Oklahoma Association for Justice

CONTINUING LEGAL EDUCATION

INSURANCE LAW UPDATE 2019

By

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Thursday, November 7, 2019: Cox Convention Center, Oklahoma City, OK

Thursday, December 5, 2019: Renaissance Tulsa Hotel, Tulsa, OK

ABOUT THE SPEAKERS

Rex Travis is a graduate of the University of Oklahoma College of Law (1962). He limits his practice in Oklahoma City to plaintiffs' insurance and personal injury claims. He has done this practice more than 57 years.

He writes articles for the Oklahoma County Bar Association Briefcase, frequently writes briefs for the Oklahoma Association for Justice (OAJ) *amicus curiae* program, writes a regular insurance law column for the OAJ Advocate, and has taught Insurance Law at the University of Oklahoma College of Law and Oklahoma City University School of Law and frequently teaches CLE programs. He has published chapters in Matthew Bender Company's Law of Liability Insurance. He is a past president of the Oklahoma Association for Justice and the Oklahoma County Bar Association (OCBA) and serves on the Legal Ethics Committee of the Oklahoma Bar Association (OBA). He has received the Earl Sneed Award for CLE from the OBA, the Journal Record award from the OCBA and the Tommy D. Frazier Award from the OAJ, both for lifetime achievement. He is a retired Lt. Col. from the U.S. Air Force Reserve.

Margaret Travis has practiced in the areas of bankruptcy, insurance law, and personal injury since she was admitted to the Oklahoma Bar in 1991. Margaret has served Travis Law Office's insurance and injury clients for many years, including making court appearances and presenting clients for depositions. For the past fifteen years, Margaret has also practiced in the area of bankruptcy law and has developed a successful bankruptcy practice handling both Chapter 13 and Chapter 7 bankruptcies. She has recently taken on a more active role at Travis Law Office and brought her well established bankruptcy practice under the Travis Law Office roof.

Note: written materials available to download as PDF at www.TravisLawOffice.com

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ACCIDENTAL DEATH INSURANCE

Cancer patient's death after fall out of wheelchair not accidental within meaning of policy – *Davis v. Fed. Ins. Co.*, 2019 WL 1521990 (W.D. Okla. Apr. 8, 2019)

Davis v. Federal Insurance Company[1] holds the death of an insured cancer patient was not "accidental" within the meaning of an accidental death policy despite the death certificate listing the "manner of death" as "accident" following a fall out of her wheelchair, causing a subdural hematoma.

Mrs. Mosley suffered from leukemia, for which she received chemotherapy. While being transported to chemotherapy, she fell out of her wheelchair and got abrasions and a subdural hematoma. Nineteen days later she died. The death certificate and report of the medical examiner's office showed the "manner of death" to be "accidental" but listed as the cause of death bacteremia from an infected chemo port. Her daughter testified she did not have an infection of the chemo port before the fall from the wheelchair.

The accidental death and dismemberment policy Federal Insurance Company wrote on her about a year before her death required that to be accidental, the death had to be "independent of illness, disease or other bodily malfunction." Federal denied the death claim because the medical examiner listed the infection and diabetes as contributing causes to her death.

The Court, Judge Russell, in the Western District, sustained the life insurance company's Motion for Summary Judgment. He disregarded the insured's daughter's affidavit that the infection did not appear to be present before the fall from the wheelchair because the daughter did not qualify as an expert witness.

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[1] 2019 WL 1521990 (W.D. Okla. Apr. 8, 2019).

Plaintiff appealed to the Tenth Circuit but the case settled pending the appeal. Full disclosure: this was my case and I lost it!

ATTORNEY FEE – PREVAILING PARTY

> **Insured not "prevailing party" entitled to attorney fee where insurance company made offer larger than verdict after the time the insurance company was required to make an offer – *Hamilton v. Northfield Ins. Co., 910 F.3d 1320 (10th Cir. 2018); Order Certifying Questions: 761 F. App'x 794 (10th Cir. 2019); Amended Order: 913 F.3d 998 (10th Cir. 2019)***

Hamilton v. Northfield Insurance Company[2] holds the trial court properly granted an insurance company summary judgment on a bad faith claim and, after the insured won the underlying contract claim to a jury, held the insured was not the prevailing party because the insured later rejected a settlement offer of more than the later verdict. The Court later, however, granted a partial rehearing and certified the attorney fee issue to the Oklahoma Supreme Court.

This is a very involved case. Hamilton owned a business building with a sheet metal roof. The building developed a leak in the roof and water damaged the interior of the building. The insured first attempted to do repairs and, when this did not resolve the leaking issue, reported the claim to his insurance company, claiming that high winds had caused the sheet metal roof to lift up and strip the screws holding it down, causing the water leak.

The insurance company denied the claim and, more than the 90 days within which the insurance company was required to make a settlement offer (since then the statute was amended to require an offer within 60 days) passed before Hamilton sued the insurance company on the contract claim and for bad faith. The trial court sustained the insurance company's motion for summary judgment on the bad faith claim but overruled it as to the contract claim. The repair

[2] 910 F.3d 1320 (10th Cir. 2018); Order Certifying Questions: 761 F. App'x 794 (10th Cir. 2019); Amended Order: 913 F.3d 998 (10th Cir. 2019).

cost appeared to be around ten to twelve thousand dollars (the trial court later instructed the jury it could not return a verdict for more than $10,652). The insurance company offered $45,000 for a release of all claims long after the ninety days ran.

Hamilton refused the offer and the jury returned a verdict for the $10,652. Hamilton sought attorney fees and interest under 36 O.S. Sec. 3629B. The trial court, Judge White, in the Eastern District, denied the attorney fee. Everybody appealed. The Tenth Circuit affirmed, in an opinion by Judge McKay.

Following the Tenth Circuit opinion, Hamilton petitioned for rehearing and asked the Tenth Circuit to certify the attorney fee question to the Oklahoma Supreme Court. The Tenth Circuit granted the motion as to the attorney fee only and certified the question to the Oklahoma Supreme Court:

> In determining which is the prevailing party under 36 O.S, Sec, 3629B, should a court consider settlement offers made by the insurer outside the sixty (formerly ninety-) day window for making such offers pursuant to the statute and "In determining the prevailing party under 36 O.S. Sec. 3629B should a court add to the verdict costs and attorney fees incurred up until the offer of settlement for comparison with a settlement offer."

The Oklahoma Association for Justice (OAJ) has filed an *amicus* brief in support of Hamilton's position, arguing that offers after the time period when the insurance company is required to make an offer should not count as insurance companies could always make an offer just more than the contract claim and assure that the insurance company and not the insured will be the prevailing party and that costs and attorney fees incurred up to the time of the offer must be considered unless excluded from the offer of settlement. Stay tuned for the answer to this important question!

Full disclosure; I'm involved in this case as part of the team that filed the *amicus* brief for OAJ.

AVIATION LIABILITY INSURANCE

Airplane passenger's estate is limited in coverage to lower coverage level for passenger, not the higher coverage level for non-passengers – *Arch Ins. Co. v. Harris*, 2019 WL 2016862 (N.D. Okla. May 7, 2019)

Arch Insurance Company v. Harris[3] holds the grief and emotional distress claims of survivors of a passenger killed in a crash are limited by a $100,000 passenger limit, not the million dollar limit applicable to persons killed who are not passengers.

Shillington was killed in the crash of an aerobatic airplane flown by Harris. Harris had a liability policy with Arch Insurance Company on the plane which provided $1 million bodily injury coverage but which limited coverage to $100,000 for bodily injury to a passenger. Shillington left a wife and surviving parents.

Arch sued for declaratory judgment that the passenger limitation applied to the claims for grief and emotional distress claims of these survivors, even though they were not passengers. The Court, Judge Eagan, in the Northern District, granted Arch summary judgment. The Court distinguished *Old Republic Insurance Company v. Durango Air Service, Inc*.,[4] which held to the contrary. The policy in the present case, unlike in *Durango Air Service* had a provision that:

> Regardless of claimant's relationship to the injured party and the alleged injury, damage, loss, cost or expense claimed, all claims and related claims arising out of, based upon or attributable to the Bodily Injury to any person or Passenger are included in, and not in addition to, the Each Person and Each Occurrence Limits of Insurance specified in the Declarations, as applicable.

Durango Air Service held the policy ambiguous as to the question whether survivors' damages were subject to the lower, passenger limit. The Court says Oklahoma's statute, 15 O.S.

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[3] 2019 WL 2016862 (N.D. Okla. May 7, 2019).
[4] 283 F.3d 1222 (10th Cir. 2002).

Sec. 157 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each part helping to interpret the others.') requires the present result.

The policy defines "passenger" to include anyone in the aircraft, which includes crew members. This raises the question: whose death would ever be covered by the $1 million limit? Maybe some farmer standing in his field where the plane crashes?

BAD FAITH – DISCOVERY

Court resolves tedious bad faith discovery dispute – *Field v. State Farm Mut. Auto. Ins. Co.*, 2019 WL 1521989 (W.D. Okla. Apr. 8, 2019)

Field v. State Farm Mutual Automobile Insurance Company[5] involves the Court resolving a tedious and tendentious discovery dispute in conjunction with a bad faith UIM case.

A State Farm insured had an underinsured motorist claim. The insured and State Farm were unable to resolve the claim and the insured sued on the policy and for bad faith. Shortly after that suit was filed, State Farm paid the UIM limit, leaving only the bad faith case to be resolved.

State Farm and the insured soon developed a discovery dispute, which encompassed several categories of issues.

By requests for production, the insured sought documents relating to the training given to State Farm employees in handling UIM claims. The insured also sought information about State Farm's computer programs entitled "Auto Injury Evaluation" or "Auto Claim File." State Farm complained that the insured's attorneys did not properly understand the use of these programs and argued that the insured should just take a deposition and let a State Farm employee explain the programs, without first getting State Farm's written materials.

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[5] 2019 WL 1521989 (W.D. Okla. Apr. 8, 2019).

The Court, Judge Cauthron, in the Western District, overruled State Farm's objection to the Requests for Production. She noted that the burden of showing undue burden imposed by the discovery was on the party seeking to prevent discovery and that State Farm has not made such a showing. Judge Cauthron stated she had examined the materials and agreed with the insured that they would offer evidence material to the Insured's claims.

The Court also permitted the insured to do Rule 30(b)(6) depositions on the computer programs and other claims handled with the use of the computer programs. However, the Court allowed State Farm to avoid the depositions as to its financial condition as of the years 2015-2017, to which State Farm offered to stipulate. The Court also suggested the insured should produce his own expert to explain the financials State Farm had produced, rather than requiring State Farm to produce such expert. The Court found financial information for the years 2012-2014 too remote since the case involved a 2016 injury and limited the financial discovery to the years 2015-2018.

