

Split 6th Circuit Panel Says American Family Insurance Agents Aren't Employees

More than 7,000 American Family Insurance agents sued the insurer in federal court in Ohio, seeking to be classified as employees eligible for benefits under ERISA.

By [Greg Land](#) | February 05, 2019 at 12:04 PM



Steve Mooney, Weinberg Wheeler Hudgins Gunn &

Dial. (Courtesy photo)

A split U.S. Court of Appeals for the Sixth Circuit panel [has found more](#) than 7,000 American Family Life Insurance agents are independent contractors and not employees and are thus not able to pursue a class action arguing they should be eligible for inclusion in the insurer's health and retirement plan.

An Ohio judge had certified the class after holding a 12-day advisory trial, at the conclusion of which the jury issued a verdict declaring the agents were employees and not independent contractors.

But Senior Judges Danny Boggs and John Rogers said the trial court failed to give the appropriate weight to some of the factors the court must use to determine whether a plaintiff is an employee or independent contractor under the relevant precedent for disputes concerning benefits under the Employee Retirement Income Security Act of 1974.

“Because American Family properly classified its agents as independent contractors, we reverse,” Boggs wrote for the majority.

But appellate Judge Eric Clay said the trial court and jury had it right, writing the district judge had properly weighed the agents’ employment status using the relevant factors, and that the majority erred in its analysis of how much weight those factors should be given by the lower court.

Clay was also unimpressed with the majority’s use of his own dissent in a prior case to bolster its position.

“Such cherry-picking does nothing to increase the persuasiveness of the majority’s reasoning, particularly to the extent that my dissent is at odds with controlling case law and the subsequent published decisions of this court,” wrote Clay.

The decision reversed a ruling by Senior Judge Donald Nugent of Ohio’s Northern District, who in 2017 wrote the evidence presented “supports a finding that the American Family agents defined in the class description should have been classified as employees and not independent contractors.”

The plaintiffs’ appeal was argued by Charles Crueger of [Crueger Dickinson](#) in Whitefish Bay, Wisconsin, whose co-counsel includes firm partner Erin Dickinson; Gregory Coleman and Mark Silvey of Knoxville, Tennessee’s [Greg Coleman Law](#); and Edward Wallace and Tania Yusaf of Chicago’s [Wexler Wallace](#).

In an email, Crueger said there may be more litigation on the matter.

“We disagree with the decision of the two-judge majority and believe the dissenting opinion is correct,” said Crueger. “We are currently considering whether to file a petition asking the full Sixth Circuit to grant rehearing on the decision. We have not made any decision at this time about seeking review from the Supreme Court.”

American Family’s appeal was argued by Pierre Bergeron, who was then with [Squire Patton Boggs](#); he was elected to Ohio’s First Appellate District in Cincinnati in November and left the firm Jan. 31.

Bergeron co-counseled on the appeal with Squire Patton lawyers Lauren Kuley, Scott Coyle and Colter Paulson; and Gregory Mersol and Gilbert Brosky of [Baker & Hostetler](#) in Cleveland.

In a statement, American Family’s chief insurance strategy officer Steve Holman hailed the ruling.

“Today’s ruling is now the sixth time a federal court has confirmed our agents are properly classified as independent contractors,” Holman said.

The agents are “paid by commission, hire and pay their staff, set their work hours, and create and execute plans to run their businesses,” he said. They file taxes as independent contractors with the Internal Revenue Service and take tax deductions for their business expenses.”

Stephen Mooney, a partner with [Weinberg Wheeler Hudgins Gunn & Dial](#) in Atlanta, was among the trial team that argued the advisory trial on behalf of the insurer in Cleveland.

Mooney said the lower court’s decision certifying the class threatened to upend the way insurers across the country function in relation to their agents. “This is a very closely watched case because all the big insurers use their agents as the delivery system for their products,” said Mooney, whose trial team included Weinberg Wheeler partners Billy Gunn and Matthew Gomes, and Baker Hostetler’s Mersol. They were assisted by Weinberg lawyers Nancy Rigby and Kate Spinelli.

“This is a case that could dramatically change the employee versus independent contractor landscape,” Mooney added. “Even the trial judge said in his opinion the ruling could have far-reaching implications and that prior case law said insurance agents are independent contractors.”

According to the website of legal services corporation KCC, a plaintiff’s actuary has said the case could expose American Family to as much as \$1 billion in liability, including about \$500 million existing liability and another \$500 million to raise its pension fund accordingly, if the plaintiffs prevail.