

OKLAHOMA ASSOCIATION FOR JUSTICE

CONTINUING LEGAL EDUCATION

MALPRACTICE  
AVOIDANCE IN TORT AND INSURANCE CASES

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**MALPRACTICE AVOIDANCE IN TORT AND INSURANCE CASES**

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## **MALPRACTICE AVOIDANCE IN TORT AND INSURANCE CASES**

### **INTRODUCTION:**

There are a lot of alligators out there, in the form of potential legal malpractice. When they bite any of us, all of our malpractice premiums go up and our public image goes down.

In almost 50 years of a tort and insurance practice, I've made a lot of mistakes. I've seen a lot of other people make other mistakes. Let's take a look at some of them. Hopefully, by looking at some of these mistakes, we can all be in a better position to avoid them in the future.

There are some things we all know we need to do to avoid malpractice claims and bar complaints: Handle our business well and keep clients informed. Take or promptly return phone calls. I've found the surest way to end up with an angry client is to not return the client's calls thinking "I really don't have anything to report to them." It's a mistake. If you don't have anything to report, talk to the client anyway and tell them why. If you need to apologize, do that. Shooting straight with clients is a good way to build good client relations and avoid malpractice claims and bar complaints.

Send clients copies of everything that comes in or goes out of your office about the client's matter. We have an office procedure that does a carbon copy of everything we generate in our office about the case to the client. That alone will save a lot of complaints and claims. If the stuff you have to send the client is awkward (maybe someone chewing on you for having failed to do something you were supposed to do) do it anyway. Far better to have the client hear it from you with your explanation than from someone else, much later.

But we all know all that. Today we will talk about some more substantive things you can do to avoid complaints and claims.

Oddly enough, most malpractice claims in a litigation practice come at the beginning and

the end of the case. The largest single cause of litigation malpractice claims is missed time deadlines (statutes of limitation, notice deadlines, etc.). Not far behind that is overlooking coverage and failing to make a claim against an insurance policy or other source of recovery. If you're not really sure where all the potential coverage is, talk to someone who will know.

Next in frequency of claims come mistakes in settling claims. Usually, it is making partial settlements of claims and thereby screwing up claims you meant to pursue.

With regard to what comes in between, the lawyer is usually protected from malpractice claims by the "judgment call" rule. Most mistakes lawyers make in the area of discovery, trial preparation and trial are not the sort of thing that make for viable malpractice cases. Most can be explained on the basis that the lawyer exercised professional judgment (in taking or not taking a deposition, calling or not calling a witness, etc.). Most lawyers who handle legal malpractice cases will not file that sort of suit. The lawyer is just not liable for a mistaken exercise of professional judgment.

What *does* make a viable malpractice case is the "clear error" sort of case - the blown statute of limitation, overlooked coverage, missed appeal time or the settlement with one tortfeasor or insurance company which precludes other claims. Those "slam dunk" malpractice claims are the sort of claims we will concentrate on here.

### **MISSED TIME DEADLINES:**

Most missed time deadline malpractice cases do not lend themselves to prevention by Continuing Legal Education. They result from carelessness, not lack of knowledge. We all know that, if we fail to file suits by the statute of limitations (SOL) date, we will have a major problem. Usually (although not always) we know the correct SOL. We just lack the self-discipline to create or follow office procedures to avoid this sort of very avoidable loss. But

some cases involve unusually short time constraints. We will talk about those.

## **THE IMPORTANCE OF SYSTEMS**

### **Have A Docketing System**

The way to avoid blown limitations claims is to have and use a system for getting limitations dates docketed. These dates should be docketed as soon as you talk to the prospective client - even before you accept employment.

Even if the case is an uninsured motorist case, with a 5-year SOL, and you plan to file it next week, **docket the SOL** as soon as it comes in. Most blown limitations claims I have seen involved a lawyer who meant to file the case soon after it came in - he just didn't get around to it.