State Farm wanted each deposition limited to seven hours, while the insured wanted depositions for two days each. The Court limited the depositions to a full 8-hour day each. This is a tedious opinion but one which may interest you if you get into a similar discovery dispute.

BAD FAITH – MOTION TO DISMISS

Complaint meets requirements to get past motion to dismiss – *Linthicum v. Praetorian Ins. Co.*, 2019 WL 1590591 (W.D. Okla. Apr. 12, 2019)

Linthicum v. Praetorian Insurance Company[6] holds that a complaint successfully avoids dismissal pursuant to a rule 12(B)(6) motion to dismiss.

[6] 2019 WL 1590591 (W.D. Okla. Apr. 12, 2019).

This is a case about a very expensive cow. A ranch-owner insured a black angus cow for $500,000. The cow died. The insured claims the agent told him that, with regard to a cow insured for $100,000 or more, the policy would pay the insured amount without regard to the actual value of the cow. The insurance company denies that and claims it had to evaluate the cow before it could pay the claim.

While the insured and the insurance company fought about whether the insurance company could evaluate the cow as part of the claim process, the insured refused to appear for an examination under oath (EUO) which the company demanded. While they were arguing about all that, the one-year "time to sue" clause in the policy ran. Soon after the insurance company declined to reschedule the EUO and the one-year time-to-sue period ran, the insured sued.

The Court, Judge Degiusti, in the Western District, appears persuaded that the time to sue clause was likely tolled by the handling of the claim by the insurance company. The Court refused to consider exchanges of emails and letters between the lawyers and the insurance company, as offered by both sides, because the Court says such materials cannot be considered on a Motion to Dismiss, as opposed to a Motion for summary judgment.

The Court spends some time discussing whether, if the policy claim fails due to a time bar, the insured may still pursue a bad faith claim within two years. It seems to have been the law for some years that the insured can still pursue a bad faith claim even if the policy claim is barred by a short statute of limitation.[7] The Court also seems troubled by the question whether the representations of the writing agent can modify the terms of the written policy. That, too, seems

[7] *Lewis v. Farmers*, 1983 OK 100, 681 P.2d 67, 70.

pretty settled under Oklahoma law.[8]

BAD FAITH – MOTION TO DISMISS

Bad faith allegations sufficient to defeat motion to dismiss – *Walmer v. Bristol W. Ins. Co.*, 2019 WL 573425 (N.D. Okla. Feb. 12, 2019)

Walmer v. Bristol West Insurance Company[9] holds Plaintiff's bad faith allegations are sufficient to defeat a federal rule 12(B)(6) Motion to Dismiss.

Plaintiff had a collision loss. His collision carrier, Bristol West, asked him for pictures from which it would evaluate his loss. He submitted those and, while he was waiting for a response, got an estimate from a dealership for $10,000. Nine days after the wreck, Bristol West sent an estimate for $4,507.33 and a check for that amount less a $1,000 deductible.

The insured, unhappy with the insurance company's estimate, complained to Bristol West. The insurance company re-evaluated and totaled the vehicle for a cash value of $6,552. The insured discovered an option provided in the policy for appraisal by a third-party umpire and asked Bristol West to provide that option. Bristol West never responded. The insured sued in state court on the policy and for bad faith.

Bristol West removed the case to federal court and filed this Federal Rule 12(B(6) Motion to Dismiss. The Court, Judge John Dowdell, in the Northern District, overruled the motion. He distinguished other cases which Bristol West cited by pointing out those cases involved petitions or complaints which were much less specific than the one in the present case.

Unlike this case, those earlier cases talked in generalities about insufficient evaluations

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[8] *Security Ins. Co. of New Haven v. Greer*, 1968 OK 3, 437 P.2d 243 ; *Gentry v. American Motorist Ins. Co.*, 1994 OK 4, 867 P.2d 468; *Pacific Nat. Fire Ins. Co. v. Smith Bros. Drilling Co.*, 1945 OK 272, 162 P.2d 871.

[9] 2019 WL 573425 (N.D. Okla. Feb. 12, 2019).

and delays in handling while in this case Plaintiff stated specific figures and time. This is probably a good case to know about to avoid Motions to Dismiss.

BAD FAITH – PLEADING

Bad faith complaint meets motion to dismiss standards – *Narr v. Farmers Ins. Co., Inc.*, 2019 WL 1474006 (W.D. Okla. Apr. 3, 2019)

Narr v. Farmers Insurance Company, Inc.[10] holds a complaint meets the standards required by *Twombly* and *Iqbal* to state a claim for bad faith.

Narr's house, insured by Farmers, suffered damage consisting of a cracked slab and cracked brick veneer, which Narr claimed was caused by an earthquake. Narr pleaded that he provided Farmers a contractor's estimate for $133,876.01 for repairs including repairing the crack in the slab and replacing the brick veneer. He also alleged Farmers hired an engineer who recommended the slab be repaired and the brick replaced. He says Farmers refused to pay for those repairs, claiming the damage was not done by an earthquake.

Farmers moved to dismiss under Federal Rule 12(B)(6). The Court, Judge Goodwin, in the Western District, overruled the Motion to Dismiss saying the case presented a close question but was sufficient to defeat a 12(B)(6) motion under *Twombly*[11] and *Iqbal*.[12]

BAD FAITH – PLEADING

Complaint meets standard required to meet dismissal standards – *Greater First Deliverance Temple, Inc. v. GuideOne Mut. Ins. Co.*, 2019 WL 149566 (W.D. Okla. Jan. 9, 2019)

Greater First Deliverance Temple, Inc. v. GuideOne Mutual Insurance Company[13] holds a complaint meets the standards required to defeat a federal rule 12(b)(5) and (6) motion.

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[10] 2019 WL 1474006 (W.D. Okla. Apr. 3, 2019).
[11] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555(2007).
[12] *Ashcroft v. Iqbal*, 556 U.S. 662,678 (D2009).
[13] 2019 WL 149566 (W.D. Okla. Jan. 9, 2019).

A church with property insured with GuideOne sustained a water loss. The Church's bad faith complaint alleges GuideOne failed to pay for needed remediation, which the church had to pay, and made a "low-ball" offer of $26,325.20 for damages which a contractor estimated at $276,462.43. After that estimate was produced, GuideOne increased its offer but only to $55,937.78.

GuideOne moved to dismiss, claiming "the complaint merely alleges a legitimate dispute". concerning value. The Court, Judge DeGiusti, in the Western District, disagreed, finding the complaint "minimally sufficient" to state a bad faith claim and denied GuideOne's Motion to Dismiss.

Cases such as this are good for determining what a particular judge will find an adequate pleading. A well-constructed West Law search involving the name of your probable judge is a good investment.

BAD FAITH – PLEADING

Summary judgment on bad faith not appropriate where the inferences insurance company claimed were dispositive were not conclusive – *Daniels v. CSAA Gen. Ins. Co.*, 2019 W 4060874 (W.D.` Okla. 2019)

Daniels v. CSAA Gen. Ins. Co.[14] holds that summary judgment for an insurance company was not appropriate based on a good faith dispute as to evaluation where the undisputed facts did not support the defense.

Two women occupying a car insured by CSAA were injured by the negligence of an unidentified hit-and-run driver. Apparently, the named insured settled and this suit involves the passenger.

[14] 2019 W 4060874 (W.D.` Okla. 2019).

CSAA's policy provided $25,000 med-pay and $250,000 UM coverage. CSAA wrote the passenger's attorney and asked for a medical authorization and copies of all medical bills. A medical authorization was never produced. The passenger's lawyer sent CSAA $27,734.30 in medical bills. CSAA paid its $25,000 in med-pay on the medical bills. The passenger's lawyer demanded $250,000 for the UM claim. The CSAA adjuster responded with an offer of $5,000, which she said was for "general (non-economic) damages only". The adjuster took the position the non-economic damages were valued at $5,000 to $8,000.

The passenger sued on the UM policy and for bad faith and CSAA apparently removed the case. CSAA moves here for partial summary judgment as to bad faith, claiming that its evaluation of $5,000 to $8,000 was reasonable so it was entitled to summary judgment as to the bad faith claim. Judge David Russell, in the Western District, denied the Motion for Partial Summary judgment.

Judge Russell was apparently comfortable with CSAA's position that it didn't need to include the total medical expense, including that paid under med-pay in its UM evaluation. While the opinion does not reflect the analysis, he may have been right. Under *Aetna v. State Board of Property and Casualty Rates*,[15] a policy provision crediting med-pay against UM would be valid. If the policy had such a provision, then CSAA would have been entitled to that credit.

Rather, Judge Russell calculated that the UM evaluation should have included the remainder of the medical bills unpaid by the $25,000 ($2,734.30 remaining after payment of the $25,000 in med-pay) so that the claimed evaluation o $5,000 to $8,000 was not indisputably reasonable and summary judgment was not proper.

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[15] (Pull cite and exact case name from alpha list in UM CLE)

CANCER INSURANCE

Court limits discovery rule so limitations bar bad faith recovery; reasonable expectation based on advertising and agent representations make fact question precluding summary judgment; reasonable belief in defense defeats bad faith recovery – *Ake v. Cent. United Life Ins. Co.*, 2018 WL 5986756 (W.D. Okla. Nov. 14, 2018)

Ake v. Central United Life Insurance Company[16] holds the discovery rule does not toll limitations until insured gets legal advice, reasonable expectations created by advertising or agent's representations can create ambiguity precluding summary judgment and an insurance company's reasonable belief in its defense allows summary judgment on bad faith.

Mrs. Ake bought a cancer policy for her family in 1997. In 2010, her husband was diagnosed with prostate cancer, of which he apparently died in 2016. The insurance company paid over $100,000 in benefits during that time. This suit involves disputed claims and resulting bad faith claims.

Mrs. Ake argued that the discovery rule kept the two-year statute of limitations on a bad faith claim from barring many of her bad faith claims until after she contacted a lawyer and found out some of the insurance company's actions may have been bad faith. On the insurance company's motion for summary judgment, the Court, Judge Russell, in the Western District, held that the two-year statute[17] began to run when the claim was denied but certainly not later the than the time she complained to the Insurance Commissioner.

