Oklahoma Association for Justice

Continuing Legal Education

MALPRACTICE AVOIDANCE IN TORT AND INSURANCE CASES

By

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

Thursday, December 5th, 2019: Renaissance Tulsa Hotel and Convention Center, Tulsa

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MALPRACTICE AVOIDANCE IN TORT AND INSURANCE CASES

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MALPRACTICE AVOIDANCE IN TORT AND INSURANCE CASES

INTRODUCTION:

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

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

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

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

But we all know all that, so we won't talk much about it today. Today we will talk about some more substantive things you can do to avoid complaints and claims.

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

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

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

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

MISSED TIME DEADLINES:

Most missed time deadline malpractice cases do not lend themselves to prevention by Continuing Legal Education. They result from carelessness, or lack of a system, not lack of knowledge. We all know that, if we fail to file suits by the statute of limitations (SOL) date, we will have a major problem. Usually (although not always) we know the correct SOL. We just

lack the self-discipline to create or follow office procedures to avoid this sort of very avoidable loss. But some cases involve unusually short time constraints. We will talk about those.

The Importance of Systems

1. Have a Docketing System

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

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

2. Have a Backup System

The biggest malpractice exposure zones are our desks. It is a constant battle to keep from having a mountain of paper there, awaiting attention. If a file gets there without getting the SOL docketed, it is malpractice waiting to happen.

We try to guard against that with a procedure for docketing SOL's as soon as the new case is received over the internet, in the mail, hand delivered, or in a phone conversation.

In our office, our system looks like this:

3. Process for opening files and docking statutes of limitation

a. The person who answers the phone takes down pertinent information in an intake form. The form guides the inexperienced staff member on what information we need to collect from the potential client.

b. Our intake person then opens a file for every intake form, email, or other inquiry. Note: there are a few types of calls (bad acts by car dealers or car

repair shops and claims against landlords) that we refer to attorneys who handle those types of cases without opening files.

c. Our intake person dockets the case SOL in consultation with our attorneys. "Docketing" means putting the SOL on our calendar and adding tasks for all attorneys, legal assistants, and the intake person 3 months prior to the SOL, 2 months prior, and 1month prior to the SOL.

d. The intake person is trained to look for short statutes: OGTCA (state, municipalities, schools, hospitals, jails/prisons, etc.), intentional acts (assault, rape, slander, libel, etc.), statutory fire policies (we review the policy on all homeowners' claims to ensure there is not a short SOL). Additionally, the intake person is trained to recognize the 2-year SOL for tort cases (most wrecks, falls, negligence, injuries, and bad faith claims). Note: there are some cases in which we cannot docket a SOL: cases outside our practice which we refer to attorneys practicing in those areas (workers' comp, employment law, ERISA claims), homeowners' claims where the client has not yet provided any documentation of the SOL, cases where the client cannot remember the date of incident (DOI).

e. In consultation with our attorneys, the intake person refers the case, creates a file closing letter, or makes an appointment to sign the client. Note: we close all files with a letter, sent via email where possible. In referred cases, we copy the inbound and/or outbound referral attorneys on the letters and let them know what we have done with the case.

f. If we decline or refer a case, the intake person abandons the SOL calendar event and tasks.

g. If we handle a case, the intake person creates new file intake documents and converts the digital file from a "contact" file to a "litigation" file and assigns it to a legal assistant.

This system relies heavily on our Case Management Software and training of our staff. If you don't already have Case Management Software: GET SOME! It is relatively inexpensive, makes opening and closing files relatively easy, and provides a place for everything you need to work cases: name "cards" for case related people, important documents, emails, calls, notes and more. Good case management software, optimized and organized for your firm, and USED BY EVERY TEAM MEMBER, is a must.

There are a variety of cloud and non-cloud based case management software available:

- Practice Panther
- MyCase
- Clio
- CloudLex

They have become relatively inexpensive, most have a client portal-which makes communicating with clients easy, and are less expensive than a malpractice claim.

