

NBI PRESENTATION 2016—Advanced Issues in Personal Injury Litigation

By Paul Kouri with Brennan C. Clay

I. LEGISLATIVE AND CASE LAW UPDATE:

A. FEDERAL AND STATE RULES/PROCEDURES UPDATE

DECEMBER 2015 CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE

Rule	Subsection	Changes Made
1	n/a	Modified to specify that the “parties” should share responsibility with the court in the administration of justice. As a practical matter, the new Rule 1 can be cited in discovery correspondence, motions, and court orders to emphasize that the parties have an obligation to cooperate in discovery.
4	(m)	Presumptive time for serving a defendant with a summons reduced from 120 days to 90 days. The committee notes recognize that the shortened presumptive time may increase the number of extensions for good cause.
16	(b)(2)	Shortens amount of time for court to issue a scheduling order by 30 days (the shorter of 120 -90 days after any defendant is served or 90 -60 days of any defendant’s appearance). As with the change to Rule 4, this presumptive time may be extended by the court for good cause. Practically, this change may accelerate the early case schedule.
16	(b)(3)	Amended to say that scheduling order may include requirements for preservation of electronically stored information (ESI) and agreements between the parties made pursuant to Federal Rule of Evidence (FRE) 502. Also provides that court may require any discovery motion to be preceded with a request for a conference with the court. The notes show that such conferences allow judges to dispose of discovery disputes without the delays and costs of a formal motion.
26	(b)(1)	Four changes were made to the Scope of Discovery. First, <u>proportionality factors were restored</u> . Such factors include (a) the importance of the issues at stake, (b) the amount in controversy, (c) parties’ relative access to information, (d) parties’ resources, (e) importance of discovery in deciding issue, and (f) weighing the costs/benefits of the discovery. The notes state no one factor outweighs the rest. Second, <u>language related to the source of information in discovery is deleted</u> . The notes state that this information remains discoverable, but is so entrenched in practice that the rules do not require exhaustive examples. Third, <u>language regarding the court’s ability to order discovery of relevant subject matter is deleted</u> . The notes state this provision was rarely invoked and that proportional discovery fulfills this role. Fourth, <u>the phrase “reasonably calculated to lead to the discovery of admissible evidence” has been deleted</u> . The amendment is meant to discourage a reading of 26(b)(1) that mistakenly characterizes this language as the scope of discovery rather than the language’s intended purpose of preventing relevancy objections based on admissibility. The amendment preserves the rule that inadmissibility does not give rise to an objection to relevant discovery requests. The practice of using the “reasonably calculated” language in objecting to overly-broad discovery requests is no longer effective

		since such language has been eliminated and was never intended for that purpose.
26	(d)(2)	Provides that either party may issue a Rule 34 document request 21 days after service of the summons and complaint. This is a new exception to the normal discovery moratorium that requires parties to hold their Rule 26(f) conference before issuing discovery. The requests are not deemed “served” until the discovery conference, but the earlier issuance of the requests may help make the conference more productive.
26	(f)(3)	Discovery plans must now state the party’s view on preservation of ESI and whether they want the court to enter in an order following an agreement reached pursuant to FRE 502. FRE 502(e) allows limitations on waivers due to the inadvertent disclosure of attorney work product and attorney-client communications. Incorporation of a 502 agreement into an order may expand the court’s reach over 3 rd parties.
30	n/a	Committee notes say the rule is amended to reflect the proportionality changes to 26(b)(1)
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33	n/a	Committee notes say the rule is amended to reflect the proportionality changes to 26(b)(1)
34	(b)(2)	The amendments narrow the objections that a party can make to document requests. Objections must now be stated “with specificity.” Secondly, the amendment allows the common practice of a response stating that a party will produce copies of the documents, but clarifies that such production must be completed no later than the time specified in the request or within a reasonable time specified in the response. This provision is meant to prevent parties from stating they will produce documents without providing a set date for doing so. Neither the amendment nor the notes define what constitutes a “reasonable time.” Lastly, an objection to document requests must state whether responsive materials are being withheld on the basis of the objection.
37	(e)	The 2015 amendments overhaul the 2006 version of the Federal Rules related to a party’s failure to preserve ESI. The new version takes an affirmative approach, stating what courts can do, rather than what they cannot. The new rule states when a court is permitted to take action and what action they may take. A court may take action when (1) the lost information is electronically stored, (2) the type of ESI should have been preserved in the anticipation or conduct of litigation (3) the ESI was lost because a party failed to take reasonable steps to preserve it, and (4) the lost ESI information that cannot be restored or replaced through additional discovery. Upon a finding that the court could take action, the court must then determine whether (a) there is a finding that the party who lost the ESI acted with the intent to deprive the other party of the ESI’s use in the litigation or (b) whether the loss was simply prejudicial to the other party, but not intended as such. If the court determines a party acted with intent in losing ESI, it may take the more punitive measures of (1) presuming that the lost information was unfavorable to the responsible party, (2) instructing the jury that it may or must presume the information was

		unfavorable to the party responsible for the loss, or (3) dismissing the action or ordering default judgment. Prejudicial loss of ESI due to the party's negligence does not give rise to an inference against the party, but the court may order such measures as are necessary to cure the prejudicial effect. Examples of measures that may be appropriate for negligent loss of ESI include (a) forbidding the party that failed to preserve information from putting on certain evidence, (b) permitting the parties to present evidence and argument to the jury regarding the loss of the ESI, or (c) giving a jury instruction to assist in the evaluation of lost ESI.
55	(c)	Amended to reflect the distinction between a default judgment where the court has not directed entry of final judgment under Rule 54(b) and a final judgment subject to stricter demands under Rule 60(b)
84	n/a	Before the 2015 amendments, this provision provided forms to illustrate the "simplicity and brevity of statements which the rules contemplate." This provision was abrogated in 2015 because that purpose had been fulfilled and other forms made this provision unnecessary.

References: Joseph F. Marinelli. "New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?" Business Law Today. *American Bar Association*. February 2016. http://www.americanbar.org/publications/blt/2016/02/07_marinelli.html; Supreme Court's submission of changes to Fed. R. Civ. P. to Congress. April 29, 2015. https://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf; Fed. R. Civ. P. and Committee Notes. Accessed through https://www.law.cornell.edu/rules/frcp/rule_84

FRCP DOES NOT APPLY IN OKLAHOMA COURTS *Pierson v. Joplin*, 2016 OK 40, --- P.3d---, answers this burning question.

FEDERAL RULES OF EVIDENCE

CHANGES TO THE FEDERAL RULES OF EVIDENCE IN THE LAST 3 YEARS

Rule	Subsection	Year	Change Made
803	(10)	2013	The Federal Rule was amended to incorporate a "notice and demand" approach used in some states. The new provision allows a prosecutor to show the absence of a public record by providing the defendant with notice at least 14 days before trial that the government intends to prove the issue via a certification. It is then up to the defendant to object within 7 days of trial if this form of proof is not satisfactory. The court may set out a different time frame for these procedures
803	(6)	2014	The amendment clarifies the burden of proof for claiming "lack of trustworthiness" of a business record. Once the proponent satisfies the requirements for admission, the opposing party bears the burden of establishing that the source or circumstances of the record indicate a lack of trustworthiness.

803	(7)	2014	The amendment clarifies the burden of proof for claiming “lack of trustworthiness” of an absent business record. Once the proponent satisfies the requirements for admission, the opposing party bears the burden of establishing that the source or circumstances of the absent record indicate a lack of trustworthiness.
803	(8)	2014	The amendment clarifies the burden of proof for claiming “lack of trustworthiness” of a public record. Once the proponent satisfies the requirements for admission, the opposing party bears the burden of establishing that the source or circumstances of the public record indicate a lack of trustworthiness.
801	(d)(1)(B)(ii))	2014	The amendment allows for the use of a prior consistent statement “to rehabilitate the declarant’s credibility as a witness” when necessary to rebut a challenge to the witness’s credibility other than those challenges expressly stated in 801(d)(1)(B)(i). This broadens the scope of how a consistent statement may be used for rehabilitation.