A number of disputes over whether a policy provision was or was not ambiguous resulted in Mrs. Ake producing sales literature the salesman used in selling her the coverage. The Court

[16] 2018 WL 5986756 (W.D. Okla. Nov. 14, 2018).
[17] 12 O.S. Sec. 95(3); *Lewis v. Farmers*, 1983 OK 100, 681 P.2d 67, 70.

held the reasonable expectation doctrine[18] should be interpreted in light of sales literature and representations of salesmen selling the insurance, which may give rise to a reasonable expectation. On this basis he denied summary judgment on some contract issues.

While the Court made several rulings favorable to the insured on contract issues, he sustained the insurance company's summary judgment motion as to bad faith. The insurance company had a good faith belief in the propriety of their coverage denials, even if they were wrong.

DISCOVERY – ATTORNEY CLIENT PRIVILEGE

Attorney-client privilege intended only for seeking legal advice, not business decisions – *Curtis v. Progressive N. Ins. Co.*, 2019 WL 1937596 (W.D. Okla. May 1, 2019)

Curtis v. Progressive Northern Insurance Company[19] holds that attorney-client privilege is limited to enabling the client to get legal advice and not to protect business communications.

This case involves what is presumably hoped to be a class action dealing with Progressive's use of computer software in the handling of total loss property claims. Progressive submitted a privilege log to protect mainly email communications involving management and its house counsel. The disclosure of the documents to the Court, Judge Wyrick, in the Western District, was assigned to Magistrate Judge Suzanne Mitchell for review.

As often happens in discovery cases, the result is an encyclopedic listing of cases dealing with attorney-client privilege and work product protection.[20] This makes for a great research resource.

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[18] *Max True Plastering Co. v. U.S.Fid. & Guar. Co*., 1996 OK 28, ¶23, 912 P.2d 861, 864.
[19] 2019 WL 1937596 (W.D. Okla. May 1, 2019).
[20] For another excellent example of that sort of opinion see *Lindley v. Life Inv'rs. Ins. Co of Am*., 267 F.R.D 382 (N.D. Okla.. 2010) an opinion by Magistrate Judge Paul Cleary.

The opinion notes that attorney-client privilege is controlled by state law (here, Oklahoma) while work product protection is a matter of federal law. The Court notes that Progressive here does not rely much on work product but rather relies on attorney-client privilege.

The Court finds most of the disputed emails to not be within the privilege because they deal with business advice, rather than seeking legal advice. The purpose of attorney-client privilege is to enable a client to seek legal advice, not to protect business advice.

If you have a privilege or work product issue, this case and *Lindley* are good places to start.

FEDERAL CIVIL PROCEDURE

Striking rebuttal expert as untimely denied – *Smith v. CSAA Fire & Cas., Ins. Co.*, 2018 WL 5905144 (W.D. Okla. Nov. 9, 2018)

Smith v. CSAA Fire & Casualty, Insurance Company[21] holds it would not strike a rebuttal expert witness from Plaintiff's witness list on the theory that he should have been designated as a witness in the case in chief.

Plaintiff in a bad faith case designated witnesses, not including a particular expert dealing with the proper calculation of costs of repair. Then Defendant designated experts, including one to testify about the proper calculation of repair costs. Plaintiff then submitted a Rebuttal Expert Witness List including an expert designated specifically to rebut Defendant's expert.

Defendant moved to strike the Rebuttal Expert Witness List, saying the witness should have been listed as an expert for use in Plaintiff's case in chief. Judge DeGiusti, in the Western District Court denied the Motion.

[21] 2018 WL 5905144 (W.D. Okla. Nov. 9, 2018).

Judge DeGiusti said the listing of the witness made clear the witness was being listed specifically to rebut the report of Defendant's expert. In any event, the Court notes that the scheduling order had been stricken and the trial not reset so Defendant had plenty of time to depose the newly designated expert and was not prejudiced.

FEDERAL CIVIL PROCEDURE

Costs of dismissed action denied under exercise of discretion under F.R.C.P. 41 – *Sandner Grp. - Alternative Risk Sols., Inc. v. Bancfirst Ins. Servs., Inc.*, 2018 WL 5818355 (N.D. Okla. Nov. 7, 2018)

Sandner Group - Alternative Risk Solutions, Inc. v. Bancfirst Insurance Services, Inc.[22] holds the Court will exercise discretion to decline to impose costs and attorney fees where an action is dismissed and refiled.

Plaintiff corporation had a legal issue with another corporation and sued that corporation in the Northern District of Illinois (the NDIL suit) seeking a temporary restraining order and a temporary injunction along with other relief. The defendant corporation resisted on jurisdictional grounds or, alternatively, transfer to the Northern District of Oklahoma. The Northern District of Illinois federal court refused to decide the jurisdictional issue without discovery on the jurisdictional issue. Rather than spend money resisting the Motion and in order to get its TRO, Plaintiff chose to dismiss the Northern District of Illinois action and refile in the Northern District of Oklahoma.

Defendant responded in the Northern District of Oklahoma with a Motion for Costs under Federal Rule 41(d) to require the Plaintiff to pay Defendant its costs, including attorney fees incurred in the NDIL case. Judge Frizell denies the cost motion in this opinion.

[22] 2018 WL 5818355 (N.D. Okla. Nov. 7, 2018).

Judge Frizell notes that the purpose of Rule 41(d) is to discourage plaintiffs from vexatiously filing, dismissing and refiling actions. Here, plaintiffs dismissed and refiled to avoid the expense and delay of litigating the personal jurisdiction in the Northern District of Illinois and instead refiled in the Northern District of Oklahoma, which was the venue the Defendant suggested.

This is not an insurance law case but is included here because it could easily come up in an insurance case. This is a rule plaintiffs' lawyers should be aware of if they dismiss and refile a case. Even if the case is refiled in state court and removed to federal court, the federal judge has discretion to impose costs and attorney fees in the prior action as a condition of proceeding with the refiled action. This case teaches that you should have a very good reason for dismissing and refiling or you shouldn't do it.

FEDERAL PRACTICE – REMAND

> **Demand of an amount in excess of $75,000 permits removal to federal court and prevents remand on later stipulation by Plaintiff not to seek more – *Whitham v. Progressive N. Ins. Co.*, 2019 WL 1058152 N.D. Okla. Mar. 6, 2019)**

Whitham v. Progressive Northern Insurance Company[23] holds an offered stipulation by Plaintiff's attorney not to seek more than $75,000 after having claimed that amount in the petition does not justify remand from federal court.

Plaintiff in a UM case sought bad faith damages and prayed for an amount in excess of $75,000. Immediately after the UM carrier removed the case, Plaintiff's attorney wrote defense counsel a letter reducing his demand to the UM limit - $50,000. The UM carrier refused to withdraw its removal petition. Plaintiff filed a Motion to Remand.

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[23] 2019 WL 1058152 (N.D. Okla. Mar. 6, 2019).

The federal court, Judge Eagan, in the Northern District, overruled the Motion to Remand. She points out that the law is clear that nothing that happens to reduce the damages sought after removal impairs the diversity jurisdiction of the federal court.

FEDERAL PRACTICE – REMAND

Joining adjuster or other entity representing insurance company may defeat diversity and prevent removal if the basis of liability is something other than bad faith – *Chickasha Lodge #94 AF & AM v. Great Lakes Reinsurance (UK) PLC*, 2019 WL 184333 (W.D. Okla. Jan. 14, 2019)

Chickasha Lodge #94 AF & AM v. Great Lakes Reinsurance (UK) PLC[24] holds joinder of an engineer with the same citizenship as plaintiff, hired by an insurance company in a bad faith case, and alleging a basis for liability of the engineer other than bad faith, may prevent removal and justify remand.

A Masonic lodge had property coverage with a foreign insurance company. The Oklahoma lodge brought a bad faith suit in state court and joined a resident engineering company the insurance company hired to inspect the damaged property. The lodge did not claim bad faith on the part of the engineering firm but rather alleged negligence, tortious interference with contract and civil conspiracy.

The insurance company removed the case, claiming fraudulent joinder of the engineering firm to defeat diversity. The federal court, Judge Goodwin, in the Western District, sustained Plaintiff's Motion to Remand. Judge Goodwin held the rule that a non-insurance company defendant such as an adjuster, cannot be liable in a bad faith case, applies only when the allegation against the non-insurance entity defendant is bad faith. The same rule does not apply when other allegations are the basis for the joinder. The Court cites a number of cases as

[24] 2019 WL 184333 (W.D. Okla. Jan. 14, 2019).

supporting the ruling: *Sisk v. J.B. Hunt Transp., Inc.*[25], *Jordan v. Cates*[26], *Annese v. U.S. Xpress, Inc.*[27] The Court declined to award Plaintiff attorney fees and costs. There was an "objectively reasonable basis for seeking removal."

FEDERAL PRACTICE – REMAND

Involuntary dismissal of resident defendant does not excuse untimely removal which justifies remand – *Barrett v. Liberty Ins. Corp.*, 2019 WL 2152515 (N.D. Okla. May 17, 2019)

Barrett v. Liberty Insurance Corporation[28] holds involuntary dismissal of a resident defendant, creating diversity, does not justify untimely removal to federal court and, after removal, permits remand.

The Barretts had two separate claims against Liberty, one on their home and one on a rental property. Liberty did not pay the claims so they sued Liberty in Tulsa County, joining the agent on a theory he negligently sold them insurance which didn't pay and didn't properly advise them about their insurance coverage. The state court dismissed the agent on the theory there is no duty on the part of an agent to exercise ordinary care in the agent's business.

Upon the agent being dismissed, Liberty removed the case to federal court. Plaintiff moved to remand, arguing, while Liberty removed within 30 days of the agent's dismissal, the removal came more than 30 days after Liberty was served. The Court, Judge Egan, in the Northern District, granted remand to state court.

Judge Egan acknowledged that voluntary dismissal by the plaintiff of the resident defendant renders the case removable. However, the Tenth Circuit recognizes the

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[25] 2003 OK 69, 81 P.3d 55.
[26] 1997 OK 9, 935 P.2d 289.
[27] No. CIV-17-655-C, 2017 U.S. Dist. LEXIS 212545 (W.D. Okla. Dec. 28, 2017).
[28] 2019 WL 2152515 (N.D. Okla. May 17, 2019).

"voluntary/involuntary doctrine." Under this doctrine, the involuntary dismissal of the resident defendant doesn't render the case removable or extend the defendant's time to remove unless the joinder of the resident defendant was fraudulent. The Court says it was not, because the Plaintiff alleged the basis for the claim against the agent so Liberty could have removed and made its claim of fraudulent joinder within the 30 days it had to remove from the time it was served.