4. Be Sure the Docket Gets Reviewed

Of course, getting the SOL on the docket doesn't do much for you if you don't look at the docket. In addition to each paralegal or legal assistant knowing to check this, we designate an employee as the "Docket Fairy." Their job is to watch the docket for things which must be done and nag the paralegal or lawyer whose initials appear on the docket to see that it gets done.

Each file is assigned to a lawyer and a legal assistant. Both are responsible for seeing that the clerical people have docketed the matter. We make notes in the case management software of

what docketing we did. When the lawyer or legal assistant sees a matter has come in and not been docketed, they know to docket it.

5. Be Sure the Prospective Client Knows If You Will Not File the Case

It's important to make clear to the prospective client whether you will handle the case. We use the letter which is an Appendix to this paper for that. It's cheap malpractice insurance.

Short Statutes of Limitation

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

1. Statutory Fire Policies

The most commonly missed short SOL is the one-year SOL in the statutory fire insurance policy.[1] Suit must be filed within one year of the loss. The statute is constitutional.[2]

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

Even losses which are not under a statutory fire policy form may have a shorter SOL than the standard five-year statute. Under some circumstances, a policy may contain a valid provision

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[1] 36 O.S. § 4803(G) ("No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless. . . commenced within twelve months next after inception of the loss.")
[2] *Walton v. Colonial Penn. Ins. Co.*, 1993 OK 115, 860 P.2d 222.
[3] *Springfield Fire & Marine Ins. Co. v. Biggs*, 1956 OK 114, 295 P.2d 790.
[4] *Wagnon v. State Farm Fire & Cas. Co.*, 1997 OK 160, 951 P.2d 641.

shortening the time to sue to less than five years[5] under 36 O.S. § 3616. Figuring out which ones can be reduced to one year is tricky. The solution is "sue early and often" on insurance claims!

2. Health Insurance Policies

In *Terry v. Health Care Serv. Corp.*, 344 F.Supp. 3d 1314 (W.D. Okla. 2018), the Terrys' premature baby had to be evacuated by helicopter from Elk City to Oklahoma City due to a health condition. After transportation, the Terrys received a nearly $50,000 bill from the helicopter evacuation company. Blue Cross and Blue Shield of Oklahoma (BC) paid $4,849.86 after administrative appeal because the helicopter service was "out of network." BC asserted that rather than the 5-year SOL on a contract the Terrys were bound by a 3-year SOL. The Terrys ultimately survived a Motion to Dismiss, but this is a good example of a short statute of limitations which may well come back to haunt you.

Possible Cures

1. Waiver by Negotiation

It may be possible to salvage one of these short policy SOL cases. The insurance company may be estopped to assert its limitations defense by having negotiated and led the insured to believe it would settle.[6]

2. Maybe It's a Bad Faith Case

It may also be possible to assert that the insurance company's failure to pay the claim within a year was bad faith. This triggers the two-year SOL applicable to bad faith.[7] You contend that the amount which should have been paid under the policy is a consequential damage arising

[5] *Hayes v. State Farm Fire & Cas. Co.*, 855 F.Supp.2d 1291 (W.D. Okla. Jan. 24, 2012).
[6] *See Whitley v. Oolagah Ind. School Dist.*, 1987 OK 67, 741 P.2d 455; *Hart v. Bridges*, 1979 OK 31, 591 P.2d 1172; *Phillips Petroleum Co. v. U.S. Fid. & Guar. Co.*,1968 OK 23, 442 P.2d 303; *Agric. Ins. Co. of Watertown, N.Y. v. Iglehart*, 1963 OK 214, 386 P.2d 145.
[7] *Lewis v. Farmers Ins. Co., Inc.*, 1983 OK 100, 681 P.2d 67.

from the insurance company's bad faith.

This theory is not without its problems. In order to make a *Lewis v. Farmers* recovery, you must prove bad faith. If you only prove that the claim should have been paid, and not that the insurance company was in bad faith, you will get nothing.[8] Obviously both of these possible ways of salvaging a blown limitation period are just that: salvage operations. The best way to avoid malpractice from blown SOL's is not to blow SOL's in the first place.