### **Have A Backup System**

My biggest malpractice exposure zone is my desk. I fight a constant battle to keep from having a mountain of paper there, awaiting attention. If a file gets there without me getting the SOL docketed, I can be SOL, in another sense of the word.

I try to guard against that with a procedure for docketing SOL's as soon as the new case is received in the mail, hand delivered, or comes up in a phone conversation. For incoming mail and deliveries, we use a rubber stamp that says "ON DOCKET." Whoever opens the mail and first sees the deadline docketed it and puts the stamp on. This indicates to whomever sees the matter that it has been docketed.

This gives us a "double check" system. If I don't see the "on docket" stamp, I know to get it docketed. So do paralegals and others who may see the new file. Your malpractice insurance carrier likely requires such a "double check" system. If it doesn't, it should.

### **Be Sure The Docket Gets Reviewed**

Of course, getting the SOL on the docket doesn't do much for you, if you don't look at the docket. We designate an employee as the "Docket Fairy." That person's job is to watch the docket for things which must be done and nag the paralegal or lawyer whose initials appear on the docket to see that it gets done.

Each file is assigned to a lawyer and a legal assistant. Both are responsible for seeing that the clerical people have docketed the matter. We make notes in the electronic file (we call them "file diary entries") of what docketing we did. When the lawyer or legal assistant sees a matter has come in and not been docketed, they know to docket it.

### **Be Sure the Prospective Client Knows If You Will Not File the Case**

Beyond getting SOL's docketed and protected, it is important to be sure there is a clear understanding with the prospective client whether you are going to handle the case. I use a standard letter, a copy of which is an Appendix to this paper, for this purpose. It's pretty cheap malpractice insurance.

### **SHORT STATUTES OF LIMITATION**

There are a few areas in which lawyers don't know the correct SOL. Most of the cases we encounter carry a 2-year SOL. However, just enough have shorter SOL's to cause malpractice exposure.

### **Statutory Fire Policies**

Perhaps the most commonly missed short statute is the one-year SOL contained in the statutory fire insurance policy.<sup>1</sup> Suit must be filed within one year of the loss. The statute is

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<sup>1</sup>36 O.S. 1991 §4803G "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless. . . commenced within twelve months next after

constitutional.<sup>2</sup>

The loss need not be a fire loss to be within the one-year fire policy SOL. Policies (including homeowners' policies) will often consist of a statutory fire policy with endorsements adding all sorts of other coverages (such as theft, windstorm, etc.). A loss under one of these "ancillary coverages" will still be covered by the statutory fire policy's one-year SOL.<sup>3</sup> However, a lawyer got a break with a holding that a theft claim will not be covered by the one year SOL.<sup>4</sup> Other types of claims will still be covered by the shorter, fire policy SOL.

### **Possible Cures**

#### **Waiver by Negotiation**

It may be possible to salvage one of these fire policy SOL cases. The insurance company may be estopped to assert its limitations defense by having negotiated and led the insured to believe it would settle.<sup>5</sup>

#### **Maybe It's a Bad Faith Case**

It may also be possible to assert that the insurance company's failure to pay the claim within a year was bad faith. This triggers the two-year SOL applicable to bad faith.<sup>6</sup> You contend that the amount which should have been paid under the policy is a consequential damage arising  

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inception of the loss.

<sup>2</sup>*Walton v. Colonial Penn. Ins. Co.*, 1993 OK 115, 860 P.2d 222.

<sup>3</sup>*Springfield Fire & Marine Ins. Co. v. Biggs*, 1956 OK 114, 295 P.2d 790.

<sup>4</sup>*Wagon v. State Farm Fire and Cas. Co.*, 1997 OK 160, 951 P.2d 641.

<sup>5</sup>*Whitley v. Oologah Ind. School Dist.*, 1987 OK 67, 741 P.2d 455; *Hart v. Bridges*, 1979 OK 31, 591 P.2d 1172; *Phillips Pet. Co. v. U.S.F.&G. Co.*, 1968 OK 23, 442 P.2d 303; *Agricultural Ins. Co. of Watertown New York v. Iglehart*, 1963 OK 214, 386 P.2d 145.