APPLICATION OF OKLAHOMA’S 12 O.S. §3009.1 IN FEDERAL COURT

This statute is a state evidentiary rule that says (under certain circumstances) in a personal injury case, a plaintiff may only introduce evidence of the amount of medical bills paid (or lien), rather than the full, as billed amounts. While the statute abrogates strict application of the collateral source rule under Oklahoma law, there is some question of whether the collateral source rule operates as procedural or substantive law for purposes of a federal diversity analysis. If the collateral source rule, and 12 O.S. 3009.1, operates as procedural law, a federal court sitting in diversity would not be obligated to follow Oklahoma law on the issue, but would apply its own procedural law.¹ The rules of evidence are typically considered procedural. The weight of authority, though, suggests that the collateral source rule operates as “substantive” rather than “procedural” rule of law.² As such, a federal court sitting in diversity would apply Oklahoma law on the issue, and would likely determine that 12 O.S. §3009.1 applies, such that a party is limited to evidence of the amount actually paid by Plaintiff’s health insurance carrier, rather than the full amount incurred.

Only a few federal cases have touched on the conflict between the collateral source rule and 12 O.S. §3009.1, Oklahoma’s 2009 statute restricting evidence of medical bills to the amount actually paid by an injured party and its health insurer (rather than the amount billed out by the healthcare provider). Two of these, *Compton v. Hale*³ and *Brown v. USA Truck, Inc.*⁴ were filed

¹ See *Hanna v. Plumer*, 380 U.S. 460, 465 (1965)

² See *Manderson v. Chet Morrison Contractors, Inc.*, 666 F.3d 373, 381 (5th Cir. 2012); *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994); *Bradford v. Bruno's, Inc.*, 41 F.3d 625, 626 (11th Cir. 1995); *Shelley v. White*, 711 F. Supp. 2d 1295, 1297 (M.D. Ala. 2010); *Lindholm v. Hassan*, 369 F. Supp. 2d 1104, 1106 (D.S.D. 2005)

³ No. CIV-11-319-RAW, 2012 WL 5385680 (E.D. Okla. Oct. 2, 2012)

⁴ No. CIV-11-856-D, 2013 WL 653195 (W.D. Okla. Feb. 21, 2013)

before the statute went into effect, but recognized that the statute would control if the claims had arisen later. In *Hodge v. Stan Koch & Sons Trucking, Inc.*,⁵ the court did not address the conflict upon defendant's motion in limine, stating that the defendant could present evidence of collateral payments pursuant to §3009.1, only after the plaintiff opened the door by presenting evidence at trial of actual damages in excess of the amount paid. As such, no case provides a definitive answer to the questions of the applicability of §3009.1 in federal court.

Be aware of the disparity in how various federal courts have ruled on the collateral source question overall. A number of courts have held that the collateral source rule bars evidence that plaintiff's bills were written-off by a health insurance or Medicare provider.⁶ Others have held the opposite to be true, holding that state statutes limiting the evidence of medical bills to those actually paid preempt the collateral source rule.⁷ Almost invariably, these federal court decisions have interpreted state law in deciding this as a substantive evidentiary issue.

As a final note, be aware the constitutionality of 12 O.S. § 3009.1 is in question before the Oklahoma Supreme Court in: *Christian v. Lee*, Case No. CI-114883 and *Lee v. Bueno*, Case No. 114563. Has been ruled unconstitutional by many trial courts and constitutional by some. Arguments raised: Special Law, Denies Access to Courts, Violates Due Process/Equal Protection, Separation of Powers.

DISCLOSURE OF TREATING DOCTOR "EXPERT OPINION" IN FEDERAL COURT

The Federal Rules of Civil Procedure govern the timely disclosure of expert witnesses:

(A) *In General*. In addition to the disclosures required by [Rule 26\(a\)\(1\)](#), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under [Federal Rule of Evidence 702](#), [703](#), or [705](#).

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

⁵ No. CIV-13-071-KEW, 2015 WL 540815, at *1, ¶3 (E.D. Okla. Feb. 9, 2015)

⁶ See *Reed v. Nat'l Council of Boy Scouts of Am., Inc.*, 706 F. Supp. 2d 180, 194 (D.N.H. 2010); *McConnell v. Wal-Mart Stores, Inc.*, 995 F. Supp. 2d 1164, 1169 (D. Nev. 2014); *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255, 1262 (D.N.M. 2006); *Lindholm v. Hassan*, 369 F. Supp. 2d 1104, 1107 (D.S.D. 2005); *Blige v. M/V GEECHEE GIRL*, 180 F. Supp. 2d 1349, 1357 (S.D. Ga. 2001)

⁷ *Shelley v. White*, 711 F. Supp. 2d 1295, 1297 (M.D. Ala. 2010); *McAmis v. Wallace*, 980 F. Supp. 181, 184 (W.D. Va. 1997); *Stanley v. Walker*, 906 N.E.2d 852, 858 (Ind. 2009)

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under [Federal Rule of Evidence 702](#), [703](#), or [705](#); and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

So, if your witness is an expert hired for the litigation, they must prepare a Rule 26 report. If they are not hired for purposes of the litigation, but will offer “expert testimony” (sometimes called “hybrid” testimony) they need not prepare a report, but you must still disclose the subject matter and the facts and opinions they will offer.

Beware, there are cases out there saying treating physicians do not require any special disclosures. The rule has been changed since then to make clear all witnesses who will offer 700s Rules testimony must be specially disclosed.

To be safe we make this disclosure on both the expert witness list and the regular witness list, so far without ill effect:

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

Jane Doe,)	
)	
Plaintiff,)	Case No. CIV-15-101-D
v.)	
Evil Corporation,)	
)	
Defendant.)	

PLAINTIFF’S FINAL LIST OF EXPERT WITNESSES

EXPERT WITNESSES

Witness	Expected Testimony
Dr. Kevin Smith 600 C Street Harrisburg, IL 62946	Dr. Smith is Plaintiff’s orthopedic surgeon. He is expected to testify that he performed two hip replacement surgeries for Plaintiff and that he believes, based on her history, that but for the fall at Defendant’s apartment complex, she would have gone many years without the need for these procedures. Dr. Smith will also testify that a complication of one of these surgeries was a broken femur. He will testify these were painful injuries that will cause permanent impairment, and that Plaintiff will more likely than not require a second set of hip replacements, and other care, in the future. He will testify to the care provided at the ER, in physical

	therapy, and elsewhere was necessary and appropriate and due to her fall injuries.
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 ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2016, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing. Based on the current records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following EFC registrants:

Defense Attorney, OBA #12345
 Defense Firm
 First Place
 15 East 5th Street, Suite 3900
 Tulsa, Oklahoma 74103

S/Paul Kouri
 Paul Kouri

Oklahoma changes

Recent Changes to Oklahoma Rules of Civil Procedure (12 O.S. 2015-2016)

Title	Section	Year	Changes Made
12	§3009.1	2015	<p>This statute provides a rule of evidence limiting introduction of medical expenses as an element of damages to the amount actually paid by an injured party and her health insurer, rather than the full amount billed by health care providers. In 2015, several changes were made to clarify the language of the original 2011 statute. For clarity, §3009.1 was broken up into four subsections, instead of the original two. The legislature also clarified who bore the burden of introducing evidence by employing the active voice, rather than the passive.</p> <p>The language related to the scope of the rule in Subsection A has been broadened to include “any services in the treatment of the injured party, including doctor bills, hospital bills, ambulance service bills, drug and other prescription bills, and similar bills.” The “any services” phrase is more</p>