FEDERAL PRACTICE – REMAND

Defendant's statement as to amount in controversy, absent a statement by plaintiff as to the amount, is controlling if reasonable – *Klementovicz v. State Farm Fire & Cas. Co.*, 2019 WL 1379939 (N.D. Okla. Mar. 27, 2019)

Klementovicz v. State Farm Fire and Casualty Company[29] holds that, where the Plaintiff asked only for an amount in excess of $10,000, and the Defendant removed, claiming an amount in controversy of more than $75,000, a Motion to Remand would be denied.

Plaintiff had a homeowner's policy claim for property damage. His attorney sued for an amount in excess of $10,000 without complying with 12 O.S. Sec. 2008(A)(2) to demand a specific amount less than $75,000 or an amount in excess of $75,000. The Defendant removed, alleging the amount in controversy was more than $75,000. Plaintiff moved to remand, still not stating an amount sought.

The federal court, Judge Dowdell, in the Northern District overruled the Motion to Remand. He points out that the rules have changed with regard to removal so that the amount in controversy which the Defendant alleges in the removal papers will be accepted unless specifically challenged by plaintiff. He declined the defendant's request to make the Plaintiff pay Defendant's attorney fees.

[29] 2019 WL 1379939 (N.D. Okla. Mar. 27, 2019).

FEDERAL PRACTICE – REMAND – USAA

USAA was not entitled to remand where USAA was joined along with USAA subsidiary and USAA handled claims for the subsidiary – *Lowe v. United Services Automobile Association, et al.*, 2019 WL 3245521 (W.D. Okla. 2019)

Lowe v. United Services Automobile Association, et al.[30] holds that USAA is not entitled to remand a case in which it is sued along with its subsidiary over a claim which USAA handled.

Lowe had coverage with USAA General Indemnity Company (GIC). She had a UM claim on which she sued in state court both GIC and USAA. The insurance companies apparently conceded that there could be no diversity jurisdiction against USAA under *Tuck v. USAA*[31] but claimed Lowe's joinder of USAA was fraudulent because her policy was with the subsidiary. Lowe responded that USAA ran all of its subsidiaries as if they were a part of USAA, including the handling of this claim.

USAA is an unincorporated association made up of military members and former military members. Because its members are citizens of all 50 states, USAA is not usually subject to diversity jurisdiction. USAA writes coverage on dependents and former dependents of USAA members through stock companies, including GIC. There is only one USAA website and policy-writing and claim handling are all done by USAA.

Here, USAA and GIC removed the case and Lowe filed a motion to remand. Chief Judge DiGiusti sustained the motion to remand in this opinion. He says the burden on a defendant resisting remand is heavy one. It must show that there is no possible claim the insured could make against USAA. Since USAA handled the claim, that would be a very difficult burden to meet.

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[30] 2019 WL 3245521 (W.D. Okla. 2019).
[31] 859 F.2d 842, 844-45 (10th Cir. 1988).

USAA argued that Lowe was limited to the contents of its state court petition and could not show the other facts it needed to show USAA was an alter ego of the subsidiary. The Court noted the substantial differences in pleading rule between the notice pleading rules in state court and the federal rules and did not hold the insured to the more onerous federal rules. It looks like USAA is going to have a hard time staying out of state court.

GENERAL LIABILITY INSURANCE

Trial court did not abuse its discretion in granting insurance company a declaratory judgment of no coverage – *State Farm Fire & Cas. Co. v. Telecomm Consultants, Inc.*, 2018 WL 6574951 (10th Cir. Dec. 13, 2018)

State Farm Fire and Casualty Co. v. Telecomm Consultants, Inc.[32] holds the district court did not abuse its discretion in granting State Farm a declaratory judgment that it had no coverage on a former chief executive officer of an insured corporation.

Telecom Consultants, Inc. (TCI) suffered a crisis as its two founding members fought for control of the business. One of them, Butler, was claimed to have attempted to interfere with TCI's computers destructively.

His former partner sued Butler in state court. Butler sought coverage and a defense from State Farm, which insured TCI and Butler but only for acts on behalf of TCI. State Farm defended Butler in the State Court action but filed this declaratory judgment action in federal court for a declaration of no coverage.

Butler moved to dismiss or stay the declaratory judgment, arguing it would interfere with the state court action. The trial court, Chief Judge Heaton, in the Western District, refused and entered declaratory judgment against Butler, who appealed.

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[32] 2018 WL 6574951 (10th Cir. Dec. 13, 2018).

The 10th Circuit affirmed, in this opinion by Judge Lucero. The declaratory judgment statute says the court may grant declaratory judgment but grants great discretion to the judge. *State Farm v. Mhoon*[33] spells out the factors the court should consider. Chief Judge Heaton followed them.

GENERAL LIABILITY INSURANCE

"That particular part" exclusion provision is ambiguous, leading to coverage – *MTI, Inc. v. Employers Ins. Co. of Wausau*, 913 F.3d 1245 (10th Cir. 2019)

MTI, Inc. v. Employers Insurance Company of Wausau[34] holds that an exclusion provision in a liability policy is ambiguous as applied, leading to coverage.

MTI, Inc. (formerly Midwest Towers, Inc.) contracted with an electric utility to replace large, corroded "anchor bolts" holding a cooling tower to its foundation. Its contract required it to replace the bolts and add "anchor adhesive" to the bolts. The workmen installed the anchor bolts but did not yet have the anchor adhesive to apply to the bolts so they went home for the night without otherwise securing the tower. A windstorm came up overnight and damaged the tower so badly it had to be replaced at a cost of $1.4 million.

MTI's general liability insurance company, Employers of Wausau, denied coverage based on an exclusion for

> 'property damage' to that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations; or that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.

MTI settled with the electric utility by paying it $350,000. The rest of the $1.4 million in damages was paid by the utility's property insurance company. MTI then sued Wausau on the

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[33] 31 F.3d 979, 983 (10th Cir. 1994).
[34] 913 F.3d 1245 (10th Cir. 2019).

policy.

The trial court, Judge Russell, in the Western District, held the exclusions unambiguously excluded coverage and granted Wausau summary judgment. The Tenth Circuit reversed, in this opinion by Judge Lucero. He held that the exclusions were susceptible to two reasonable interpretations: one that the exclusion applied only to the bolts and the other (which the trial court adopted) that it applied to the whole structure. This made them ambiguous and required an interpretation in favor of the insured and coverage.

HEALTH INSURANCE

Motion to dismiss denied in suit for out-of-network helicopter evacuation charges – *Terry v. Health Care Serv. Corp.*, 344 F. Supp. 3d 1314 (W.D. Okla. 2018)

Terry v. Health Care Service Corporation[35] holds a motion to dismiss for failure to state a claim was not good but that an insured's claim for a declaratory judgment of coverage was neither proper nor needed.

Mr. and Mrs. Terry's premature baby was in grave danger if he could not be evacuated by helicopter from Elk City to Oklahoma City, due to his lungs not being fully formed. The doctor wrote that he would not survive an ambulance trip and would die if he were not airlifted to Children's Hospital in Oklahoma City. A helicopter service transported him to Oklahoma City and he survived.

The helicopter evacuation cost $49,999. The Terry's health insurance company, Blue Cross and Blue Shield of Oklahoma (BC), paid (after an administrative appeal) $4,849.86, declaring the helicopter service was "out of network." (BC had no helicopter service in network.) This left the Terrys owing $45,149.14, for which the helicopter service sued, got a judgment and

[35] 344 F. Supp. 3d 1314 (W.D. Okla. 2018).

garnished the Terrys. (This is not an ad for Medicare for All – it just sounds that way!)

This all took a while. In addition to the administrative appeals, the Terrys complained to the Oklahoma Insurance Department, with no success. The helicopter evacuation was in January of 2014. On December 30, 2017, the Terrys got a letter from BC saying BC had reconsidered their appeals and that it thought the claim was handled correctly and that the Terry's owed the remaining $45,149.14. The Terrys filed this suit March 27, 2018.

BC responded with a Motion to Dismiss, claiming the suit was barred by the statute of limitations. Rather than the 5-year contract statute of limitation, which would have given the Terrys until December 30, 2022, BC argued it relied on a contract provision in its health policy that "No such action [on the policy] may be taken later than three years after expiration of the time within which a Properly Filed Claim is required by this Contract." The policy required a claim to be filed "within 90 days after the benefit period for which the claim is made."

The Court in this case, Judge Cauthron, in the Western District, presumed that BC was arguing that the "benefit period" applicable to the claim was the calendar year 2014 so that the "benefit period" triggering the running of the three-year limitation period began January 1, 2014 (nearly a year before the bill was incurred) so that the statute ran March 31, 2018, before the suit was filed April 27, 2018.

Judge Cauthron denied BC's Motion to Dismiss, saying: "the dates in the complaint do not make clear the right sued upon has been extinguished." The Court also found the Terrys had adequately pleaded a claim for breach of contract, based on their claim to a reasonable expectation of coverage. The Court also denied a Motion to Dismiss a bad faith claim based on the two-year, tort statute of limitation, based on the discovery rule. The opinion also allows the bad faith claim to go forward on grounds of fraud, constructive fraud and misrepresentation.

Finally, the Court granted BC's Motion to Dismiss as to a claim for declaratory judgment because the declaratory judgment was sought on the basis that BC's refusal to pay made the policy non-compliant with the Affordable Care Act by making the Terrys pay a huge deductible. The Court notes that the other relief sought might make the declaratory judgment relief unnecessary.

HOMEOWNER'S – EARTHQUAKE INSURANCE

Failure to object to insurance company raising a new coverage defense at trial waived error absent fundamental error – *Thomas v. Farmers Ins. Co., Inc.*, 2019 WL 2158054 (10th Cir. May 17, 2019)

Thomas v. Farmers Insurance Company, Inc.[36] holds that the insured's failure to object when the insurance company raised a new reason at trial for denying a claim waived the error.

Thomas noticed two days after a 2014 earthquake 112 miles away a slab floor collapsed and sank four inches. Farmers denied their earthquake damage claim stating as a reason that the damage was not caused by an earthquake. They sued on the contract and for bad faith.

At the trial, for the first time, Farmers changed its reason for not paying the claim, saying the damage was caused by an earthquake but that it was a 2011 earthquake 55 miles away and before Farmer's policy was effective. Thomas did not object at trial. The jury in the trial court, Judge Terry Kern, in the Northern District, returned a verdict for Farmers on both the contract claim and the bad faith claim.