<sup>6</sup>*Lewis v. Farmers Ins. Co., Inc.*, 1983 OK 100, 681 P.2d 67.

from the insurance company's bad faith.

This theory is not without its problems. In order to make a *Lewis v. Farmers* recovery, you must prove bad faith. If you only prove that the claim should have been paid, and not that the insurance company was in bad faith, you will get nothing. Obviously both of these possible ways of salvaging a blown limitation period are just that: salvage operations. The best way to avoid malpractice from blown SOL's is not to blow SOL's in the first place.

### **Other Short Statutes**

Other, less commonly seen claims carry short SOL's. These are libel, slander, assault, battery, malicious prosecution, false imprisonment, and an action for statutory penalty or forfeiture.<sup>7</sup>

### **Foreign Statutes of Limitation**

Foreign SOL's are also a common cause of legal malpractice. Oklahoma lawyers are used to a two-year SOL for tort actions. Many other states have one-year tort limitations. Louisiana, for example, has a one-year tort SOL.<sup>8</sup> California has a one-year uninsured motorist SOL.<sup>9</sup>

When I talk to someone about an accident occurring in another state or country, I always immediately check the Law Digest volume of the Martindale Hubbell Law Directory. Doing so saved me at least one certain malpractice claim. I took a case involving an accident which an Oklahoman had in the Dominican Republic. Upon checking the Martindale, I found to my shock

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<sup>7</sup>12 O.S. 1991 §95(4).

<sup>8</sup>Louisiana Rev. Civil Code, 1870, as amended by Act 173 of 1983.

<sup>9</sup>Cal. Ins. Code, §11580.2[i].

that the Dominican has a six-month tort SOL.<sup>10</sup> I had only a matter of weeks in which to file.

The foreign statute of limitation which gives Oklahoma lawyers the most grief seems to be Louisiana, which has a one year statute of limitations on a tort action.<sup>11</sup> Another potentially troublesome neighboring state is New Mexico. While the general tort statute of limitations in New Mexico is three years,<sup>12</sup> a negligence action against a city, town or village carries a one year statute.<sup>13</sup> In New Mexico, a wrongful death action must be filed within one year of the date of death.<sup>14</sup> The other neighboring states have general tort statutes of limitation equal to or longer than Oklahoma's two years.<sup>15</sup>

### **File Suit Early**

Generally, filing a suit as early as possible after you get a tort or insurance claim in your office is a good practice. Obviously, you must make a suitable investigation to avoid sanctions under the rules requiring investigation into the factual and legal basis for the claim.<sup>16</sup> However, this ought not to take long. In addition to avoiding missed SOL claims, early filing starts pre-

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<sup>10</sup>Dominican Republic Civil Code, §§1304, 2219-2279.

<sup>11</sup>Louisiana Rev. Civ. Code Section 3492-3, 3468.

<sup>12</sup>N.M.Stat. Ann. Section 37-1-8.

<sup>13</sup>N.M. Stat. Ann. Section 37-1-24).

<sup>14</sup>N.M. Stat. Ann. Section 37-1-11.

<sup>15</sup>Arkansas: 3 years (Ark. Code 1987 Section 16-56-105); Missouri: 5 years (Mo. Rev. Stat. Section 516.20); Kansas: 2 years (Kan.Stat. Ann. Section 60-513); Colorado: 2 years (Col.Rev.Stat. Section 13-80-102); Texas: 2 years (Civil Practice & Remedies Code Section 16.003).

<sup>16</sup>12 O.S. 1991 §2011; Fed. Rule of Civ. Proc. 11.

judgment interest running.<sup>17</sup> While the availability of pre-judgment interest is questionable due to the potential constitutionality of “tort reform” virtually doing away with it, the potential ought to be some inducement to file suit early.

