legal maneuvering. Some may question the balance of cost and benefit for such an amendment. However, public and health policy interests are best served by permitting injured plaintiffs to have their lawsuits adjudicated on their merits. Therefore, Tennessee's legislature should amend the THCLA to align with its original intent—to serve the needs of providers *and* patients.

⁴¹ Horwitz, *Unintended Consequences*, *supra* note 8, at 16.

⁴² South, *supra* note 8.