Thomas appealed. The Tenth Circuit affirmed. While it is certainly improper for an insurance company to urge at trial a different ground for denying a claim than it used initially, the only way this could result in reversal was if the error was fundamental and it wasn't.

[36] 2019 WL 2158054 (10th Cir. May 17, 2019).

HOMEOWNER'S – LIABILITY INSURANCE

A threat is not an accident nor, in this case, did it cause bodily injury so court will grant insurance company summary judgment – *Shelter Mut. Ins. Co. v. Martindale*, 2019 WL 80442 (W.D. Okla. Jan. 2, 2019)

Shelter Mutual Insurance Company v. Martindale[37] holds that a threat is not an accident and did not cause bodily injury so it was appropriate for the court to grant the insurance company summary judgment.

Novacek was a fraternity pledge. As a part of the hazing of pledges, there was a "fight club" in which pledges were required to box or wrestle one another. During such a fight, a member other than Martindale hit Novacek in the abdomen with a baseball bat, causing him to fall and hit his head and lose consciousness.

When he awoke the next morning, Martindale, a fraternity member (according to Martindale) threatened Novacek, telling him "to keep his mouth shut about the incident or [the fraternity] would ruin his reputation, damage his property, and have him kicked out of school." Martindale denied he said any of these things.

Martindale's parents had homeowner's liability insurance with Shelter, under which Martindale was an insured. Shelter defended Martindale under reservation of rights but filed this declaratory judgment action for a declaration there was no coverage and no duty to defend.

Martindale moved to dismiss or stay the declaratory judgment action until the underlying state tort action could clarify the facts. Shelter opposed the dismissal or stay and moved for summary judgment. The trial court, Judge Cauthron, in the Western District, denied the stay or dismissal and granted Shelter's Motion for Summary Judgment.

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[37] 2019 WL 80442 (W.D. Okla. Jan. 2, 2019).

There may have been bodily injury from the initial incident (getting hit with a bat), but Martindale was not accused of participating in that. His only involvement was the claim that he made threats in order to cover it up. The threats were not an "accident," as defined in the policy, nor did the threat, as opposed to the initial assault, cause bodily injury.

LIABILITY INSURANCE

Policy exclusion capable of more than one reasonable interpretation ambiguous and ineffective – *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 906 F.3d 926 (10th Cir. 2018)

Siloam Springs Hotel, L.L.C. v. Century Surety Company[38] holds ambiguous an exclusion for "qualities or characteristics of indoor air" as being susceptible of more than one reasonable interpretation as applied to a loss caused by carbon monoxide poisoning from a defective, indoor pool heater.

The case has a long and twisted history. In 2016, the Tenth Circuit took up the case on appeal from a motion for summary judgment which Judge Vicki Miles-LaGrange sustained in favor of an insurance company. Hotel guests became ill allegedly due to a leak of carbon monoxide from a defective indoor pool heater. The insurance company insured a hotel in Arkansas owned by an Oklahoma limited partnership. The District Court erroneously recited that the hotel was owned by an Oklahoma corporation. In fact, the record showed the hotel was owned by an Oklahoma limited partnership. Because the record failed to show that no member of the limited partnership had the same citizenship as the insurance company, the Tenth Circuit found the record did not clearly show federal court diversity jurisdiction and remanded for a determination of that jurisdictional issue.

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[38] 906 F.3d 926 (10th Cir. 2018).

The Tenth Circuit also suggested to the District Court that coverage cases such as those involved in the case often dealt with public policy issues and that it was a good idea to defer those public policy issues by certifying questions to the state Supreme Court. The District Court determined there was diversity and followed the circuit's suggestion and certified to the Oklahoma Supreme Court whether such an exclusion would violate Oklahoma public policy. The Oklahoma Supreme Court replied that it would not.[39] The District Court then held there was no coverage. The hotel appealed. The Tenth Circuit reversed, in this opinion by Judge McKay.

In a sort of a "meanwhile, back at the ranch" moment, it developed that the same insurance company had a lawsuit pending involving the same exclusion and the same facts in Nevada. The Ninth Circuit certified a question to the Nevada Supreme Court questioning the validity of the same policy provision based on ambiguity. The Nevada Supreme Court held unanimously that the exclusion was ambiguous.[40] The Tenth Circuit follows the lead of the Nevada Supreme Court and an opinion by Justice Kauger in the Oklahoma certified question case concurring in part and dissenting in part, holding here that the exclusion was ambiguous.

The basis for the ambiguity is that "a policyholder could reasonably expect that the indoor air quality exclusion applies only to continuously present substances that render the air harmful, and that the policy allows recovery for an unexpected condition that temporarily affects the air quality inside of a building." Since either interpretation could be proper, the policy is ambiguous and must be interpreted in favor of the insured and coverage and not in favor of the insurance company and exclusion.

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[39] *Siloam Springs Hotel v. Century Sur. Co.*, 392 P.3d 262, 270–71 (Okla. 2017) (*Siloam II*).
[40] *Century Surety Co. v. Casino West, Inc.*, 130 Nev. 395, 329 P.3d 614 (2014).

MOTOR CARRIER LIABILITY INSURANCE

In federal court, no joinder of liability insurance company under unified carrier registration – *Thurmond v. CRST Expedited, Inc.*, 2019 WL 362275 (W.D. Okla. Jan. 29, 2019)

Thurmond v. CRST Expedited, Inc.[41] holds that, in federal court, there can be no joinder of the motor carrier's liability insurance company where the motor carrier has registered under the Unified Carrier Registration process.

Oklahoma state courts have for years permitted joinder of the liability insurance company for a licensed motor carrier, pursuant to 47 O.S. Sec. 169(A). The theory is that the policy is a statutorily required policy, permitting joinder. However, in *Fierro v. Lincoln Gen. Ins. Co*,[42] the Oklahoma Court of Civil Appeals held joinder is not permissible where the interstate motor carrier is operating under the Unified Carrier Registration system, which permits a carrier licensed in any state to utilize that filing in all participating states, because the policy was not filed with the Oklahoma Corporation Commission. Oklahoma elected to participate in that system in 47 O.S. Sec. 162.1. The filing in the other state is not, said that Court, to justify joinder.

State courts have generally permitted the joinder while the federal courts, as the Court, Judge Russell in the Western District, noted here, have all followed *Fierro* and denied joinder. Judge Russell lists the various federal cases: *Hankla v. Lee*, No. CIV-17-641-D, 2018 WL 563181 (W.D. Okla., Jan. 25, 2018)*; White v. Lewis*, No. CIV-13-862-C, 2014 WL 7272464 (W.D. Okla., Dec. 18, 2014)*; Beebe v. Flores,* No. CIV-11-1381-HE, 2012 WL 137780 (W.D. Okla., Jan. 28, 2012), all West Law only cases supporting that ruling.

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[41] 2019 WL 362275 (W.D. Okla. Jan. 29, 2019).
[42] 2009 OK CIV APP. __, 217 P.3rd 158, 160.

MOTOR VEHICLE LIABILITY

Third permitee not an omnibus insured, so not entitled to more than minimum coverage – *State Farm Mut. Auto. Ins. Co. v. Kowalik*, 754 F. App'x 761 (10th Cir. 2018)

State Farm Mutual Automobile Insurance Company v. Kowalik[43] holds a third permittee driving an insured vehicle was not entitled to more than minimum ($25,000) coverage.

The facts in this case are involved. An Oklahoma City police officer was dating a woman who was getting divorced from her husband, a business owner. The husband bought his wife a Porsche, titled in his name and gave her permission "to do whatever she wanted" with the Porsche.

The wife gave the police officer permission to use the Porsche to go to work on an evening shift. He was supposed to return the car to her after work but he called her and told her he had been hurt on his previous shift and might not go to work. She invited him to her house if he didn't go to work. He did not show up at her house and she assumed he had gone to work. Instead, he picked up a barmaid and they went drinking. Late that night, with both of them highly intoxicated, she was driving and rolled the Porsche, killing both of them.

The husband had $250,000 liability coverage on the Porsche, which he insured with State Farm in his name. The police officer left a young son in the custody of his ex-wife, Kowalik. The ex-wife, as administratrix of the police officer's estate sued the barmaid's estate.

State Farm defended under reservation of rights and filed this declaratory judgment action for a declaration the husband's $250,000 liability coverage did not apply but that the only coverage it owed was the $25,000 minimum, compulsory liability insurance limit. (This result is

[43] 754 F. App'x 761 (10th Cir. 2018).

due to *Sisk v. Gaines*[44], which held lack of permission does not avoid coverage to the extent of minimum compulsory insurance limits.) The trial court, Judge Scott Palk in the Western District, agreed and granted State Farm summary judgment in the declaratory judgment action. The 10th Circuit affirmed, in this opinion by Judge Matheson.

The rule has been clear for many years in the 10th Circuit that a person given permission to use a car (called a "first permittee") has no right to give permission to a third person (called a "second permittee") to use the car so the second permittee has no coverage.

Kowalik attempted to avoid that rule with an exception to the rule which is that there is an exception to the second permittee rule which says that "use" and "driving" are different so the second permittee is still "using" the car when another person is driving for the second permittee, so there is still permissive use if the use of the car was that of the second permittee.

The trial court and the 10th Circuit were having none of that. They held that the exception did not work where the person driving the car was the tortfeasor and the person killed was the second permittee. In order to make that work, the Court says the reasoning would have to be that the police officer would have to be the liable party, not the person for whose death the wrongful death damages are sought. This is so because the policy agrees to pay damages for which "the insured" (who would be the second permittee – the police officer) is liable to others and he can hardly be liable for the injuries that caused his own death.

In the interest of full disclosure, this was my case. I represented Kowalik and lost the case.

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[44] 2006 OK CIV APP 117, 144 P.3d 204.

PROPERTY INSURANCE

Earth movement, underground water exclusions ambiguous due to lack of specificity whether they refer to natural or man-made events – *Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3

Oklahoma Schools Risk Management Trust v. McAlester Public Schools[45] holds a loss due to the rupture of an underground water main is not excluded by earth movement and underground water exclusions because they do not specify whether the earth movement or underground water movement referred to is natural or man-made.

McAlester Public Schools had a loss of a junior high school building due to the rupture of a large water main under the school. The water main burst and the force of the water against the foundation or forcing the earth under the school up into the foundation broke the concrete foundation, causing a large loss. The school's insurance, provided by an interlocal cooperative of schools pooling their self-insurance, denied coverage, based on policy exclusions for damage due to earth movement and underground water.