## **GOVERNMENTAL TORT CLAIMS ACT NOTICE AND SUIT**

### **NOTICE - A Short Fuse**

Failure of timely notice or suit under the Governmental Tort Claims Act (GTCA - 51 O.S. §151 et seq.) is another common source of malpractice claims. The rules (which have varied over the years) are now clear.

You have one year from the date of loss to give written notice of claim, under 51 O.S. §156. If you don’t give notice within a year, the claim will be forever barred. Also, you don’t have the minority of the claimant available to extend the statute, like you do for other claims.<sup>18</sup>

Note that some old Court of Civil Appeals cases, not overruled by name, held the one-year “saving statute”<sup>19</sup> (which permits refile of a case within one year) does not apply to a governmental tort claim.<sup>20</sup> However, the Supreme Court has overruled those cases and held that the saving statute *does* apply.<sup>21</sup> What happens is that a defense lawyer will cite one of these Court of Civil Appeals cases. The plaintiff’s lawyer doesn’t catch that they have been overruled

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<sup>17</sup>12 O.S. 1991 §727A2.

<sup>18</sup> *Johns v. Wynnewood School Bd. of Ed.*, 1982 OK 101: 656 P.2d 248.

<sup>19</sup>12 O.S. 1991 §100.

<sup>20</sup>*Robbins v. City of Del City*, 1994 OK CIV APP 65, 875 P.2d 1170; *Cesar v. City of Tulsa*, 1993 OK CIV APP 150, 861 P.2d 349; *Gibson v. City of Tulsa*, 1994 OK CIV APP 108, 880 P.2d 429.

<sup>21</sup>*Cruse v. Board of County Commissioners of Atoka County*, 1995 OK 143, 910 P.2d 998.

because *Shepherds* or *Key-Cite* won't pick up that it's overruled. The plaintiff's lawyer may dismiss without realizing it's a viable case. But, note also, that the refiling statute does not *apply* to *Federal Tort Claim Act* cases.<sup>22</sup>

## **TIME FOR SUIT**

Under 51 O.S. §157, suit must be filed within 180 days of the date the claim is denied. The claim is deemed denied at the end of 90 days from the date it is filed.

You should note that the 180 days begins to run from the *earlier* of the date of the actual denial or the date the claim is deemed denied, after 90 days. *Clem v. Leedey Public Works Authority*<sup>23</sup> holds that the 180 statute of limitations begins to run with the date of denial, not the date the denial letter is received. Docketing these dates becomes critical.

Earlier cases held that the governmental entity had no duty to notify you or your client it has denied the claim, so as to trigger the running of the 180 days. It was enough if the agenda of the meeting showed the claim is to be considered on a particular day.<sup>22</sup> However, a 1994 amendment<sup>23</sup> to §157 requires the governmental entity to give notice of the denial and provides the 180-day time to sue will not run until the 90-day "deemed denied" period if the entity does not give the notice. The shortened time limits of the Tort Claim Act are constitutional.<sup>24</sup>

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<sup>22</sup>*Benge v. U.S.*, 17 F.3d 1286 (10<sup>th</sup> Cir. 1994).

<sup>23</sup>*Clem v. Leedey Public Works Authority*, 2003 OK CIV APP 93, 73 P.3d 969.

<sup>22</sup>*Patterson v. Town of Muldrow*, 1993 OK CIV APP 172, 865 P.2d 1269.

<sup>23</sup>Laws 1994, c. 374, §1.

<sup>24</sup>*Black v. Ball Janitorial Service, Inc.*, 1986 OK 75, 730 P.2d 510; *Jarvis v. City of Stillwater*, 1983 OK 88, 669 P.2d 1108.

## SETTLEMENT PROBLEMS

### DON'T RELEASE THE PRIMARY TORT-FEASOR

If you release the person primarily liable and proceed against one secondarily liable, you may be liable.<sup>25</sup> If you release an employee and sue the employer, you will be out of luck. The release of the employee releases the employer, as a matter of law. This rule has been applied to statutory liability as well as *respondeat superior* cases.<sup>26</sup>

### RELEASE AND SATISFACTION AND RELEASES:

#### YOUR PROFESSIONAL LIFE GOT SAFER

Amid all the gloom and doom we have been talking about, maybe you need a little good news. We have it in the area of release and satisfaction of judgment and releases.