			<p>encompassing than the enumerated expenses provided for by the earlier version.</p> <p>The new Subsection B includes the latter half of the original Subsection A. The amended version clarifies that <u>only</u> Medicare reimbursement rates in effect at the time of injury, “not the amounts billed” can be admissible when no payment has been made. The amended §3009.1(B) also provides that either “sworn testimony” or a “signed statement,” may be used as means of proving that the provider will accept payment at the Medicare reimbursement rate, where the earlier version allowed only a “signed statement.” The phrase “in consideration of the patient’s efforts to collect the funds to pay the provider,” has been removed.</p> <p>The entirety of Subsection C is a new addition that allows the amount <u>billed</u> to be admissible when the requirements of Subsections A and B are not met.</p>
12	§3225.1	2015	<p>This is an entirely new provision to the Discovery Code providing for the appointment of “Discovery Masters” and specifying the extent of authority granted to those masters. The statute largely follows Fed. R. Civ. P. 53 in an effort to make Oklahoma civil procedure more compatible with the Federal Rules. Oklahoma law previously allowed “referees” only in cases of accountings or, sometimes, where the court obtained the consent of both parties. Litigants who engaged in aggressive discovery tactics could refuse the appointment of a discovery master, thereby causing delay and increasing expense. The new statute negates this problem by removing the ability of litigants to withhold their consent.</p> <p>To compensate for this potential infringement on party autonomy, the rule imposes restrictions on the use of discovery masters and limits their authority. For the court to appoint a special master over a party’s objection, the court must make special findings that the case is sufficiently complex and that the benefits of appointing the master will outweigh the cost. The statute also allows the court to apportion costs of the discovery master according to the parties’ ability to pay and their relative responsibility for the discovery dispute that required the appointment. Unless the parties waive it, the court must hold a hearing on the appointment of a discovery master. An order appointing the discovery master must state (1) a requirement that the master proceed with all reasonable diligence, (2) the master’s duties, (3) the circumstances under which master may engage in <i>ex parte</i> communications with the parties, (4) any limitations on the discovery master’s communications with the court, (5) the nature of materials to be preserved and filed as part of discovery master’s record, (6) the time limits and other procedures for the court to review the master’s findings, and (7) the basis, means, and procedures for paying the master. The discovery master must execute and file an oath. Parties may object to a discovery master’s order, report, or recommendation, and the statute provides the standards of review for various objections. Discovery masters are subject to</p>

			the same conflict-of-interest standards as judges and receive the same immunity provided to the judiciary.
12	§3233	2015	This section provides the discovery code requirements for interrogatories. The 2015 amendments provide that a party responding to interrogatories must restate each interrogatory and then respond to it. This appears to be a simple codification of common procedural practice. All other elements of this section have remained the same since the 2010 Amendments.
12	§682(C)	2016	2016 Amendments eliminated subsection holding that a claim against an officer, director or shareholder would not be tried during the same phase of the proceeding as issues of liability with respect to the corporation unless conduct by officer, director or shareholder gave rise to a claim arising out of the same transaction or occurrence.
12	§1171	2016	Amendment to section related to garnishment providing that creditor may proceed against any person whom he has <u>good faith belief</u> is indebted to the judgment debtor.
12	§1190	2016	Amendment to section related to garnishment specifying that a garnishee may deduct a fee of \$10 from the money garnishee owes to the judgment debtor for costs incurred in answering garnishment brought pursuant to §1171. An exception exists such that the judgment creditor must remit \$25 directly to a garnishee that is a federally insured depository institution (read: Bank, S&L) for costs in answering. Any fee remitted by the judgment creditor to the garnishee is taxed and collected as costs.

References: James C. Milton. “New Discovery Master Law Takes Effect on Nov. 1, 2015” Oklahoma Bar Association Journal. Sept. 12, 2015-- Vol. 86, No. 24.
<http://www.okbar.org/members/BarJournal/archive2015/SeptArchive15/OBJ8624Milton.aspx>

12 O.S. § 3226 Now Requires that a Plaintiff Provide, Where Pertinent, Medical, School, and Employment Authorizations as Part of the Initial Disclosure Requirement:

. . . in any action in which physical or mental injury is claimed, the party making the claim shall provide to the other parties a release or authorization allowing the parties to obtain relevant medical records and bills, and, when relevant, a release or authorization for employment and scholastic records.

The obligation is subject to the remainder of the Discovery statute, including the baseline requirement of relevancy. So, we do not provide unlimited authorizations, nor do we provide employment authorizations where there is no wage loss claim.

Oilfield Liability Limitation

By 2011 enactment, Worker's Compensation Act defines any operator or owner of an oil or gas well as the "principal employer" of any injured or killed worker whose immediate employer was hired by the operator or owner. 85 O.S. § 302 (85A § 5, in the "Code"). Statutorily overruling the "necessary and integral" test for determining whether a contractor is the principal employer of a subcontractor such that the contractor may claim the benefit of the workers' compensation act's exclusive remedy. This provision is currently before the Oklahoma Supreme Court (I think).

Effect of Tort Reform

Most of these efforts from the massive 2009 bill were struck down as "log-rolling," but then reenacted solo to overcome that defect.

Paid v. Incurred—currently in the Supreme Court

No Pay, No Play—Struck down as a Special Law

Caps on Non-Economic Damages—Currently in the Supreme Court

Workers' Compensation Reform—many provisions up for review. Court just struck the "Opt-Out" system. Statutory abrogation of *Parret v. Unicco* (85 O.S. § 302/85A O.S. §5) under review, as is question of whether workers' compensation system catches only "unforeseeable" injury. I'm told there was an article in the OBJ a couple years ago also.

Cases

We are seeing a trickle down effect of Twombly/Iqbal type motions being filed in state court actions. Had one granted against us last year because we did not use the word "negligence" in our fact specific petition. Do take these seriously, as several states with putative "notice" regimes, have adopted this line of cases from the federal courts.

Judge Cauthron has issued a useful order outlining the parameters of Twombly/Iqbal in *Harris v. Chevron*, OKWD Case No. CIV-15-94 C.

B. INSURANCE LAW UPDATE

Earth Movement Exclusion Applies Only to Natural Movement Such as Earthquake—*Broom v. Wilson Paving & Excavating, Inc.*, 2015 OK 19, 356 P.3d 617. *Broom* holds that an earth movement exclusion applies only to natural earth movement such as an earthquake and not to earth movement due to the action of the insured. *Broom* worked for a temporary labor agency. He was sent to work for Wilson Paving & Excavating digging a ditch for a pipeline. The ditch caved in and badly injured him. He sued Wilson for OSHA violations connected to the cave-in. Ultimately, he got a judgment against Wilson and filed a garnishment against Mid-Continent Casualty Co. which had a commercial general liability policy on Wilson. Mid-Continent argued

that it had no coverage due to an earth movement exclusion in the policy. It excluded coverage for losses:

. . . arising out of, caused by, resulting from, contributed to, aggravated by, or related to earthquake, mud slide flow, subsidence, settling, slipping, falling away, shrinking, expansion, caving in, shifting, eroding, rising, tilting or any other movement of land, earth or mud.

The trial court held that the exclusion applied only to earth movement caused by wide-spread, naturally occurring causes, such as earthquake and granted judgment for Wilson and against Mid-Continent on the garnishment. The Court of Civil Appeals affirmed that holding but reversed on other grounds. The Supreme Court, in this 5 to 4 opinion by Justice Gurich affirmed the holding that the earth movement exclusion did not apply.

The Court cited numerous cases from around the country holding that the purpose of the earth movement exclusion was to protect insurance companies from massive losses occurring from earthquakes and mud slides which would affect many of their insureds at the same time. If the exclusion applied to all earth movement, even that caused by the insured, the coverage issued here to an excavating company would not cover much.

We have this issue before the Supreme Court on a *cert.* petition in Oklahoma Schools Risk Management Trust v. McAlester Public Schools, Case No. SD-114553.

Kansas UM policy becomes stackable by virtue of policy provision (in nearly every policy) that broadens coverage to comply with the law of any state in which a wreck occurs and policy provision that makes policy limits “subject to law of the state of occurrence”—*Leritz v. Farmers Ins. Co.*, 2016 OK 79, ---P.3d---. Kansas resident injured in motorcycle accident in Oklahoma. His Kansas policy insured the motorcycle and two other vehicles and had \$100,000 UM. We filed suit, seeking to stack the three UM limits, asking the Supreme Court to overrule or clarify *Bohannon v. Allstate*, 1991 OK 64, 820 P.2d 787. We argued the “extraterritoriality” provision (also in all policies), which says the policy provides coverage in the states and territories of the US, equates to a “place of performance,” that, pursuant to our *lex loci contractus* choice of law statute (15 O.S. § 162) trumps the “place of where [the contract] was made,” such that the court should apply Oklahoma law to an Oklahoma wreck. The Supreme Court did hold the policy stacks, but on the basis of our backup argument—the Court held that a policy provision in the limits of liability section, that makes that provision subject to the law of the state of occurrence and a provision that broadens coverage to comply with the law of the state of occurrence, combine to make the policy stackable. The decision is currently back in the Supreme Court on a motion for rehearing.

Keep in mind this rule will only apply to cases predating the 2014 change to the UM statute that precludes stacking unless expressly stated in the policy.