The school board argued the exclusions were ambiguous because they didn't specify whether the earth or water movement to be excluded was natural or man-made. The insurance trust argued it made no difference. However, cases from other jurisdictions have almost universally held that the purpose of earth movement exclusions was to protect insurance companies from catastrophic losses due to earthquakes or landslides affecting multiple properties and threatening the solvency of insurance companies due to the large number of claims.

While the present case was pending in the trial court, the Oklahoma Supreme Court adopted that ruling in *Broom v. Wilson Paving & Excavating, Inc*.[46] There, the Supreme Court

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[45] 2019 OK 3.
[46] 2015 OK 19, 356 P.3d 617.

held an earth movement exclusion ambiguous because it didn't specify whether it applied to a ditch cave-in, which injured a contract worker. The trial court, Associate District Judge Tim Mills, in Pittsburg County, held the earth movement exclusion inapplicable on the basis of *Broom* but sustained the insurance program's motion for summary judgment on the basis of the underground water exclusion.

The school board argued that most jurisdictions have applied the same rule to the underground water exclusion as is applied to the earth movement exclusion. The Court of Civil Appeals affirmed the trial court. The Supreme Court granted *certiorari* and reversed the trial court and the Court of Civil Appeals, in a five-to-four decision by Justice Edmondson.

The majority simply followed *Broom* and the other-jurisdiction cases applying the same rule to the underground water exclusion as *Broom* applied to the earth movement exclusion. Justice Wyrick (who has since left the Court to become a federal judge) wrote a dissent joined in by Justice Winchester. He thought the other-jurisdiction cases applying the *Broom* rule to the underground water exclusion just didn't make any sense. He likened it to a child arguing that when his mother said "eat your vegetables" he didn't have to eat carrots and broccoli because she didn't specify which vegetables. Justices Kauger and Combs also dissented, without separate opinion.

The insurance trust filed a petition for rehearing, arguing the Court should not have applied the rules of an insurance case dealing with ambiguity, to the insurance trust since the trust should be free of the rues applying to insurance companies and insurance policies. The Court overruled the Petition for Rehearing, without opinion.

In the interest of full disclosure, I am involved in this case. I represent the school board.

TITLE INSURANCE

No negligence claim against an insurance company leads to partial judgment on the pleadings; maybe big trouble for insured – *Riverbend Land, LLC v. First Am. Title Ins. Co.*, 2018 WL 4905353 (W.D. Okla. Oct. 9, 2018)

Riverbend Land, LLC v. First American Title Insurance Company[47] holds there can be no negligence claim against an insurance company and that a contract claim survives a motion for judgment on the pleadings in a title insurance case.

This is a troubling case, if you do title insurance work. Riverbend Land bought land in northwest Oklahoma City, adjacent to the Kilpatrick Turnpike. It bought title insurance and did not itself have the title examined. It paid $1.7 million for the land. It sold the land and the purchaser refused to go through with the sale because it said "abutter's rights" to the land had been sold by a prior owner and are now owned by the Turnpike Authority.

When the title insurance company refused to do anything, the insured sued the title insurance company. The Court, Judge Friot, in the Western District, ruled on the title insurance company's FRCP 12(C) Motion for Judgment on the Pleadings which the Court says is treated like a 12(B)(6) motion.

The Court first dismisses with prejudice the land company's negligence claim because it says there is a rule in Oklahoma that an insurance company cannot be sued for negligence, citing *Tolman v. Reassure America Life Insurance Company*.[48] The rationale for this seems to be that the existence of a bad faith cause of action excludes the existence of a negligence claim. This would appear to leave the land company with only a bad faith cause of action for the error in title examination, in the face of a bad faith rule that negligence is not sufficient for a bad faith case.

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[47] 2018 WL 4905353 (W.D. Okla. Oct. 9, 2018).
[48] 2017 OK CIV APP. 15, 391 P.3d 120, 123.

Somewhat curiously, having just poured out the insured based on an Oklahoma Court of Civil Appeals case holding there is no negligence claim against an insurance company, the Court rejects the insured's reliance on a Court of Civil Appeals case holding a title insurance company is negligent if it fails to identify title defects in a title examination[49] as "not binding precedent!"

The Court leaves in the case a breach of contract theory, which is problematic because the title insurance cases say the title insurance covers only title defects and not usability of the land. This insured may have a tough time coming up. The concept that an insurance company cannot be liable for negligence raises an interesting question: if an insurance salesman runs red light and hits someone, is the insurance company home free?

The facts in *Tolman* are troubling as well. A life insurance beneficiary cashed at a bank a check which the life insurance company wrote on a closed account. The Oklahoma District Attorney prosecuted and had the beneficiary arrested after the insurance company was contacted and failed to admit its error. That's not bad faith claim handling. It's stupid and tortious! The Supreme Court needs to look at this "rule" that an insurance company can't be liable for negligence.

TRUCK INSURANCE

Multiple-vehicle collision on interstate results in two "per accident" limits – *Nat'l Cas. Co. v. W. Express*, 356 F. Supp. 3d 1288 (W.D. Okla. 2018)

National Casualty Company v. Western Express[50] holds a sixteen-vehicle rear-end collision on an interstate resulted in two per accident limits.

On a foggy March day on I-40 in far western Oklahoma, there was a 16-vehicle pile-up

[49] *American Title Ins. Co. v. M-H Enterprises*, 1991 OKCIV APP 58, 815 P.2d 1219.
[50] 356 F. Supp. 3d 1288 (W.D. Okla. 2018).

as a mix of cars and large trucks collided, causing multiple deaths and injuries. The start was when a semi hit a car from the rear. Other semis piled into the wreckage.

The truck involved in the first collision was owned by Western Express and insured by National Casualty Company. National Casualty filed for a declaratory judgment that its coverage was limited to a one million dollar limit due to there being only one accident and that the limit was exhausted by settlements. Strangely, the insured trucking company also argued for a finding of one accident because of a $900,000 per accident self-insured retention. The injured claimants advocated for 16 separate accidents to maximize coverage. They argued for a rule, based on Tennessee law, where the policy was issued, which arguably applies the "effect" doctrine, under which each injury would be a separate accident. They relied on a Tennessee case in which the insured excavated a lot and caused the buildings on each side of the lot to collapse.[51] The Tennessee Supreme Court found there were two occurrences and two limits applicable.

The Court, Judge Russell, in the Western District, rejected both positions and held, based on the particular facts of the wreck, that there were two accidents, triggering two sets of limits. The first impact, in which the semi hit the car, was one accident, which triggered one limit. All the subsequent collisions, all happening within minutes, constituted a second accident and triggered a second limit.

This wreck has resulted in a large number of cases, some in state courts and others in federal courts. Hopefully this decision will move the cases toward resolution.

Full disclosure: I'm in this one. I represent one of the injured claimants.

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[51] *Kuhn's of Brownsville, Inc. v. Bituminous Cas Co*, 270 S.W. 358 (Tenn. 1954).

UNINSURED MOTORIST

Summary judgment on whether a UM claim is barred is not appropriate where the insured took the tort-feasor's smaller than limits offer for a reason other than that damages were paid by the lower offer – *Madrid v. State Farm Mut. Automobile Ins. Co.,* 2019 OK CIV APP __, __ P.3d__ (Case No. 117,274, Aug. 30, 2019)

Madrid v. State Farm Mut. Automobile Ins. Co.[52] holds summary judgment is inappropriate on the issue whether the insured taking a liability coverage offer less than the liability limit bars the insured's recovery of uninsured motorist (UM) limits where the evidence is such that the insured may have taken the smaller offer for a reason other than that the insured's damages were less than the liability limit.

Ms. Madrid lived with her parents in Oklahoma but went to college in Texas. Her parents had a car insurance policy with State Farm which provided $200,000 UM coverage. While in Texas, she was badly hurt by a Texas tort-feasor with a $100,000 liability limit. She hired a Texas lawyer who settled the case for $90,000. He later explained that he figured it would cost him more than the $10,000 he was giving up to pay doctors for depositions to try the case. Under the Texas procedure, with which he was familiar, such a settlement would not bar recovery of the UM.

However, Oklahoma has a Court of Civil Appeals case, *Porter v. State Farm Mut. Auto. Ins. Co*.,[53] which held that taking less than the tort-feasor's liability limit has the effect of barring a UM recovery, even if there are arguably reasons why it makes sense to do so.

Madrid sued in Oklahoma. The trial court, Judge Don Andrews, followed *Porter v. State Farm* and sustained State Farm's Motion for Summary Judgment. The current decision declines

[52] 2019 OK CIV APP __, __ P.3d __ (Case No. 117,274, Aug. 30, 2019).
[53] 2010 OK CIV APP 8, 231 P.3d 691.

to follow *Porter v. State Farm* and reversed, in an opinion by Chief Judge Bryan Jack Goree, in the Oklahoma City Division of the Court of Civil Appeals. Judge Joplin concurred while Judge Buettner dissented, saying he would follow *Porter v. State Farm*.

Madrid argued that treating proof of the settlement for less than the liability policy as establishing conclusively that the value of the claim was less than the liability limit without regard to what other reasons existed for the settlement constituted establishing an irrebuttable presumption in violation of due process under *Vlandis v. Kline*.[54]

The *Madrid* Court noted that argument on Ms. Madrid's part but overruled the trial court's sustention of the summary judgment on the basis that there existed a fact question whether the basis for taking less than the liability limit was that the claim's value was not greater than the liability limit or, as Madrid's Texas lawyer explained, the cost of pursuing the claim against the tort-feasor.

This decision, in Division I of the Court of Civil Appeals, puts that division in conflict with *Porter v. State Farm,* in Division III of that Court. This would seem to set up the basis for the Supreme Court to grant *certiorari* to resolve the conflict.[55] This case serves as a cautionary tale for why lawyers ought to be very careful about handling cases involving other state's law without co-counsel from that state or some very careful legal research of the law of the other state.

Full disclosure: This was my case. I represented Madrid.

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[54] 412 U.S. 441 (1973).

[55] Oklahoma Supreme Court Rule 1.178(a)(3): Reasons for granting certiorari include: "Where a division of the Court of Civil Appeals has rendered a decision in conflict with the decision of another division of that court."

UNINSURED MOTORIST

Attorney's lien against UM claim not superior to medical lien when there is not enough money to pay both – *Dallas v. Geico Insurance Co.,* 2019 OK CIV APP 41, __ P.3d __

Dallas v. Geico Insurance Co.[56] holds that an attorney's lien against a UM claim is not superior to a medical lien but rather stands on the same footing as the medical lien when there is not enough money to pay both the medical lien and the attorney lien.