Until a few years ago, it was easy to get in trouble settling lawsuits. *Brigance v. Velvet Dove Restaurant*<sup>27</sup> held that release and satisfaction of a judgment barred an action against joint or concurrent tort-feasors, whether that was the parties' intent or not. In a landmark opinion, the Supreme Court reversed that ruling, holding that a release and satisfaction releases other tort-feasors only if the judgment was actually litigated or on its face reflects that it is intended to be a full satisfaction of all claims, including those against tort-feasors not joined.<sup>28</sup>

The problem was, of course with friendly suits. We reduced claims to judgments and released and satisfied them to obtain court approval, because a minor could not contract to

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<sup>25</sup>*Barsh v. Mullins*, 1959 OK 2, 338 P.2d 845; *Mid-Continent Pipeline Co. v. Crauthers*, 1954 OK 61, 267 P.2d 568.

<sup>26</sup>*Burke v. Webb Boats, Inc., and Arrowhead*, 2001 OK 83, 37 P.3d 811.

<sup>27</sup>1988 OK 68, 756 P.2d 1232 "*Brigance II.*"

<sup>28</sup>*Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, 920 P.2d 122.

release a claim. Those friendly suits proved unfriendly. Now they are less so.

Releases also used to be dangerous. A case called *Brown v. Brown*<sup>29</sup> held that signing a release which releases the named tort-feasor “and all other persons” had the effect of releasing all tort-feasors. This became a very common source of malpractice problems, as lawyers failed to adequately read “boilerplate” releases and released claims they never meant to release. Once more, the Oklahoma Supreme Court came to our rescue and, in *Moss v. City of Oklahoma City*,<sup>30</sup> reversed *Brown* and held that only named tort-feasors will be released by such a release.

Another problem was the rule that release of the original tort-feasor released a successive tort-feasor. This applied most commonly when a doctor or hospital treated an accident victim and was alleged to have committed malpractice. If the victim settled with the tort-feasor who caused the original accident and injury, this release also released the doctor or hospital.<sup>31</sup>

A series of opinions reversed this rule as well.<sup>32</sup> Finally, *Hoyt v. Paul R. Miller, Inc.*<sup>33</sup> put together several of these rules. That case held an agreed judgment and release and satisfaction of the claim against the tort-feasor would not release the claim against the doctor.

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<sup>29</sup>1966 OK 2, 410 P.2d 52.

<sup>30</sup>1995 OK 52, 897 P.2d 280.

<sup>31</sup>*Farrar v. Wolfe*, 1960 OK 123, 357 P.2d 1005; reversed, *Hoyt v. Paul R. Miller, Inc.*, 1996 OK 80, 921 P.2d 30.

<sup>32</sup>*Shadden v. Valley View Hospital*, 1996 OK 140, 915 P.2d 364; *Carmichael v. Beller*, 1996 OK 48, 914 P.2d 1051.

<sup>33</sup>1996 OK 80, 921 P.2d 350.

## **DON'T SETTLE WITH TORT-FEASORS WHEN YOU HAVE UM (EXCEPT VERY CAREFULLY)**

Settlements with third parties can also have disastrous results as to UM coverages. *Porter v. MFA Mut. Ins. Co.*<sup>34</sup> holds that you will destroy your UM claim if you settle with and release the tort-feasor. *Frey v. Independence Fire and Cas. Co.*<sup>35</sup> reaches the same result if the insured settled with the tort-feasor by using a covenant not to sue the tort-feasor. A specific reservation of the right to sue the UM insurance company did not prevent destruction of the UM claim.