3. File Suit in a Neighboring State

It is sometimes possible to file a suit in federal court in a state with a longer statute of limitation and then do an inter-district transfer to an Oklahoma federal court, pursuant to 28 U.S.C.§1404(a). The rule in federal courts is that the transferee court (in Oklahoma in this case) will apply the statute of limitations rule of the state in which the transferor federal court sits. So you can select a state where you can serve the defendant and which has a longer statute of limitations and get the Oklahoma federal court to apply that longer statute of limitations to your case.

That result originates from *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990). There, a claim originated in Pennsylvania but the statute ran there. The Plaintiff's lawyer sued John Deere in Mississippi, which had a longer statute of limitation, which had not run and transferred the case to Pennsylvania. The Supreme Court established the rule about applying the transferor court's statute of limitation.

We used that technique in *Hatchett v. K & B Transp*., 263 F.Supp2d 1315 (WD OK 2003). An Oklahoma lawyer let the statute run on an Oklahoma truck wreck which substantially injured the client. It turned out the defendant trucking company was incorporated in Nebraska.

[8] *Hale v. A.G. Ins. Co.*, 2006 OK CIV APP 80, 138 P.3d 567.

We hired a Nebraska lawyer and filed suit there and immediately did an inter-district transfer to the Western District of Oklahoma. Judge Joe Heaton reluctantly followed *Ferens* to hold that the Nebraska 4-year statute of limitations applied and allowed the case to proceed to a successful settlement.

Other Short Statutes

Other, less commonly seen, claims carry short SOL's: libel, slander, assault, battery, malicious prosecution, false imprisonment, and an action for statutory penalty or forfeiture.[9]

Foreign Statutes of Limitation

Foreign SOL's are a common cause of legal malpractice. Oklahoma lawyers are used to a two-year SOL for tort actions. Many other states have one-year tort limitations. Louisiana, for example, has a one-year tort SOL.[10] California has a one-year uninsured motorist SOL.[11]

When we talk to someone about a claim arising in another state or country, we always immediately run a search on Westlaw to check the SOL. Doing so saved us at least one certain malpractice claim. We took a case involving an accident an Oklahoman had in the Dominican Republic. Upon checking the SOL, we found that the Dominican Republic has a six-month tort SOL.[12] We had only a matter of weeks in which to file.

The foreign statute of limitation which gives Oklahoma lawyers the most grief seems to be Louisiana, which has a one-year statute of limitations on a tort action.[13] Another potentially troublesome neighboring state is New Mexico. While the general tort statute of limitations in

[9] 12 O.S. § 95(4).
[10] La. Civil Code Art. 3492 ("Delictual actions are subject to a liberative prescription of one year.")
[11] Cal. Ins. Code §11580.2(b)(2) (West 2019).
[12] Dominican Republic Civil Code, §§1304, 2219-2279.
[13] La. Civ. Code Arts. 3492, 3468.

New Mexico is three years,[14] a negligence action against a city, town or village carries a two-year statute.[15] The other neighboring states have general tort statutes of limitation equal to or longer than Oklahoma's two years.[16]

File Suit Early

Generally, filing a suit as early as possible after you get a tort or insurance claim in your office is a good practice. Obviously, you must make a suitable investigation to avoid sanctions under the rules requiring investigation into the factual and legal basis for the claim.[17] However, this ought not to take long. In addition to avoiding missed SOL claims, early filing starts pre-judgment interest running.[18] While the availability of pre-judgment interest has changed due to continually changing "tort reform" virtually doing away with it, the potential ought to be some inducement to file suit early.

Governmental Tort Claims Act Notice and Suit

1. Notice - a Short Fuse

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

You have one year from the date of loss to give written notice of claim, under 51 O.S. § 156. If you don't give notice within a year, the claim will be forever barred. Also, you don't have the minority of the claimant available to extend the statute, like you do for other claims.[19]

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[14] N.M. Stat. Ann. § 37-1-8.
[15] N.M. Stat. Ann. § 37-1-24.
[16] Arkansas: 3 years (Ark. Code § 16-56-105); Missouri: 5 years (Mo. Rev. Stat. § 516.20); Kansas: 2 years (Kan. Stat. Ann. § 60-513); Colorado: 2 years (Colo. Rev. Stat. § 13-80-102); Texas: 2 years (Tex. Civ. Prac. & Rem. Code § 16.003).
[17] 12 O.S. § 2011; Fed. R. Civ. P. 11.
[18] 12 O.S. § 727(A)(2).
[19] *Johns v. Wynnewood School Bd. of Ed.*,1982 OK 101: 656 P.2d 248.