This is kind of a strange case. Mr. Dallas was injured while a passenger in a car driven by his wife who took evasive action to avoid a car which left the scene and was never identified. This circumstance resulted in an uninsured motorist (UM) claim against GEICO which was settled without a lawsuit for $60,614.78. This amount was not enough to pay a 50% attorney fee and pay the medical liens.

After the settlement was entered into without a lawsuit, Dallas filed an interpleader action, asking the trial court to adjudicate the medical liens and claims to apportion the settlement fund. The attorney endorsed "attorney lien claimed" on the interpleader petition.

The trial court, Judge Ogden, in Oklahoma County, conducted a hearing and took evidence. Two lien claimants did not appear and assert their claims. Two others accepted the trial court's allocation to them and did not join in the appeal. However, Pain Management Solution (Pain Management) participated in the trial and lodged this appeal.

The trial court gave the 50% attorney fee priority and ordered that paid and allocated the remaining settlement funds to the lien claimants who had appeared. Pain Management appealed, claiming the attorney had no lien because no suit was filed to recover the settlement before the

[56] 2019 OK CIV APP 41, 445 P.3d 873.

interpleader, that the 50% attorney fee was unreasonable and that the trial court erred in excluding what it claimed was evidence there had been a $52,000 offer before the ultimate settlement. The Court of Civil Appeals, in a unanimous opinion by Judge Keith Rapp, affirmed in part and reversed in part.

Judge Rapp rejected the evidentiary grounds, finding that there was no error in rejecting an offer of a letter Pain Management claimed reflected that there had been an offer of $52,000 before the lawyer was retained. The Court did not make clear whether the rejection was based on hearsay or that it was an offer of settlement. However, the Court noted that the "letter" was actually a hand-written message from Mr. Dallas asking Pain Management to accept $52,000 without saying the UM carrier had offered that.

The Court also rejected an argument that the trial court should have required introduction of the 50% fee contract instead of taking the lawyer's word for it that there was such a written contract. This was within the trial court's discretion.

The principal thrust of the opinion is that the attorney's lien had no priority over the medical liens so that the attorney's lien shared equally with the medical lien claimants in the settlement proceeds. This result flows from the applicable medical lien statute, 42 O.S.§46:

> A. Every physician who performs medical services or any other professional person who engages in the healing arts, within their scope of practice pursuant to Title 59 of the Oklahoma Statutes for any person injured as a result of the negligence or act of another, shall, if the injured person asserts or maintains a claim against such other person for damages on account of such injuries, have a lien for the amount due for such medical or healing arts services upon that part going or belonging to the injured person of any recovery or sum had or collected or to be collected by the injured person, or by the heirs, personal representative, or next of kin of the injured person in the event of his death, whether by judgment, settlement, or compromise. Such lien shall be inferior to any lien or claim of any attorney handling the claim for or on behalf of the injured person. The lien shall not be applied or considered valid against any claim for amounts due pursuant to the provisions of Title 85A of the Oklahoma Statutes.

> B. In addition to the lien provided for in subsection A of this section, every physician or professional person licensed under Title 59 of the Oklahoma Statutes who performs medical or healing arts within their scope of practice for any person injured as a result of the negligence or act of another, shall have, if the injured person asserts or maintains a claim against an insurer, a lien for the amount due for such medical or healing arts services upon any monies payable by the insurer to the injured person.

The Court notes that §46A deals with tort claims for the negligence of "another" on behalf of the injured party. On the other hand, §45B deals with and gives a medical lien for contract claims against the injured party's own insurance. The Court says Subsection A is not involved since that is not the claim involved in the case. Rather, the claim was a contract claim against Dallas's insurance company.

Subsection A provides that the medical lien is inferior to an attorney's lien. Subsection B does not have that provision. For that reason, the attorney's lien in this case did not get priority but rather the attorney lien and medical liens were coequal and shared equally.

The result was that the two medical lien claimants who did not participate and make claim got nothing. The two medical lien claimants who accepted the judgment got what they accepted since they did not appeal and the attorney and Pain Management shared the remainder equally.

There's an historical reason for 42 O.S.§46 being worded the way it is. Originally, the statute consisted only of what is now Subsection A. The Legislature added Subsection B in 2012 to reverse the case of *Kratz v. Kratz*,[57] which held that medical liens did not attach to the insured's own coverage, such as med pay and UM. The Legislature simply added Subsection B which provided a lien against the insured's own coverage but did not contain the language now

[57] 1995 OK 63, 905 P.2d 753.

found in Subsection A giving attorneys' liens priority.

The Court seems not very troubled about Pain Management's argument that the 50% attorney fee was unreasonable. Just sort of reading between the lines might make one suspicious that the 50% fee might have been expected to be split between the lawyer and the client after the litigation was over. But, the Court doesn't address that.

This case, while undoubtedly correct, is a difficult one for lawyers with claims against UM or med pay. However, it's going to take a change in the legislation to change it. One might wish "good luck" on the idea of getting this legislature to enact an amendment favoring lawyers over doctors and other health care providers!

UNINSURED MOTORIST

Tenth Circuit adopts different version of "mend the hold" doctrine than Oklahoma; provision extending coverage to a point "including, but not limited to" does not create ambiguity – *Genzer v. James River Ins. Co.,* 2019 WL 3926934 (10th Cir. Aug. 20, 2019)

Genzer v. James River Insurance Company[58] holds that the Tenth Circuit when applying Oklahoma law will adopt a different version of the "make whole" rule than do Oklahoma courts and that a policy provision extending UM coverage to a ride-share driver delivering a passenger to the trip's "final destination, including but not limited to, dropping-off of passenger(s)" is not ambiguous with regard to whether the driver's return trip from an out-of-town destination is part of the trip.

Ms. Genzer was an Uber driver in Oklahoma City. She accepted an assignment to deliver a passenger from Oklahoma City's Will Rogers Airport to Woodward, Oklahoma, a distance of some 139 miles. She delivered the passenger in Woodward and, according to her testimony, still

[58] 2019 WL 3926934 (10th Cir. Aug. 20, 2019).

logged into the Uber app so as to be available for another passenger taking the reverse trip, returned to Oklahoma City.

Near Watonga, Oklahoma, she was meeting an oil field truck with a load of pipe. A piece of metal departed the truck's load of pipe, penetrated her windshield and buried itself into her head. She was covered by an uninsured (UM) policy provided by Uber through James River Insurance Company for $1 million. The parties agreed that the truck, whose owner and driver were unknown, was an uninsured motor vehicle.

James River denied UM coverage for the stated reason that she was "offline at the time of the accident" and not logged into her Uber app. Genzer replied that she was logged into the app. James River responded that, whether "available or offline, there isn't coverage." The driver sued.

James River took the position in the lawsuit that there were two different policies (neither of which was available to the driver before the lawsuit) and that the policy under which it denied the claim did not apply and that the other policy terminated when she dropped off the passenger.

Genzer took the position that James River could not assert a coverage defense other than the one stated in its denial letter because of the "mend the hold" doctrine adopted in Oklahoma by *Morrison v. Atkinson*[59] and by the Tenth Circuit in *Haberman v. The Hartford Ins. Group.*[60] The term was a wrestling term in which a wrestler may turn loose his opponent in order to get a better grip on him some other way.

Genzer also claimed that the policy provided coverage by its terms because it applied to the trip to deliver a passenger to the trip's "final destination, including but not limited to, dropping-off of passenger(s)." This provision, she claimed, was at the strongest, from the

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[59] 1906 OK 25, 85 P. 472, 473.
[60] 443 F.3d 1257, 1270-1271 (10th Circuit 2006).

insurance company's viewpoint, ambiguous because her interpretation (that the return trip) was part of the trip during which coverage was provided was plausible as was the insurance company's interpretation and, when two or more interpretations of a policy are plausible, the policy is ambiguous and should be interpreted in favor of the insured and coverage.

The trial court, Judge Scott Paulk, in the Western District, granted James River summary judgment. The Tenth Circuit affirmed, in this opinion by Judge Phillips.

The Court expressed doubt that Oklahoma law adopted the mend the hold doctrine, based largely on an unpublished opinion by Judge White, *Fry v. American Home Assur. Co.*,[61] in which he said "It does not appear Oklahoma has adopted this doctrine, although it was mentioned in passing in *Morrison v. Atkinson*, 85 P. 472 (Okla.1906)." The Tenth Circuit affirmed *Fry*.[62]

In the present opinion, the Tenth Circuit states two grounds for failing to apply the mend the hold rule: (1) it says *Morrison* actually involves the rule that a party is bound on appeal by a position it took in the lower court and (2) that *Haberman* and *Buzzard v. Farmers Ins. Co., Inc.*[63] apply the rule only when the parties allege bad faith.

The Tenth Circuit's conclusion with regard to *Morrison* seems not supported by the opinion itself. It relies on the rule set forth and named by the United States Supreme Court in *Ohio & Mississippi Railway Company v. McCarthy*:[64] The *Morrison* Court says:

> Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold.

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[61] 2015 WL 519706.
[62] *Fry v. American Home Assur. Co.*, 636 Fed.Appx 764 (10th Cir. Okla.).
[63] 1991 OK 127, 824 P.2d 1105, 1109.
[64] 96 U.S. 258 (1877).

Despite this language, the Tenth Circuit suggests that the mend the hold rule in Oklahoma does not apply to a position taken by the party pre-litigation. So that will apparently be the rule in federal courts for the time being, until the Oklahoma Supreme Court addresses the issue. The Plaintiff in the present case asked the Tenth Circuit to certify the question of applicability of the mend the hold rule in Oklahoma after the trial court questioned the existence of the rule. The Tenth Circuit refused to certify the question.

This leaves us with the unfortunate situation that a case involving the mend the hold rule will likely reach a different result depending on whether it ends up being decided in state or federal court. It is very difficult to change a Court of Appeals ruling because one panel of that Court cannot change a ruling by another panel.

Moving on from the mend the hold question, the Court of Appeals determined that the policy was not ambiguous as to when the trip on which coverage was provided applied. The Court did not appear to be troubled by the question: what is the meaning of the language "including but not limited to" if not that some remainder of the trip necessary to get the Uber driver home from an out-of-town trip might be contemplated. The Court says it might, instead, refer to intermediate stops along the way before the passenger is dropped-off.

This is a bad case which we will regret. Plaintiff's attorneys will try very hard to keep the case in state court to take advantage of the favorable law there. They will also assert bad faith, even where it is probably not going to be successful as a bad faith case, to take advantage of the suggestion that the mend the hold rule applies to bad faith claims but not to other coverage claims.