Members of class action are not subject to prevailing party attorney fee by virtue of not opting out of class—*Avens v. Cotton Electric Cooperative*, 2016 OK CIV APP 39, ---P.3d--- 2006 wild fire burned more than 13,000 acres in Stephens County. Affected individuals filed class action suit against electric cooperative. Cooperative ultimately prevailed and sought 12 O.S. § 940 attorney fee award against insurers of class representatives who took no active part in litigation and did not pay litigation expenses, or participate in other, subrogation suit, filed by other insurance companies. Trial court denied motion finding no legal support. COCA affirms, borrowing from federal class action law which does not allow attorney fee award against class members who do not actively participate.

Physician employment by political subdivision is not limited by list stated in 51 O.S. § 152, so likely “employee” of subdivision and shielded from liability by OGTC—*Anderson v. Morgan*, 2016 OK CIV APP 40, 376 P.3d 913. Doctor employed by Comanche County Hospital Authority sued for medical negligence, claims immunity from suit under OGTC (remedy is suit against the governmental entity rather than the individual). COCA agrees, noting that even though he did not fall within one of the specified categories of physicians “employed by the state” (51 O.S. § 152), that statute does not apply to “political subdivisions,” so classical definition of employee applies—one who is “authorized to act on behalf of a political subdivision.” As such, the OGTC shields him from personal liability.

C. CASE LAW UPDATE

Tort Cases

Informed Consent doctrine requires physician disclose reasonable alternative *not recommended* by that physician—*Allen v. Harrison*, 2016 OK 44, 374 P.3d 812. Woman swallows nail. Goes to ER at Duncan Regional Hospital. Prescribed high fiber diet “to let the nail pass,” and instructed to return if she had problems. Next day she goes to Southwestern Hospital in Lawton because she or severe vomiting. They do emergency surgery to remove the nail. Leaves her with perforated and infected bowel and she has two more surgeries for complications. Woman sues Duncan Regional for failure to advise of risks associated with letting the nail pass and of the alternative treatment options. Doctor defended claim of failure to advise of alternatives by claiming that was not really an option because he was not qualified to perform the surgery, so he had no legal duty to advise of those options. The trial court, agreed, granting summary judgment on that basis and because the doctor did not affirmatively injure the patient. COCA affirmed, on another basis, holding doctrine of informed consent only triggered when the doctor provides surgical treatment that causes injury, while failing to disclose alternative, non-surgical options. The Supreme Court reversed, noting “a patient’s right of self-decision is only exercised effectively if the patient possesses enough information to enable and informed choice.” Duty to inform extends to invasive and non-invasive procedures and emergency room physician is not shielded from the duty. Also, physician “affirmatively treated” the patient by prescribing a high fiber diet.

Experts should be allowed to testify in medical negligence claim—*Nelson v. Enid Medical Associates, Inc.*, 2016 OK 69, 367 P.3d 212. Doctors sued after complications of surgery for incarcerated hernia with bowel obstruction. Estate claims patent overdosed on Vasopressin. Two defendants file *Daubert* challenge to two experts proposed by plaintiff, and claimed causation cannot be proved. Review of trial court *Daubert* decision reviewed under “clear abuse of discretion” standard. Supreme Court distinguishes “general causation” (this substance is capable of causing injury) with specific causation (and it caused injury here), and discusses at length the kind of information a medical expert may cite. Ultimately holds science need not be universally accepted to be “generally accepted.”

Court turns to specific causation. Trial court rejected the testimony as “legally insufficient ‘educated guess,’” which failed to “rule out” alternative causes. Supreme Court reverses, holding “differential diagnosis” need not definitively rule out all other causes to survive *Dauber* challenge.

Limitations Periods of Governmental Tort Claims Act tolled by misleading acts of governmental employee—*Watkins v. Central State Griffin Memorial Hospital*, 2016 OK 71, - -P.3d--- Male nurse accused of unauthorized pelvic exam at psychiatric hospital. Griffin employees provided false information to civil and criminal investigators and misled family of injured patient, but patient’s GAL was aware of the general allegations during the one-year notice period, but was not made aware until after it ran, that some of what she had been told was false. GAL submitted OGTCAs notice, which was rejected as untimely. She filed suit. Supreme Court ultimately holds government estopped to assert untimeliness due to the misleading and false information provided which led GAL to believe there was no wrongdoing by the nurse. Court applies this rule to this “narrow set of facts.”

No Common Law claim for misappropriation of intangible property not arising to level of trade secret. Nor does Oklahoma Uniform Trade Secrets Act preempt all common-law remedy—*American Biomedical Group, Inc. v. Techtrol, Inc.*, 2016 OK 55, 374 P.3d 820. American Biomedical Group developed method to track individual cattle with a “bolus” of electrical transmitters and contracted with Techtrol to manufacture the devices under a non-disclosure agreement, then transferred its technology to Techtrol. The deal went south and the relationship ended. Techtrol started manufacturing and selling the boluses. American sued for misappropriation of its intangible, proprietary information. The Supreme Court holds that Oklahoma common-law does not recognize a tort of misappropriation of intangible property, but does recognize a cause of action for misappropriation of business information. The UTSA preempts the tort of misappropriation of a trade secret, but only as to that information defined in the Act as a “trade secret.” Does not preempt common-law protection of other business information that is not trade secret. Finally, Court holds unjust enrichment not available where the information is acquired involuntarily, or where there is adequate remedy at law, but Techtrol has not shown absence of disputed fact in that regard.

Officers, Directors, Shareholders, Members, of Nursing Home not shielded from direct negligence claims by 12 O.S. § 682—*Maree v. Neuwirth*, 2016 OK 62, 374 P.3d 750. Estate of deceased sued nursing home and later (after running of statute) amended to also name individuals and LLCs that had ownership interest in the nursing home. Trial court refused the amendment citing 12 O.S. § 682, which says, essentially, you cannot attempt to pierce corporate veil until after you get judgment against the corporation. Supreme Court issued writ and ordered trial court to allow the amendment. The claims against the new entities were not solely derivative claims, but were based upon claims of direct negligence by those entities. § 682 does not prohibit suit against officers and others “for their own conduct. . . .”

12 O.S. § 682 is Substantive Statute that Cannot be Retroactively Applied—*Sauders v. Mangum Nursing Center, LLC*, 2016 OK CIV APP 53, ---P.3d--- Betty Lowell died at Mangum Nursing Center on May 8, 2013. The pertinent amendment to Section 682 took effect in November, 2013. COCA determined the statute was substantive since it limits which parties may be sued for nursing home negligence. As such it cannot apply to a claim which arose before the effective date of the statute.

Company’s prior good safety record no shield to “*Parret*” liability—*Tiger v. Verdigris Valley Electric Cooperative*, 2016 OK 74, ---P.3d--- 2008 injury, before *Parret* abolished by legislature with 85 O.S. § 302 (now in 85A O.S. § 5). Electrician’s apprentice killed attempting to connect high voltage cable. Evidence that company Field Engineer and crew foreman allowed job to proceed despite known, unsafe, conditions, and compounded that by allowing untrained apprentice to attempt to connect live high voltage cable. Supreme Court holds evidence sufficient for jury to find employer acted with knowledge that injury was substantially certain to result. Conduct rises to level of intent necessary to escape workers’ compensation exclusive remedy.

This was an older injury that predated the statutory abrogation of *Parret v. Unicco*. That statutory abrogation is now before the Supreme Court, after a trial court held the abrogation to violate the Oklahoma Constitution.

Also, the new workers’ compensation code purports to apply only to “unforeseeable injury.” At least one court has held that means any foreseeable injury not subject to exclusive remedy.

Court of Civil Appeals does not expand “Constructive Notice” rule in OGTC claim—*T.L.I. v. Board of County Commissioners*, 2016 OK CIV APP 12, 376 P.3d 930. Minor, T.L.I. was hurt when car he was riding in crashed into an embankment at the end of a dead end road. The dead end road sign had apparently fallen over long before the wreck. In OGTC suit that resulted, trial court granted summary judgment to county since plaintiff could not show actual or constructive notice that the sign was missing. Plaintiff conceded no actual notice, but claimed county had constructive notice by virtue of failure to implement any procedures for its employees to report downed signs. Plaintiff argued failure to implement such policy constitutes willful ignorance, resulting in imputation of constructive notice. COCA explains constructive notice is a legal inference from established facts. Since the board had no policy to or procure in

place to report downed signs there are no established facts from which to derive constructive notice. COCA puts it to the legislature to “expand” constructive notice to include such circumstances.