Note that some old Court of Civil Appeals cases, **not overruled by name**, held the one-year "saving statute"[20] (which permits refiling of a case within one year) does not apply to a governmental tort claim.[21] However, the Supreme Court overruled those cases and held that the saving statute *does* apply to a governmental tort claim case.[22] What happens is that a defense lawyer cites one of these Court of Civil Appeals cases. The plaintiff's lawyer doesn't catch that it has been overruled. (Shepherd's or Key-Cite won't pick up that it's overruled). The plaintiff's lawyer may dismiss. But, note also, that the refiling statute does not *apply* to *Federal* Tort Claim Act cases.[23]

2. Time for Suit

Under 51 O.S. §157, suit must be filed within 180 days of the date the claim is denied. The claim is deemed denied at the end of 90 days from the date it is filed if the governmental entity does not respond.

You should note that the 180 days begins to run from the *earlier* of the date of the actual denial or the date the claim is deemed denied, after 90 days. *Clem v. Leedey Public Works Authority*[24] holds that the 180-day statute of limitations begins to run with the date of denial, not the date the denial letter is received. Docketing these dates becomes critical.

Earlier cases held that the governmental entity had no duty to notify you or your client it has denied the claim, so as to trigger the running of the 180 days. It was enough if the agenda of the meeting showed the claim is to be considered on a particular day.[25] However, a 1994

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[20] 12 O.S. § 100.
[21] *See Gibson v. City of Tulsa*, 1994 OK CIV APP 108, 880 P.2d 429; *Robbins v. City of Del City*, 1994 OK CIV APP 65, 875 P.2d 1170; *Ceasar v. City of Tulsa*, 1993 OK CIV APP 150, 861 P.2d 349.
[22] *Cruse v. Bd. of Cnty. Comm'rs of Atoka Cnty.*, 1995 OK 143, 910 P.2d 998.
[23] *Benge v. U.S.*, 17 F.3d 1286 (10th Cir. 1994) (applying Okla. law).
[24] *Clem v. Leedey Pub. Works Auth.*, 2003 OK CIV APP 93, 73 P.3d 969.
[25] *Patterson v. Town of Muldrow*, 1993 OK CIV APP 172, 865 P.2d 1269.

amendment[26] to §157 requires the governmental entity to give notice of the denial and provides the 180-day time to sue will not run until the 90-day "deemed denied" period if the entity does not give the notice. The shortened time limits of the Tort Claim Act are constitutional.[27]

SETTLEMENT PROBLEMS

Don't Release the Primary Tort-Feasor

If you release the person primarily liable and proceed against one secondarily liable, you may be liable.[28] If you release an employee and sue the employer, you will be out of luck. The release of the employee releases the employer, as a matter of law. This rule has been applied to statutory liability as well as *respondeat superior* cases.[29]

Release and Satisfaction and Releases:

1. Your Professional Life Got Safer

Until a few years ago, it was easy to get in trouble settling lawsuits. *Brigance v. Velvet Dove Restaurant*[30] held that release and satisfaction of a judgment barred an action against joint or concurrent tort-feasors, whether that was the parties' intent or not. In a landmark opinion, the Supreme Court reversed that ruling, holding that a release and satisfaction releases other tort-feasors only if the judgment was actually litigated or on its face reflects that it is intended to be a full satisfaction of all claims, including those against tort-feasors not joined.[31]

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[26] Laws 1994, c. 374, § 1.
[27] *Black v. Ball Janitorial Serv., Inc.*, 1986 OK 75, 730 P.2d 510; *Jarvis v. City of Stillwater*, 1983 OK 88, 669 P.2d 1108.
[28] *Barsh v. Mullins*, 1959 OK 2, 338 P.2d 845; *Mid-Continent Pipeline Co. v. Crauthers*, 1954 OK 61, 267 P.2d 568.
[29] *Burke v. Webb Boats, Inc.*, 2001 OK 83, 37 P.3d 811.
[30] 1988 OK 68, 756 P.2d 1232 ("*Brigance II*").
[31] *Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, 920 P.2d 122.