These cases reach that result on the theory that the release or covenant not to sue destroys the UM carrier's subrogation right. Thus, it makes no difference whether the device used is a release or a covenant not to sue. If the effect is to preclude the UM carrier from suing the tort-feasor, the UM insurer is released.

### **USE "PORTER" RELEASES**

*Porter v. MFA* suggests use of a partial release<sup>36</sup> (now known as a "*Porter* Release") to avoid this problem. Under this device, the insured releases all of his rights against the tort-feasor, but specifically reserves the subrogated rights of the UM insurance company against the tort-feasor.

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<sup>34</sup>1982 OK 23, 643 P.2d 302.

<sup>35</sup>1985 OK 25, 698 P.2d 17.

<sup>36</sup>*Porter*, Supra Note 29, 643 P.2d at 305: "What Porter [the insured] should have done was make settlement with Shelton's [the tort-feasor's] insurance carrier by means of a partial release, conditioned on the reservation of whatever rights or interests the uninsured motorist insurance company, MFA, might have or claim thereafter against the tort-feasor."

## **POSSIBLE CURES**

### **Is There Subrogation?**

An argument can be made that there is no subrogation right in a case against an *underinsured* (as opposed to an *uninsured*) motorist. The 1979 Amendment to §3636E provided that

any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage.

The argument can be made that any attempt by the UM carrier to take credit for amounts paid by or on behalf of the insured tort-feasor contravenes that provision.

### **Will the Insured Be Fully Paid?**

Oklahoma has adopted the “make whole” rule. This rule holds that there is no subrogation where the effect of subrogation would be to cause the insured to be less than completely compensated or “made whole.”<sup>37</sup> If there is no subrogation, then the insurance company can hardly be prejudiced by the settlement.

The potential fallacy of this argument is that even though there may not be coverage available to compensate the insured and pay the subrogation, there would be a judgment for the amount over the adverse liability coverage. That leads to the next question, whether the insurance company which claims its subrogation has been destroyed must prove that it could have collected the subrogation, had the insured not destroyed the claim.

### **Was the Insurance Company Prejudiced?**

Neither *Porter* nor *Frey* discuss whether the UM insurer asserting the insured's release of

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<sup>37</sup>*Equity Fire and Cas. Co. v. Youngblood*, 1996 OK 123, 927 P.2d 572, disapproving *Fields v. Farmers Ins. Co., Inc.*, 847 F.Supp. 160 (W.D.Okla. 1993), *aff'd*, 18 F.3d 831 (10<sup>th</sup> Cir. 1994).

the tort-feasor as a defense must prove prejudice. You should argue that, if the lost subrogation right was uncollectible, there was no prejudice and the release is no defense.

Little law addresses whether the insurance company must show that it was prejudiced by the settlement. The few cases available say it must show prejudice.<sup>38</sup> The Tenth Circuit, predicting Oklahoma law agrees.<sup>39</sup>

### **Did the Insurance Company Waive Subrogation?**

The insurance company may waive its subrogation right and not be able to assert destruction of its subrogation by the settlement by denying UM coverage,<sup>40</sup> improperly leaving UM coverage off the policy so as to mislead the insured into settling with the tort-feasor,<sup>41</sup> or by improperly refusing to pay UM<sup>42</sup> or not timely paying UM.<sup>43</sup>

### **DON'T COVENANT NOT TO EXECUTE AGAINST THE TORT-FEASOR**

Take care not to execute a covenant not to execute on a judgment, except with agreement

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<sup>38</sup>*Chapman v. Hoage*, 296 U.S. 526, 532, 56 S.Ct. 333, 80 L.Ed. 370, 374 (1936): “[The insurer] is not prejudiced by failure to prosecute a claim after it has been demonstrated to be groundless.” The workers’ compensation claimant had filed and then dismissed his third-party action, after the statute of limitation had run. The court said the law does not require the claimant to do more than that which “will avoid prejudice to the insurer’s right of subrogation.”; *Hamilton Fire Ins. Co. v. Greger*, 246 N.Y. 162, 169, 158 N.E. 60, 62, 55 A.L.R. 921, 926 (1927): The insurer “must show that in fact it might have recovered against . . .” the third party “as a wrongdoer.”; See also *Twin States Ins. Co. v. Bush*, 183 So.2d 891, 893 (Miss. 1966): The insurer must prove that it “could have recovered from the person to whom the release was given. . . .” *Fraioli v. Metropolitan Prop. and Cas. Ins. Co.*, 748 A.2d 273 (R.I. 2000): It would elevate form over substance to permit the defense where an asset check revealed tortfeasor lacked assets.