No Substantial Compliance with OGTCAs notice requirement where notice of injury given to wrong entity and not treated as valid notice—*Hill v. State ex rel. Board of Regents*, 2016 OK CIV APP 14, 367 P.3d 524. Plaintiff was injured by campus police at OU Health Sciences Center. Instead of giving written notice to the Office of Risk Management, she sent notice to the school itself, and other entities. Her GTCA action was later dismissed for failure to provide the jurisdictional notice to the entity listed in the statute. COCA affirmed, distinguishing case where notice given to correct entity, but to president of the entity instead of to the clerk of the entity. But there, the entity discussed the claim at board meetings, hired an attorney, and entered a general appearance, thereby treating the improper notice as proper notice. By contrast, no action was taken with Hill’s notice. COCA also notes whole doctrine of substantial compliance called into question by 1985 change to OGTCAs which requires written notice.

Arbitration agreement upheld in nursing home case where agreement purports to apply FAA—*Weaver v. Doe*, 2016 OK CIV APP 30, 371 P.3d 1170. Plaintiff filed suit alleging injury at nursing home. Nursing home moves to dismiss citing binding arbitration provision, voluntarily entered into, in contract. Plaintiff cited Oklahoma Case, *Bruner v. Timberline Manor Limited Partnership*, 2006 OK 90, 155 P.3d 16. *Bruner* negated arbitration provision which applied Oklahoma law, because the Oklahoma Nursing Home Care Act controls over the Oklahoma Uniform Arbitration Act. In *Weaver*, though, the contract at issue did not apply Oklahoma law, but applied the FAA. The United States Supreme Court, in a similar case, says that mandates application of federal arbitration law. *Marmet Health Care Center v. Brown*, ---U.S.---, 132 S. Ct. 1201, 182 L.Ed. 2d 42 (2012).

Plaintiff Need Not File Claim in Probate Case of Deceased Defendant in Order to Preserve Suit Pending Against Decedent at Time of Death—*Guerra v. Starnes*, 2016 OK CIV APP 42, ---P.3d--- Plaintiff filed real estate disclosure breach case, then Defendant dies. Plaintiff substituted the PR or the estate, but did not file claim in probate. Defendant seeks dismissal because Plaintiff did not file claim in Decedent’s probate action (per 58 O.S. § 331). COCA holds this used to be required, but no longer in light of changes to legislation. After 1984, there was no requirement that a plaintiff present such a claim in probate, but only that the PR be timely (90 days after receipt of notice of suggestion of death) substituted in the pending action.

Injured Invitee Must Show Some Evidence of Notice of the Defective Condition—*Lewis v. Dust Bowl Tulsa, LLC*, 2016 OK CIV APP 43, ---P.3d--- Plaintiff injured by splinter in approach area of bowling lane. Evidentiary materials showed Plaintiff had noticed no problem and staff claimed to have mopped and cleaned without noticing the splinter. Plaintiff argued there were “questions whether the [Dust Bowl] sufficiently maintained, inspected, and removed hazards from the flooring . . .” COCA noted lack of evidence in that regard and that claim that the fact of “a three inch” splinter negates an inference of proper maintenance, is just conjecture.

On rehearing, the COCA also rejected “new evidence” in the form of an affidavit by the injured plaintiff’s son stating that an employee of the bowling alley admitted they knew about “a defect.” The affidavit did not satisfy the requirement of “new evidence” since the information was available to the plaintiff long before the original motion was heard.

Wood v. Mercedes-Benz, 2014 OK 68, 336 P.3d 457, Casts Doubt on Open and Obvious Defense. From *Martinez v. Angel Exploration, LLC.*, 798 F.3d 968 (10th Cir. 2015):

That rule [open and obvious] is now in doubt. Finding that the open and obvious danger doctrine is “not absolute,” the Oklahoma Supreme Court recently concluded that even where an invitee is injured by an open and obvious condition, a landowner may still have a duty to warn of or otherwise protect the invitee from the dangerous condition if the injury suffered was reasonably foreseeable to the landowner. *Wood v. Mercedes-Benz*, 336 P.3d 457, 459–60 (Okla.2014). In *Wood*, the plaintiff was a catering employee who had been sent to a car dealership to assist with an event. The night before her arrival, the dealership's sprinklers activated in freezing temperatures, leaving a layer of ice on the grass, pavement, and sidewalks surrounding the dealership. The plaintiff testified that she saw the ice, was aware of the danger it posed, and knew to be very careful in navigating her way in and out of the dealership. Despite her caution, she slipped and was injured. Afterwards, an employee of the dealership told her that he should have put salt down when he got to work.

... [T]he majority cautioned that its opinion “should not be construed as abrogating the open and obvious defense in all cases,” it again reasoned that “[t]he icy condition is not dispositive of Mercedes-Benz' duty *in this case* because Wood was required to cross the hazardous condition in furtherance of her employment.” *Id.* at 460 n. 8 (emphasis added). That is different than “a random customer appearing at the dealership” because the dealership “knew that employees of Ned's Catering would be arriving and would be required to enter the building.” *Id.*

Four justices dissented from the court's holding, saying the new exception announced by the majority “ignore[d] ... long-standing laws regarding the open-and-obvious doctrine and the duty in a premises-liability action.” *Id.* at 461 (Taylor, J., dissenting). That seems correct. *Wood* appears to represent a significant shift in Oklahoma premises liability law. Before *Wood*, the Oklahoma Supreme Court had consistently rejected attempts by plaintiffs to merge ordinary negligence principles with the common law of premises liability. *See, e.g., Scott*, 191 P.3d at 1213 (“We are not persuaded by plaintiffs’*976 attempt to change a landowner's duty to an invitee with respect to open and obvious dangers by characterizing the issue as one of ordinary negligence and urging application of concepts of ordinary negligence.”); *Sutherland*, 595 P.2d at 781; *see also Gobble v. Chesapeake Energy Corp.*, 311 P.3d 454, 457 (Okla.Civ.App.2013) (rejecting plaintiff's foreseeability argument in a pre-*Wood* decision because “[d]efining a duty based on

foreseeability is a principle of general negligence which does not govern when the harm occurs on the premises of others”).

\$350,000 Cap On Non-Economic Damages is in the Supreme Court in *Beason v. I.E. Miller Services, Inc.*, Supreme Court Case. No.114,301. Claims raised: Violates Right to Jury, Equal Protection, and Separation of Powers; Requires Illegal Special Verdict; is a Special Law.

D. TRENDS IN PERSONAL INJURY

Social Media Discovery

Social media has become a real tool in discovery. Oklahoma lawyers increasingly use information gathered from social media posts in both discovery and witness examination. Often, social media postings provide an effective means of impeaching witness testimony or destroying the merits of an injured party’s case. This is true even when the user has turned on his or her privacy settings. Many commentators feel that an understanding of social media discovery will become an essential element of discovery competency in the near future.

The use of social media in discovery also presents a number of concerns for litigators. The negative effects of posting information that runs counter to a litigant’s claims or defenses should be obvious, but attorneys should also be aware that the act of deleting previously posted information can similarly expose a party to devastating repercussions. Use of social media in discovery also presents ethical concerns for Oklahoma attorneys. Rule 8.4 of the Oklahoma Rules of Professional Conduct prohibits attorneys from engaging in acts involving dishonesty, fraud, deceit, or misrepresentation. There is some indication that going online and requesting to be an opposing party’s “friend,” in order to gain access to a private profile would constitute such a violation.

References: Alison A. Cave and Renée DeMoss, *The Impact of Social Media on the Practice of Law*. Oklahoma Bar Journal.

<http://www.okbar.org/members/BarJournal/archive2014/NovArchive14/OBJ8529CaveDeMoss.aspx>; Evan E. North, Note, *Facebook Isn’t Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1279 (2010); Steven S. Gensler, *Special Rules for Social Media Discovery?* 65 U. Ark. L. R. 7, 8-9 (2012).