The problem was, of course, with friendly suits. We reduced claims to judgments and released and satisfied them to obtain court approval, because a minor could not contract to release a claim. Those friendly suits proved unfriendly. Now they are less so.

Releases also used to be dangerous. *Brown v. Brown*[32] held signing a release which releases the named tort-feasor "and all other persons" had the effect of releasing all tort-feasors. This became a very common source of malpractice problems, as lawyers failed to adequately read "boilerplate" releases and released claims they never meant to release. Once more, the Oklahoma Supreme Court came to our rescue and, in *Moss v. City of Oklahoma City*,[33] reversed *Brown* and held that only named tort-feasors will be released by such a release.

Another problem was the rule that release of the original tort-feasor released a successive tort-feasor. This applied most commonly when a doctor or hospital treated an accident victim and was alleged to have committed malpractice. If the victim settled with the tort-feasor who caused the original accident and injury, this release also released the doctor or hospital.[34]

A series of opinions reversed this rule as well.[35] Finally, *Hoyt v. Paul R. Miller, M.D., Inc.*[36] put together several of these rules. That case held an agreed judgment and release and satisfaction of the claim against the tort-feasor would not release the claim against the doctor.

2. Don't Settle with Tort-Feasors When You Have UM (Except Very Carefully)

Settlements with third parties can also have disastrous results as to UM coverages. *Porter v. MFA Mut. Ins. Co.*[37] holds that you will destroy your UM claim if you settle with and release

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[32] 1966 OK 2, 410 P.2d 52.
[33] 1995 OK 52, 897 P.2d 280.
[34] *See Farrar v. Wolfe*, 1960 OK 123, 357 P.2d 1005; *reversed by Hoyt v. Paul R. Miller, M.D., Inc.*, 1996 OK 80, 921 P.2d 30.
[35] *See Shadden v. Valley View Hospital*, 1996 OK 140, 915 P.2d 364; *Carmichael v. Beller*, 1996 OK 48, 914 P.2d 1051.
[36] 1996 OK 80, 921 P.2d 350.
[37] 1982 OK 23, 643 P.2d 302.

the tort-feasor. *Frey v. Independence Fire and Cas. Co*.[38] reaches the same result if the insured settled with the tort-feasor by using a covenant not to sue the tort-feasor. A specific reservation of the right to sue the UM insurance company did not prevent destruction of the UM claim.

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

However, *Porter v. State Farm* has come under heavy fire and the ruling in that case may be about to change. *Nsien v. Country Mut. Ins. Co.*[39] casts doubt on the holding. *Madrid v. State Farm Mut. Automobile Ins. Co.*[40] has another division of the Court of Civil Appeals holding directly to the contrary of *Porter.* As this is written, *Madrid* is pending on Petition for *Certiorari* and looks likely to be granted to resolve the conflict.

3. Put the UM Carrier on Notice

The UM Statute has a provision on how to put the UM Carrier on notice. 36 O.S. §3636(F) provides:

> F. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor. Provided further, that any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage. Provided further, that if a tentative agreement to

[38] 1985 OK 25, 698 P.2d 17.
[39] 2019 WL 573424 (N.D. Okla. Feb. 12, 2019).
[40] 2019 OK CIV APP __, __ P.3d__.

settle for liability limits has been reached with an insured tort-feasor, written notice shall be given by certified mail to the uninsured motorist coverage insurer by its insured. Such written notice shall include:

1. Written documentation of pecuniary losses incurred, including copies of all medical bills; and

2. Written authorization or a court order to obtain reports from all employers and medical providers. Within sixty (60) days of receipt of this written notice, the uninsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The uninsured motorist coverage insurer shall then be entitled to the insured's right of recovery to the extent of such payment and any settlement under the uninsured motorist coverage. If the uninsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within sixty (60) days, the uninsured motorist coverage insurer has no right to the proceeds of any settlement or judgment, as provided herein, for any amount paid under the uninsured motorist coverage.