<sup>39</sup>*Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10<sup>th</sup> Cir. 2001).

<sup>40</sup>*Sexton v. Continental Cas Co.*, 1991 OK 84, 816 P.2d 1135.

<sup>41</sup>*Robertson v. United States Fid. & Guar. Co.*, 1992 OK 113, 836 P.2d 1294.

<sup>42</sup>*Buzzard v. Farmers Ins. Co., Inc.*, 1991 OK 127, 824 P.2d 1105.

<sup>43</sup>*Strong v. Hanover Ins. Co.*, 2005 OK CIV APP 9, 106 P.3d 604.

of the defendant's insurance company. I have seen courts treat this covenant as releasing the insurance company. It is extremely dangerous, and should be avoided.

## **DON'T GET STUCK FOR AN ERISA SUBROGATION CLAIM**

### **Don't Let Your Client Fail to Pay ERISA Subrogation**

Employer-sponsored health plans will claim that a lawyer who fails to see to it that his client pays a subrogation claim to the plan may be personally liable to the health insurance plan or company, under ERISA.<sup>44</sup> An Oklahoma federal court reached that result,<sup>45</sup> rendering judgment for \$83,819.15 against a lawyer who failed to force his client to repay an ERISA subrogation claim. The rationale for the ruling is that the lawyer who involuntarily becomes a "fiduciary" for the ERISA plan, obligated to protect the health plan against the client because he has "discretionary authority" to dispose of the settlement proceeds contrary to his client's wishes.<sup>46</sup>

The Oklahoma Supreme Court and the Tenth Circuit Court of Appeals have ruled differently as to the validity of the "make whole rule."<sup>47</sup> Because ERISA is a federal law, the federal courts have concurrent jurisdiction with the state courts. Which court you are in will

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<sup>44</sup>Employee Retirement Income Security Act - 29 USC §§1001 *et seq.*

<sup>45</sup>*Health Cost Controls v. White*, No. CIV-92-1818-D (W.D.Okla. 9/29/93).

<sup>46</sup>29 USC §1001(21)(A) defines a fiduciary as one who "exercises any discretionary authority or discretionary control respecting management or disposition of [the Plan's] assets." Judge Daugherty does not make it clear whether the lawyer should turn in his license before or after taking action contrary to his client's position and on behalf of the ERISA plan. He does note that there is no problem with a federal law requiring the attorney to participate in a conflict of interest with his client.

<sup>47</sup>*Equity Fire and Cas. Co. v. Youngblood*, 1996 OK 123, 927 P.2d 572, disapproving *Fields v. Farmers Ins. Co., Inc.*, 847 F.Supp. 160 (W.D.Okla. 1993), *aff'd*, 18 F.3d 831 (10<sup>th</sup> Cir. 1994).

determine whether this important rule applies.

This remains a threat, even though the case upon which the Oklahoma federal judge relied has been reversed on appeal.<sup>48</sup> The only safe way to protect yourself from this potential source of liability is to sue the ERISA plan for a declaratory judgment as to the plan's entitlement to the funds. I once told an ERISA plan lawyer I was going to do that. His response was to threaten sanctions for not conceding his right to my client's settlement.

The "bottom line" of the "is the lawyer an ERISA fiduciary" question is that the lawyer probably is not and will probably not be successfully sued. But then, do you want to get sued, in any event?