Low Impact Wrecks—This has become any wreck survived by the Plaintiff. Here’s a link to a short ABA article that sets out the M.I.S.T. arguments and some response:

http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/litigation_stein.html and in the appropriate case (high value), I recommend you

talk to Dr. Michael Freeman, Ph.D. in Oregon:

<http://www.ohsu.edu/xd/education/schools/school-of-medicine/departments/clinical-departments/public-health/people/michael-d-freeman-phd-mp-h-d.cfm>

Anti-Reptile Motion in Limine—The Reptile theory teaches that Jurors at heart do not give a damn about your lawsuit. They care only about protecting themselves and their loved ones. Show how a particular verdict does that and you have a vote. Seeing motions (and CLE courses) attempting to limit these arguments (“Golden Rule,” “Safety Rules,” etc.) as improper. Email me (paulkouri@travislawoffice.com) if you want to see one of these motions, or a response, and I can get that to you.

Self-Driving Cars—Are these the demise of a personal injury practice? I doubt it. I think we will always find plenty of ways to maim and kill each other, if somehow these smart cars really work as touted.

MSA Discussion Has Settled Down—For now.

Bosch Claims Abolished? The Supreme Court held in 2013 in *Bosh v. Cherokee County Building Authority*, 2013 OK 9, 305 P.3d 994 that OK Const. Art. 2, § 30 provides a private cause of action for excessive force used against a prisoner, which evades the effect of 51 O.S. § 155(25) providing exclusion from liability for operation of a prison. So, in 2014, the Legislature amended 152(14) by Laws 2014, HB 2405, c. 77, § 1 to include violation of the Oklahoma Constitution in the definition of “tort” under the tort claim act. That arguably had the effect of reversing *Bosh* (and the Constitution), to the extent the tort claim act limits damages. (Any constitutional scholars out there see a problem with that?)

Now, clever government lawyers say the amendment does away with *Bosh* and Constitutional violations altogether by reason of another of the exclusions from the tort claim act, Sec. 155(6), method of providing police protection.

There’s a pretty good argument that the constitution cannot be amended by an act of the legislature. Art. 24, Sec. 1 of the Constitution says: “Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature, and if the same shall be agreed to by a majority of all the members elected to each of the two (2) houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals and referred by the Secretary of State to the people for their approval or rejection, at the next regular general election, except when the Legislature, by a two-thirds (2/3) vote of each house, shall order a special election for that purpose. If a majority of all the electors voting on any proposed amendment at such election shall vote in favor thereof, it shall thereby become a part of this Constitution.”

This invites the Supreme Court to hold unconstitutional the 2014 amendment. As a backup argument, the interpretation the government is putting on the act makes a nullity of the provision bringing constitutional violations with the tort claim act and renders the provision a nullity. This should trigger the rule (fiction?) that the legislature will not be presumed to have done a vain and useless act.

Electronic UM rejections—Don't see why not, in light of the UCC provisions affirming electronic signatures generally. Not aware of case yet, but would expect carrier would have to satisfy the court that the electronic signature was genuine.

Incorrect Answer on Jury Questionnaire May Negate Verdict—*Muller v. Southcrest, LLC*, Case No. 113,907 (Unpublished) holds even inadvertent omission by jury may be ground for new trial. I know of one firm trying to keep from losing a multimillion dollar verdict where a juror failed to list DUI, bankruptcy, and foreclosure in response to questions about prior “lawsuits.” Moral—think hard before requesting jury questionnaires.

Beware the Rules Governing Workers' Compensation Right of Subrogation Against Third-Party Recovery has Changed with 85A O.S. § 43. *Prettyman* is abrogated, and the rule that the District court had jurisdiction to determine subrogation in a “compromise case,” has been abolished. The new rule allocates, if the carrier joins suit with the injured worker, 2/3 of the third-party recovery, after “reasonable costs of collection.” It is not clear whether “reasonable costs of collection” include the worker's attorney fee for collecting the carrier's subrogation. Alternatively, the employer can file suit, giving notice to the injured worker, and then gets to keep 100% of the proceeds up to the amount or compensation paid.

This is likely a “substantive” statute that will apply only to injury arising after the enactment. See, *Cole v. Silverado Foods, Inc.*, 1993 OK 81, 78 P.3d 542.

E. ADVANCED CASE ASSESSMENT: VALUE OF CASE?

Paul's “Words of Wisdom”: A Case that is not Tried is Worth Whatever you can Get the Defendant to Pay. A Case that is Tried is Worth Whatever You Can Get a Jury to Award. Getting Tough to Resolve Anything Short of Extended Litigation. What is Driving Down Settlement Offers?:

Paid vs Incurred (lien analysis and resolution) 12 O.S.O. 3009.1 makes it difficult for Plaintiffs and Defendants to come to agreement on case value. Plaintiffs argue the statute is unconstitutional, and if it is not, requires “written statements from the providers” (though now “sworn testimony” will suffice). Insurance companies say “so what, it's the law of the land,” so we will evaluate the case based on the “paid” bills, rather than “incurred” bills. We have tried to get creative in a few mediations, offering to take an amount based on the paid amount now, with an additional payment if the statute is struck down. So far we have not gotten any insurance company takers for that deal.

For brief on constitutionality of 3009.1, go to our website:

<http://www.travislawoffice.com/download-a-pleading>

More and More “Fight” on “Reasonableness” of Medical Bills. This trend started even before the passage of 12 O.S. 3009.1. We started seeing motions *in limine* to exclude evidence of

“billed amounts,” even before passage of 12 O.S. 3009.1 (more on this in discussion, below, on the collateral source rule).

Someone reported on our Plaintiffs’ listserv recently that at least one major carrier is engaging in a concerted effort to attack reasonableness. The problem of reasonableness is exacerbated by the fact most providers refuse to treat “accident” injuries. The stated reason is health insurance will not pay these medicals. I’ve never seen that in a health insurance policy. This results in providers sending injury patients to the “accident centers,” who will work on a lien basis. Of course, since they are working “on the come,” they get a premium for their services. There is case law that supports the argument an injured party need only exercise good faith judgment in selecting medical providers to make the treatment “reasonable.” We have not had great luck in getting courts to apply this rule to exclude argument that the doctors did unnecessary treatment or charged too much.

In a recent case, the Defendant was going to offer the testimony of a witness who was going to tell the jury how much workers’ compensation or Medicare or Medicaid would pay on the bills. The argument goes that no one really pays “retail” on medical bills, anyway, so the “billed amounts” do not reflect the “reasonable medical expense” (per our jury instruction on damages)

Until constitutionality of 3009.1 is decided, there are lists out there of which Judges have held it constitutional or unconstitutional. From what I can tell, most hold it to be unconstitutional.

For brief on “reasonableness of bills,” go to our website:

<http://www.travislawoffice.com/download-a-pleading>

II. ADVANCED COVERAGE ANALYSIS:

A. COLLATERAL SOURCE RULE.

Does 12 O.S. 3009.1 (or the “Paid versus Incurred Argument Generally) Abrogate the Collateral Source Rule? Collateral source rule says payment of benefits by anyone other than the defendant are not credited to the defendant. But what about non-payments? The paid versus incurred rule does not exclude mention of payments, but only mention of the amounts that are not paid. Insurance companies says these amounts (the “billed amounts”) are imaginary and illusory since they are never paid. We argue they are a negotiated benefit of our health insurance benefits. We also show that the law prefers any “windfall” in such situation run to the injured party rather than to the at-fault defendant.

For brief on application of “paid versus incurred” in the absence of 3009.1, go to our website also: <http://www.travislawoffice.com/download-a-pleading>

B. ADVANCED POLICY/COVERAGE ANALYSIS (UM/UIM, PREMISES LIABILITY, ETC.)

Dog bite coverage—Oklahoma has strict liability in dog bite cases, as long as not in a “rural area.” 4 O.S. 42.1-42.3. But, many homeowner’s policies now have exclusions for dog bite in general, or for bites by particular breeds of dogs, or by dogs with a prior bite history. Also keep in mind, dog bite coverage on the HO policy is not limited to the residence premises, but includes coverage for off-residence bites.

UM

C. PLAYING THE STACKING AND OFFSETS GAME

Anti-Stacking Contract Clauses

Oklahoma UM no Longer Stacks—The UM statute 36 O.S. 3636 was amended in 2014: (subparagraph B) *Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier.*

Does this mean the policy must say “this policy stacks” or is it enough if the policy contains language interpreted to allow stacking?

Does this prevent “stacking” of liability and UM for a passenger?