4. Possible Cures

i. Is There Subrogation?

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

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

See also *Raymond v. Taylor*, 2017 OK 80, 412 P.3d 1141:

"¶20 As there is no right to subrogation by an UM carrier against an under-insured tort-feasor's assets, Mercury did not have the right to subrogate the UM payment . . . ."

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

5. Will the Insured Be Fully Paid?

Oklahoma has adopted the "make whole" rule. This rule holds that there is no subrogation where the effect of subrogation would be to cause the insured to be less than fully

compensated or "made whole."[41] If there is no subrogation, then the insurance company can hardly be prejudiced by the settlement.

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

6. Was the Insurance Company Prejudiced?

Neither *Porter* nor *Frey* discuss whether the UM carrier asserting the insured's release of the tort-feasor as a defense must prove prejudice. You should argue that, if the lost subrogation right was uncollectible, there was no prejudice and the release is no defense.

Little law addresses whether the insurance company must show that it was prejudiced by the settlement. The few cases available say it must show prejudice.[42] The Tenth Circuit, predicting Oklahoma law would move in this direction, agreed.[43]

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[41] *See Equity Fire and Cas. Co. v. Youngblood*, 1996 OK 123, 927 P.2d 572, *disapproving Fields v. Farmers Ins. Co., Inc.*, 847 F.Supp. 160 (W.D. Okla. May 24, 1993), *aff'd*, 18 F.3d 831 (10th Cir. 1994).

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

[43] *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001).

7. Did the Insurance Company Waive or is it Estopped to Assert Subrogation?

The insurance company may waive or be estopped to assert its subrogation right and not be able to assert destruction of its subrogation by the settlement by denying UM coverage,[44] improperly leaving UM coverage off the policy so as to mislead the insured into settling with the tort-feasor,[45] or by improperly refusing to pay UM[46] or not timely paying UM.[47]

Don't Covenant Not to Execute Against the Tort-Feasor or Try to Covenant Not to Execute and Assign a Bad Faith Claim

Take care not to execute a covenant not to execute on a judgment, except with agreement of the defendant's insurance company. I have seen courts treat this covenant as releasing the insurance company. It is extremely dangerous, and should be avoided.

Also avoid the temptation to settle the underlying case against the tort-feasor by agreeing not to collect from the tort-feasor but rather execute only against his insurance company.[48]

Don't Get Stuck for an ERISA Subrogation Claim

1. Don't Let Your Client Fail to Pay ERISA Subrogation

Employer-sponsored health plans will claim that a lawyer who fails to see to it that his client pays a subrogation claim to the plan may be personally liable to the health insurance plan or company, under ERISA.[49] An Oklahoma federal court reached that result,[50] rendering judgment for $83,819.15 against a lawyer who failed to force his client to repay an ERISA subrogation claim. The rationale for the ruling is that the lawyer who involuntarily becomes a "fiduciary" for the ERISA plan, is obligated to protect the health plan against the client because

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[44] *Sexton v. Continental Cas. Co.*, 1991 OK 84, 816 P.2d 1135.
[45] *Robertson v. United States Fid. & Guar. Co.*, 1992 OK 113, 836 P.2d 1294.
[46] *Buzzard v. Farmers Ins. Co., Inc.*, 1991 OK 127, 824 P.2d 1105.
[47] *Strong v. Hanover Ins. Co.*, 2005 OK CIV APP 9, 106 P.3d 604.
[48] *Colony Ins. Co. v. Burke*, 698 F.3d 1222 (10th Cir. 2012).
[49] Employee Retirement Income Security Act—29 USC §§1001 *et seq*.
[50] *Health Cost Controls v. White*, No. CIV-92-1818-D (W.D. Okla. Sep. 29, 1993).

he has "discretionary authority" to dispose of the settlement proceeds contrary to his client's wishes.[51]

Oklahoma and the Tenth Circuit have ruled differently as to the validity of the "make whole rule."[52] Because ERISA is a federal law, the federal courts have concurrent jurisdiction with the state courts. Which court you are in will determine whether this important rule applies.