**DON'T PUT YOUR LICENSE ON THE LINE  
TO STIFF A MEDICAL LIEN CLAIMANT**

The Oklahoma Supreme Court has made our life difficult. *State ex rel. Oklahoma Bar Association v. Bedford*<sup>49</sup> holds that the lawyer owes a duty to a medical lien claimant to see that the lien claimant got paid out of a settlement. This was so even though the Professional Responsibility Tribunal (which is the fact-finding body in a bar disciplinary case) found the lawyer had no actual notice of the lien. By paying out the settlement proceeds to the client and failing to protect the medical lien claimant, the lawyer committed an ethical violation. The same rule may or may not apply to subrogation claims. It is a scary subject.

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<sup>48</sup>The decision relied on *Chapman v. Klemick*, 750 F.Supp. 520 (S.D.Fla. 1990), which was reversed on appeal at 3 F.3d 1508 (11<sup>th</sup> Cir. 1993), and rejected *Hotel Employees Union Welfare Fund v. Gentner*, 815 F.Supp. 1354 (D.Nev. 1993); aff'd. 50 F.3d 719 (9<sup>th</sup> Cir. 1995) (Lawyer not ERISA fiduciary).

<sup>49</sup>1997 OK 83; 956 P.2d 148.

It gets worse. *State ex rel. Oklahoma Bar Association v. Taylor*<sup>50</sup> holds that, at least under the peculiar circumstances of that case, the lawyer had a duty not only to segregate the funds claimed by medical lien claimants, he also had a duty to interplead funds to pay the lien claimant. The case may be somewhat limited to its facts because the lawyer involved had told the lien claimants he would interplead the funds if the lien claimants could not agree to a distribution. Hopefully, that is what the Supreme Court meant to hold. It may be that the lawyer may just notify the claimants he holds the funds and leave it to the claimants to file some action to resolve disputes as to whether the client owes the money and, if so, how much.

The lawyer may also face personal liability in a civil case for failing to honor a lien.<sup>51</sup> That case also holds that the lien attached to the funds in the lawyer's hands, even though the lien was not yet on file at the time of the settlement.

You must read these cases before getting into a dispute with lien or subrogation claimants to your clients' recovery. It could save you a bar complaint or civil liability.

## **CONCLUSION**

Tort and insurance lawyers face a significant malpractice exposure. The best defense to a malpractice suit is to not let the malpractice happen in the first place.

Malpractice avoidance is good practice. Not only does it avoid significant fiscal exposure, it also results in clients having claims decided on the merits. That's the way the system should work.

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<sup>50</sup>2003 OK 56, 71 P.3d 18.

<sup>51</sup>*St. Francis Hosp. v. Vaughn*, 1998 OK CIV APP 167, 971 P.2d 401.

**APPENDIX**

Letter Declining Representation

August 1, 1992

[Prospective Client]  
0000 N.W. First St.  
Anywhere, OK 73160

Re: Your Fall at GFF Store 7/31/90  
Our File No. 90-2-B

Dear Ms. XXXXXX:

Thank you for calling me yesterday about your fall at the GFF Store. When you called, you had not yet been to see a doctor. I hope you have either gotten better or have sought medical help.

As I advised you, it appears to me you have, at best, a very difficult claim against GFF. The reason for this is that you really don't know how the water on which you slipped got there or that it had been there long enough for the store to have cleaned it up. You would have to prove that to make a case against the store. For these reasons, I will not agree to handle your case.

I suggested that stores sometimes have medical payments insurance which will pay an injured customer's medical bills, without regard to fault. I suggested you contact the store and see if they had such coverage, in the event you need to seek treatment.

You should be aware that lawyers' opinions on these matters sometimes differ. You should, of course, feel free to seek a second opinion about whether you have a claim which should be pursued. You should be aware that, if such a claim is to be pursued, suit must be filed within two years of the date of your accident, or it will be barred by the statute of limitation and you will never be able to pursue it.

Good luck. Thank you for contacting us.

Yours very truly,

Rex Travis