Does this prevent stacking of UM policies under different policies? For instance, we sometimes look to UM on the policy on: (1) the insured person; (2) the occupied car; (3) on a “Resident Relative;” (4) on an employer; and (5) on passenger’s uninvolved car (see discussion below, or *Russell v. Am. States Ins. Co.*)

Is Imputed UM Stackable UM?

Though becoming rarer, it still sometimes happens that an insurance company is unable to produce a valid, signed, UM rejection. What happens when this is so with respect to a policy insuring multiple cars? Is the UM that is “imputed” by reason of the insurance company failure to produce a rejection stackable UM? This question was answered in *Mid-Continent Group v. Henry*, 2003 OK CIV APP 46, 69 P.3d 1216—imputed UM does stack. But *Henry* was then overruled by *Spears v. Glens Falls Ins. Co.*, 2005 OK 35, 114 P.3d 448. We argued in a case last year that *Henry* was overruled on other grounds and that *Spears* actually affirms the holding regarding imputed stacking—at least where the underlying policy has “Stacking” language:

[U]nder the facts presented, where the UM/UIM coverage form provided to the insured conforms with the requirements of 36 O.S. Supp.2004 § 3636, the policy is renewed annually over a ten-year period with the insured being provided coverage summaries at each renewal, a single premium is charged for multiple vehicles having UM/UIM coverage, and *policy language*

provides that liability for UM/UIM coverage is limited to the maximum amount payable for all damages regardless of the number of vehicles insured, an insurance company need not provide insureds with pre-policy notice that stacking of UM/UIM coverage is prohibited. (emphasis added)

Taken together, *Henry* and *Spears* seem to say that imputed coverage will stack if policy language supports stacking, but will not stack if the policy is otherwise not a stackable policy. In our case, some good arguments were presented for both sides of this coin. The case settled before we got an answer, though.

Sources of Coverage

Passenger Insured Under Driver's Policy on Uninvolved Car. *Russell v. American States Ins. Co.*, 813 F.2d 306 (10th Cir. 1987), suggests an unusual source for passenger UM coverage. In *Russell*, a passenger was killed in a wreck. The driver, unrelated to the deceased, was using someone else's car at the time of the wreck. The deceased collected liability money from the car policy and from the driver's policy, and collected UM as a Class I insured (named insured or resident relative) from his dad's policy (on a different car).

The owner of the car had UM, on the policy on the car, and the driver had UM on his own, separate policy, both of which were with American States. The declaratory action was to decide whether the deceased was entitled to UM under these two policies. We would normally expect the policy on the car to provide UM for the passenger as a Class II insured (insured by virtue of "occupying" the insured car). The District Court held (erroneously) that policy did not cover the passenger because the policy definition of an "uninsured vehicle" did not include an "insured highway vehicle." That would seem to negate the requirement of the UM statute that coverage extend to "underinsured" cars. Indeed, no big surprise, that is what the Court of Appeals decided.

More interesting here, though, is the UM on the driver's policy. Remember, the driver did not own the car and so his policy was on a noninvolved auto, such that the passenger would not be a typical class II "occupant" insured. That policy, though, had a provision that defined an "insured highway Vehicle" to include a car "being operated by the named insured . . . or a resident [relative]." Since the car "operated by" the named insured was thus an insured vehicle, the deceased passenger became a Class II insured by virtue of occupancy of an "insured vehicle." From review of our office "specimen policy" bank, somewhere around half of the policies out there likely have this language.

Oklahoma Governmental Tort Claims Act and UM Coverage. What is the interaction between UM and the Governmental Tort Claims Act, 51 O.S. § 151, *et seq*? First, the OGTC Act exempts governmental entities from "any loss to any person covered by any workers' compensation act . . ." 51 O.S. § 155(14). The exemption applies to both workers' compensation claims by governmental employees as well as those by non-governmental employees. *Smith v. State ex rel. DOT*, 1994 OK 61, 875 P.2d 1147. There is a silver lining,

though, in an auto case. The OGTCAs exemption makes the governmental entity “uninsured” for purposes of UM. *Karlson v. City of OKC*, 1985 OK 45, 711 P.2d 72.

But, is an OGTCAs entity entitled to a set-off for UM payments made? A lot of OGTCAs entities cite the exemption for “any claim based on the theory of indemnification or subrogation,” (51 O.S. § 155(28)) for this proposition. That provision seems clearly only to preclude a subrogated entity from subrogating against the OGTCAs entity. But apparently this bluff is working. I don’t know how they are still doing this in the face of *Salazar Roofing & Const. Co. v. City of OKC*, 2010 OK 34, 249 P.3d 950, but apparently they still are. See, e.g., *Moore v. Park View Hospital Trist Authority, et al.*, S. Ct. Case No. 112,134 (Okla. Ct. App. 2014 (not for publication)). A related argument is based upon a stilted reading of 51 O.S. § 158, which gives a governmental entity a setoff when *its own coverage* pays a claim. The OGTCAs entity claims Subparagraph E creates the setoff:

The state or a political subdivision shall not be liable for any costs, judgments or settlements paid through an applicable contract or policy of insurance but shall be entitled to set off those payments against liability arising from the same occurrence.

This setoff provision should be read in context with the rest of the statute, which tells how OGTCAs settlements and verdicts may be negotiated and paid. Subparagraph E merely gives the OGTCAs entity credit for payments made under any insurance policy covering that entity. Nothing about that statute suggests the governmental entity is allowed to reach out and take credit for the injured party’s insurance.

The final OGTCAs topic worth mentioning concerns the “waiver” of immunity created by the purchase of liability insurance. We had a car wreck case against a county, with bad injuries. The county had a liability policy with limits equal to the \$125,000 OGTCAs limits applicable to the county. The driver of the car (personal car used on OGTCAs entity business) also had her own liability policy with \$50,000 limits. Though the driver was immune from suit under the OGTCAs, her policy had a provision required by the OGTCAs entity, that made the county an additional insured (a definition of “insured” included any organization for acts or omissions of an insured).

We argued the OGTCAs entity had waived immunity to the full extent of the available liability coverage, citing *Lamont Independent School Dist. v. Swanson*, 1976 OK 38, 548 P.2d 215. The OGTCAs entity (well, NAICO, its insurance, really) claimed an offset for the \$50,000, citing a provision *in its liability policy* that said the liability coverage “does not waive” the OGTCAs limits. We argued the insurance company cannot, by such a provision, negate Oklahoma law with respect to such waivers of immunity. NAICO claimed it did not seek an “offset,” but that its policy only paid amounts the entity was “legally obligated to pay,” and that once the \$50,000 had been tendered, that reduced that “obligation” to \$75,000. The case settled before we could get it up on appeal, so we do not have an answer.

UM and the Oklahoma Guarantee Fund. When does the Oklahoma Property and Casualty Insurance Guarantee fund (26 O.S. 2001 *et seq.*) provide UM coverage? We have run across this with both Pride Insurance and now Santa Fe in receivership. Who pays in this situation? The injured party has recourse to the state Guarantee fund, which pays claims for insolvent insurance companies. But what about UM? The UM statute (subparagraphs D and E) defines a car with insolvent liability coverage as an “uninsured” car, so that the UM steps in for the insolvent coverage. Also, the Guarantee fund requires exhaustion of all other available coverage before the fund kicks in. Though UM was at one time excluded from the exhaustion requirement (and before that included), UM is currently not excluded by 36 O.S. § 2012. Also, *Welch v. Armer*, 1989 OK 117, 776 P.2d 847. The tortfeasor is also protected by the payment under the Fund, but only up to the limits of the insolvent policy.

An unresolved issue is whether the UM statute’s definition of insolvency as creating an “uninsured” car is limited to those becoming insolvent within one-year of the wreck. While 36 O.S. § 3636(C) defines insolvency to create uninsured status, subsection D purports to limit “[a]n insurer’s insolvency protection” to insolvency occurring within one year of the accident.

Although I’m told I am crazy, do not think this means that UM does not apply to insolvency that occurs more than one year after the wreck. I take comfort that a majority of our Supreme Court, *in dicta* at least, seems to agree (from *Burch v. Allstate Ins. Co.*, 1998 OK 129, 977 P.2d 1057):

The dissent argues that in enacting [§ 3636 \(D\)](#), the Legislature explicitly limited the use of UM coverage as a substitute for liability coverage to the situation in which the liability carrier becomes insolvent within one year after the date of the accident. The dissent is mistaken. Subsection (D) merely deals with an insolvent insurer as a special subclass of available UM insurance from indemnitors who become insolvent.