For example, in the present case, bad faith was an unlikely outcome because almost certainly the insurance company could claim a good faith belief in its coverage defense. Yet the Court seems to be saying if Plaintiff had asserted a bad faith claim, *Haberman* and *Buzzard* would have required application of the mend the hold rule.

In the interest of full disclosure, this was my case and I lost it.

UNINSURED MOTORIST – BAD FAITH

Trial court can evaluate UIM claim, decide offer was reasonable and grant UIM carrier summary judgment – *McKinney v. Progressive Direct Ins. Co.*, 2019 WL 2092578 (W.D. Okla. May 13, 2019)

McKinney v. Progressive Direct Insurance Company[65] holds that the trial court can evaluate a UIM claim, decide the UIM carrier's offer was reasonable and grant the UIM carrier summary judgment on the bad faith claim.

Ms. McKinney was a passenger in her young friend's parents' car which her friend was driving. The friend lost control and hit a tree, badly injuring Ms. McKinney. Progressive had liability and UM on the car and paid a $100,000 liability limit. It evaluated her claim for UIM purposes at a range from $108,482.88 to $118,482.88 and offered $8,482.88 but later increased the range to $133,888.04 and increased the offer to $33,888.04. She had incurred medical of $147,134.14, which she submitted to Progressive but did not seek in the suit because the paid amount was only $33,685.39.

McKinney sued on the policy and for bad faith arguing Progressive made "low ball" offers, as forbidden by the Oklahoma Supreme Court in *Newport v. USAA*.[66] Progressive moved for partial summary judgment as to bad faith. The Court, Chief Judge Heaton, in the Western

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[65] 2019 WL 2092578 (W.D. Okla. May 13, 2019).
[66] 2000 OK 59, 11 P.3d 190.

District, sustained the Motion, without citing or referring to *Newport*!

This is an interesting result. If the jury in the suit on the policy comes back with some verdict close to Progressive's evaluation, maybe the decision will have been proven correct. But suppose the jury brings back a much larger verdict. Do we then back up and have a new ruling on the *Newport* bad faith issue? In case you can't tell, this is my case.

UNINSURED MOTORIST – BAD FAITH

Premium payment question bars summary judgment whether policy lapsed; court questions *Porter v. State Farm* as authority; summary judgment inappropriate as to punitive damages in bad faith case – *Nsien v. Country Mut. Ins. Co.*, 2019 WL 573424 (N.D. Okla. Feb. 12, 2019)

Nsien v. Country Mutual Insurance Company[67] holds questions about premium payments barred summary judgment on issue whether a policy lapsed, the Court declines to follow the Oklahoma Court of Civil Appeals' decision in *Porter v. State Farm* that settling for less than liability limits bars a UM recovery and that summary judgment was inappropriate as to whether Plaintiffs could recover for bad faith and seek punitive damages for bad faith.

Probably because the Plaintiffs were *pro se*, this opinion is a little choppy. Mr. and Mrs. Nsien bought from Country Mutual a car policy with per person limits of $100,000 for UM and $10,000 med-pay. Country Mutual sent a premium notice that they owed $1,970 in premium, which had to be paid by February 14, 2016 on the car policy and an umbrella policy, and that, if they failed to pay by that date, the policy would terminate on that date. On February 23, 2016, Country Mutual sent a cancellation notice saying the policy would terminate March 6, if they didn't pay the $1,970.

The insureds complained that several payments they had made were not reflected in the

[67] 2019 WL 573424 (N.D. Okla. Feb. 1, 2019).

$1,970 amount claimed due and paid $448.17. Country Mutual thanked them for the payment but said it was unable to reinstate the coverage and sent them a premium notice for $574.97. On March 21, the insureds were injured in a wreck with a motorist with minimum (25/50) coverage. On May 3, 2016, Country Mutual sent the insureds a letter saying their policy had been issued effective 11/19/15 and terminated effective 05/03/2016. Country Mutual later claimed that letter was written for the benefit of the insurance company which was going to write their new policy.

The insureds settled with the tortfeasor in their wreck for $30,000, allocated $20,000 to Mr. Nsien and $10,000 to Mrs. Nsien and sued on the UM and for bad faith including punitive damages. This opinion rules on Country Mutual's summary judgment motion on all issues. The Court, Judge Dowdell, in the Northern District, overruled the summary judgment motion in its entirety.

He held that there was sufficient uncertainty about whether the policy had lapsed that summary judgment on that issue was inappropriate. A list submitted by Country Mutual seemed to confirm some of the payments not shown on accounting documents had, in fact, been paid.

Most interestingly, Judge Dowdell refused to grant summary judgment on the basis that the acceptance of less than the liability limit on the tortfeasor's policy barred a UM recovery, as the Oklahoma Court of Civil Appeals held in *Porter v. State Farm*.[68] He notes that, by statute, a Court of Civil Appeals case not approved by the Supreme Court is not precedential. He notes that the Oklahoma Supreme Court considered whether accepting less than liability limits precludes recovering UM but declined to rule that way.[69] He also cited *Phillips v. New*

[68] 2010 OK CIV APP 8, 231 P.3d 691,694.
[69] Citing *Sexton v. Continental Cas. Co.*, 1991 OK 84, 816 P.2d 1135.

Hampshire Ins. Co.,[70] in which the 10th Circuit held the UM carrier is estopped to claim destruction of its subrogation where the insured did not know there was a need to protect UM subrogation because the policy was the insured's employer's and the insured did not know about it.

Finally, Judge Dowdell found enough unanswered questions to deny summary judgment on the bad faith claim and the punitive damage claim. This may be an interesting case to watch.

UNINSURED MOTORIST – BAD FAITH

> **UM exclusion for occupying a vehicle owned by or regularly furnished for the insured's use violates public policy as applied to an insured who had no opportunity to buy UM; not bad faith for UM carrier to have such an exclusion due to reasonable basis for believing it was valid – *Vickers v. Progressive N. Ins. Co.*, 353 F. Supp. 3d 1153 (N.D. Okla. 2018)**

Vickers v. Progressive Northern Insurance Company[71] holds a UM exclusion providing there will be no coverage when the insured is occupying a vehicle owned by or furnished for the regular use of the insured is void as violative of public policy as applied to an insured who had no opportunity to buy UM coverage but that a UM carrier was not in bad faith for having such a provision in its policy and denying a claim on the basis of the exclusion because the UM carrier had a good faith basis for believing the exclusion was valid.

Vickers' father's company (an LLC) owned a vehicle he was driving when he was injured by a motorist who had minimum (25/50) limits. The vehicle being occupied was insured by Hanover for liability but not for UM. Vickers' father, with whom Vickers lived, also had personal vehicles insured by Progressive for $100,000/300,000 UM. The Progressive policy had an exclusion recommended to Progressive by Progressive's counsel in the case which purported

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[70] 263 F.2d 1215, 1223 (10th Cir. 2001).
[71] 353 F. Supp. 3d 1153 (N.D. Okla. 2018).

to limit UM coverage to minimum compulsory insurance law limits (25/50) for an insured injured while occupying a vehicle owned by or furnished for the regular use of the insured but not covered by UM. Progressive denied coverage in excess of $25,000 on the basis of that exclusion.

Vickers sued on the policy and for bad faith. The parties filed Cross-motions for summary judgment. The Court, Judge Terry Kern, in the Northern District, overruled Progressive's motion for summary judgment that there was no coverage and sustained Vickers' motion that there was coverage but granted Progressive summary judgment that it was not in bad faith.

The exclusion for occupying a vehicle owed by the insured was declared invalid in *Cothren v. Emcasco.*[72] The Oklahoma Legislature in 2004 responded with an amendment now found in 36 O.S. Sec.3636E providing that there is no coverage when the insured is occupying a vehicle owned by or regularly furnished for the use of the insured but only "if such motor vehicle is not insured by a motor vehicle insurance policy." The Oklahoma Court of Civil Appeals appears to have misread the amendment in *Conner v. Am. Commerce Ins. Co.*[73] to say it applies even where the vehicle being occupied has insurance but no UM. It approved denying coverage to an insured who was occupying a motorcycle which had liability but no UM. This is the decision on which Judge Kern seems to have relied.

However, he also cites *Morris v. Am. First Ins Co.*[74] There, the insured had liability coverage on his commercial truck he was occupying but no UM. He was, however, covered for

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[72]1976 OK 137, 555 P.2d 1037.
[73] 2009 OK CIV APP 61, 216 P.3d 850,851.
[74] 2010 OK 35, 240 P.3d 661, 664.

UM because he was a member of his mother's household and she had UM. The Oklahoma Supreme Court held this satisfied the *Conner* requirement that the vehicle have UM so the UM on his car policy, which had the exclusion like the present one, provided coverage. The present opinion says *Morris* "held that the phrase 'motor vehicle insurance policy' meant "uninsured motorist coverage." That's just not what *Morris* held!

The closest *Morris* gets to addressing the general issue is:

> ¶15 Subsection (E) of § 3636 provides that "there is no coverage for any insured while occupying a motor vehicle owned by . . . a resident relative of the named insured, if such vehicle is not insured by a motor vehicle insurance policy." Although subsection (E) does not specifically mention uninsured motorist coverage, the holding of the *Conner* court is consistent with the reasoning in *Shepard [v. Farmers]*.
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> ¶16 In the *Shepard* case the United States District Court for the Western District of Oklahoma submitted a certified question that asked whether a clause in an insurance contract was unconscionable or against public policy as expressed in Oklahoma's Uninsured Motorist Act, which denied coverage for a relative of the insured living in the same household because that relative or the relative's spouse owned an automobile. The Court observed that "Since uninsured motorist coverage is mandatory unless waived, the presumption exists that one who owns an automobile has recourse to some uninsured motorist benefits" and held that "the exclusionary language [is] consistent with sound principles of contract and insurance law and valid as measured by the relevant statutory mandates of the Oklahoma Uninsured Motorist Act." *Shepard*, 1983 OK 103, ¶ 9, 678 P.2d at 253.
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> ¶17 The *Conner* case holds that where a resident relative of a named insured insures his vehicle with liability insurance, but rejects uninsured motorist coverage, then an insurance company, with the proper exclusion, may preclude UM coverage from extending to such a vehicle.

While the Court did not get there in a correct way, it certainly reached the correct result that the exclusion is invalid as applied. It is just that his reasoning makes the case a less broad ruling than it should be.

As to the bad faith claim, the Court not surprisingly held that the insurance company had a basis for a good faith belief its exclusion was a valid one, so he granted Progressive summary judgment on the bad faith claim.