This remains a threat, even though the case on which the Oklahoma federal judge relied has been reversed on appeal.[53] The only safe way to protect yourself from this potential source of liability is to sue the ERISA plan for a declaratory judgment as to the plan's entitlement to the funds. I once told an ERISA plan lawyer I was going to do that. His response was to threaten sanctions for not conceding his right to my client's settlement.

The "bottom line" of the "is the lawyer an ERISA fiduciary" question is the lawyer probably is not and will probably not be successfully sued. But do you want to be sued?

Don't Put Your License on the Line to Stiff a Medical Lien Claimant

The Oklahoma Supreme Court has made our life difficult. *State ex rel. Oklahoma Bar Association v. Bedford*[54] holds that the lawyer owes a duty to a medical lien claimant to see that the lien claimant got paid out of a settlement. This was so even though the Professional

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[51] 29 USC §1001(21)(A) defines a fiduciary as one who "exercises any discretionary authority or discretionary control respecting management or disposition of [the Plan's] assets." Judge Daugherty in *Health Cost Controls* does not make it clear whether the lawyer should turn in his license before or after taking action contrary to his client's position and on behalf of the ERISA plan. He does note that there is no problem with a federal law requiring the attorney to participate in a conflict of interest with his client.

[52] *Equity Fire and Cas. Co. v. Youngblood*, 1996 OK 123, 927 P.2d 572, *disapproving Fields v. Farmers Ins. Co., Inc.*, 847 F.Supp. 160 (W.D. Okla. May 24, 1993), *aff'd*, 18 F.3d 831 (10th Cir. 1994).

[53] The decision relied on *Chapman v. Klemick*, 750 F.Supp. 520 (S.D. Fla. Oct. 30, 1990), which was reversed on appeal at 3 F.3d 1508 (11th Cir. 1993), and abrogated *Hotel Emps. & Rest. Emps. Int'l Union Welfare Fund v. Gentner*, 815 F.Supp. 1354 (D. Nev. Mar. 9, 1993); *aff'd*, 50 F.3d 719 (9th Cir. 1995) (lawyer is not a "fiduciary" under ERISA).

[54] 1997 OK 83, 956 P.2d 148.

Responsibility Tribunal (which is the fact-finding body in a bar disciplinary case) found the lawyer had no actual notice of the lien. By paying out the settlement proceeds to the client and failing to protect the medical lien claimant, the lawyer committed an ethical violation. The same rule may or may not apply to subrogation claims. It is a scary subject.

It gets worse. *State ex rel. Oklahoma Bar Association v. Taylor*[55] holds that, at least under the peculiar circumstances of that case, the lawyer had a duty not only to segregate the funds claimed by medical lien claimants, he also had a duty to interplead funds to pay the lien claimants. The case may be somewhat limited to its facts because the lawyer involved had told the lien claimants he would interplead the funds if the lien claimants could not agree to a distribution. Hopefully, that is what the Supreme Court meant to hold. It may be that the lawyer may just notify the claimants he holds the funds and leave it to the claimants to file some action to resolve disputes as to whether the client owes the money and, if so, how much.

You may also face personal liability in a civil case for failing to honor a lien.[56] *Vaughn* also holds the lien attached to the funds in the lawyer's hands, even though the lien was not yet filed when he settled. Read these cases before getting into a dispute with lien or subrogation claimants to your clients' recovery. It could save you a bar complaint or civil liability.

CONCLUSION

Plaintiffs' lawyers face a significant malpractice exposure. The best defense to a malpractice suit is to not let the malpractice happen in the first place. Malpractice avoidance is good practice. Not only does it avoid significant fiscal exposure, it also results in clients having claims decided on the merits. That's how the system should work.

[55] 2003 OK 56, 71 P.3d 18.
[56] *St. Francis Hosp. v. Vaughn*, 1998 OK CIV APP 167, 971 P.2d 401.

APPENDIX

Letter Declining Representation

August 1, 1992

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

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

Dear Ms. XXXXXX:

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

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

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

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

Good luck. Thank you for contacting us.

Yours very truly,

Rex Travis

RT/??
cc: ???