I think maybe Subsection (D) speaks to the right of the UM carrier to look to the Guarantee Fund for repayment after the UM pays a claim based on the liability carrier’s insolvency. That’s my story--until the Supreme Court confirms I really am crazy.

Another unresolved issue is whether the Fund gets a pass once UM pays, though the injuries exceed the UM. The Fund, I’m told, takes the position that the insolvent insurance company’s limits are “fully reduced” by the UM payment, apparently regardless of the extent of damages. That seems to be a misreading of the exhaustion statute, which says in Subparagraph (A)(2):

Any amount payable on a covered claim under the Oklahoma Property and Casualty Insurance Guaranty Association Act shall be reduced by the full applicable limits stated in the insurance policy or by the amount of the recovery under the insurance policy as provided herein. The Association shall receive a full credit for the stated limits, unless the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy. If the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the insurance policy, or if there are no

applicable stated limits under the policy, the Association shall receive a full credit for the total recovery.

If the Fund is right, the badly injured UM claimant loses any real benefit from the UM since that prevents payment by the Fund. If I were on the other side, I would argue, where injuries warrant, the exhaustion statute just reverses the priority of payment, making the UM pay first, with the Fund then kicking in after the UM. It seems that if the legislature intended by Subparagraph 2 to give the Fund a pass once another policy pays, it would have been much easier to say that than to create the “credit” that really negates any potential for coverage. I hear there is a case poised to address this question.

Multiple Policyholders

Morris and Connor and UM Coverage Under Resident Relative Coverage. For some 40 years, we have relied upon a mantra in Oklahoma: “While an insurance company is free to decide at the outset who is and is not a UM insured, once it defines someone as a UM insured, it is not free to limit coverage based upon the particular vehicle occupied at the time of injury.” And, “it is up to the legislature to carve out any exceptions to this rule.” The mantra comes from a trilogy of cases:

First, *Cothren v. Emcasco*, 1976 OK 137, 555 P.2d 1037 invalidated an “owned but uninsured vehicle” exclusion in a UM policy (that policy excluded coverage to an insured while occupying a vehicle owned by an insured, but not insured under the policy). That was not okay since it took UM coverage away from someone already defined as a UM insured.

In *Shepard v. Farmers Ins. Co.*, 1976 OK 137, 555 P.2d 1037. by contrast, the Court upholds a policy definition of insured which said a resident relative who owned her own car was not a UM insured under the policy. That was okay since it did not take coverage away from a defined insured.

State Farm Mut. Auto. Ins. Co. v. Wendt, 1985 OK 75, 708 P.2d 581, then synthesizes the above two cases: Once one is defined as a UM insured (Class I, only—since Class II UM does not follow the person) “subsequent exclusions inserted by the insurer in the policy which dilute and impermissibly limit uninsured motorists coverage are void as violative of the public policy expressed by [the UM statute].”

In 2004 the legislature accepted the Court’s “challenge” and carved out an exception:

For purposes of this section, there is no coverage *for any insured* while occupying a motor vehicle owned by, or furnished or available for the regular use of the named insured, a resident spouse of the named insured, or a resident relative of the named insured, if such motor vehicle is not insured *by a motor vehicle insurance policy.* (emphasis added)

The exception seems by its terms to apply only where the UM insured occupies a car that is not covered *for liability.* Apparently looks are deceiving.

In *Connor v. American Commerce Ins. Co.*, 2009 OK CIV APP 61, 216 P.3d 850, a son who lived with his parents owned his own motorcycle, which he insured for liability only with AIG. His parents had a policy with American Commerce, which had UM that included a resident relative in the definition of UM insured. That policy then had an exclusion to the UM coverage when a resident relative occupied a car that was not insured for UM. This seems inconsistent with *Cothren/Shepard/Wendt*, so what about the only exception “carved out by the legislature?” Doesn’t the exception apply only when the occupied car is without liability coverage? COCA recites the amendment, and even notes it applies only where the occupied car is devoid of coverage, but then simply holds a policy exclusion that does not allow UM to extend to a vehicle Defendant insurance company does not insure and which is not otherwise covered for UM is “not inconsistent with” the UM statute.

We tried to get Supreme Court to overrule *Connor* in *Morris v. America First Ins. Co.*, 2010 OK 35, 240 P.3d 661. Instead, the Court limited *Connor* to where the resident relative has no other UM (that resident relative insured had liability but not UM on the occupied car, as in *Connor*), but also happened to have another policy on his semi, which did have UM. So, under these cases, if the resident relative has a separate policy that has UM, the resident relative is also entitled to the UM on the relative’s policy, but if the resident relative’s separate policies have no UM, then there is no UM under the relative’s policy either.

Stacking of Commercial and Personal Policies

Employee who causes injury while on the clock is insured under his own auto policy, as well as under the employer’s commercial auto policy, as an “additional insured,” under the omnibus coverage provision. The coverage on the auto will usually be primary, with the coverage on the “non-owned” policy being excess.

Beware, if the policy has (and it likely will) a “Limits of Liability Clause,” restricting total coverage to the “limits provided by the policy with the highest limits,” that will be enforced. *Gordon v. Gordon*, 2005 OK 5, 41 P.3d 391. That is because our compulsory insurance laws mandate only one legal limit of coverage.

But, if the policies have no “Limits of Liability Clause, but both have “other insurance clauses” making each “excess,” the provisions cancel each other out and both have pro rata primary coverage up to the cumulative limit. *Equity Mut. Ins. Co. v. Spring Valley Wholesale Nursery, Inc.*, 1987 OK 121, 747 P.2d 947 (this case involves the commercial coverage on tractor trailer and personal coverage on the trailer). Don’t expect to see this very often.

Shelter General Ins. Co. v. Earthsmart Const., Inc., 2015 WL 6672216, holds you cannot stack coverage on semi-tractor, with separate coverage on semi-trailer, when written by same company.

Excess Coverage

Smith v. Geico, 1976 OK 190, 558 P.2d 1160, holds liability coverage may condition coverage on exhaustion of all other available coverage. (Upholds clause making coverage on driver of non-owned auto excess to coverage on auto).

UM Priority and is Umbrella Counted in Determining Liability Limits? Is there priority among UM and is an Excess/Umbrella policy considered in determining tortfeasor coverage limits? We still hear from some adjusters that some other UM policy should pay before theirs. For instance, some still say, the UM on the car pays before the UM on the person. In fairness, these adjusters may be remembering *dicta* in *Keel v. MFA Ins. Co.*, 1976 OK 86, 553 P.2d 153, to that effect. Though there is such priority with respect to liability coverage, there is not with respect to UM. That is because UM is first party coverage for which the insured (or someone on their behalf) has paid a premium.

This is made clear in *Mustain v. United States Fid. & Guar. Co.*, 1996 OK 98, 925 P.2d 533. In *Mustain*, the injured party was defined as a UM insured under an employer's policy and under his own policy. When he settled the claim against the employer's UM for less than limits, his personal policy refused to pay, claiming he had to exhaust the employer's policy on the truck he was in at the time of the injury.

On certified question for the Western District of Oklahoma, the Supreme Court determined all UM, with respect at least to the UM insured, is "primary" and thus there is no UM "priority." *Mustain* makes clear, though, once the UM is paid, the insurance companies may still have a right to apportionment amongst themselves as to which ultimately bears the burden of the UM paid. *Burch v. Allstate Ins. Co.*, 1998 OK 129, 977 P.2d 1057, teaches since UM is primary, once the insured shows damages in excess of liability limits, the UM must pay the amount in excess of the liability, up to its limit, from "dollar one" without waiting for the insured to "exhaust" the liability coverage. If multiple UM carriers, all have duty to pay first, resolve priority amongst themselves. *Pentz v. Davis*, 1996 OK 89, 927 P.2d 538.

On a different, but sort of related matter, *Geico v. Northwestern Pacific Ind. Co.*, 2005 OK 40, 115 P.3d 856, holds that a UM insured need not count excess or umbrella liability coverage in determining whether injuries exceed liability limits. This is because the UM statute is intended to provide "minimum" protection when the primary *automobile* liability policy does not. The UM statute just does not "contemplate" the excess coverage found in a "comprehensive public liability policy." *Moser v. Liberty Mut. Ins. Co.*, 1986 OK 78, 731 P.2d 406.