OKLAHOMA ASSOCIATION FOR JUSTICE

CONTINUING LEGAL EDUCATION

Tort Reform

By Rex Travis

About the Speaker:

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INTRODUCTION

The 2011 legislative session is, thankfully, over. Now we need to figure out what the legislature did to us and how we should respond to it. The purpose of this presentation is to present a sort of a thumbnail sketch of the provisions of the "tort reform" bills and what they provide.

THE BILLS

House Bill 2128

Probably the most talked about bill (although probably not the one which will have the most impact) is HB 2128, which purports to put a $350,000 hard cap on non-economic damages in bodily injury cases. This will amend 23 O.S. § 61.2 (the $400,000 damage cap legislation which passed in 2009 but never became effective.) That 2009 effort was to become effective in limiting non-economic damages only upon enactment of a $20 million "Health Care Indemnity Fund" under which the state would, in effect, provide doctors with that amount of excess medical malpractice insurance at the cost of the taxpayers. (Of course, that never happened.)

The new bill differs from the 2009 bill in several regards besides the amount and the Indemnity Fund. You may recall, the 2009 bill provided for exceptions both based on the degree of fault of the tort-feasor and the severity of the injury. As a practical matter, anyone hurt badly enough to justify non-economic damages in excess of the $400,000 the bill provided almost certainly would be hurt badly enough to come within the exceptions based on severity of injury. Those "severity of injury" provisions have been omitted from the 2011 version. What remains is an exception where the judge and jury find the tort-feasor's action to be in reckless disregard of the rights of others, grossly negligent, fraudulent or intentional or with malice. That lifts the cap.

The new law does not apply to wrongful death or Governmental Tort Claims Act Cases. It states it "shall apply to civil actions filed on or after November 1, 2011."

The mechanics of how the caps will be implemented present problems. The jury is not told of the limitation. Rather, the jury returns a general verdict for an amount of overall damages. The statute requires the court to submit special interrogatories to the jury as to which of the damages are for economic and which for non-economic damages and whether the tort-feasor's conduct falls within the categories which justify an exception to the damage limits.

This latter provision, which seems central to the working of the statute, would seem to run afoul of Article 7, §. 15 of the Oklahoma Constitution:

> In all jury trials the jury shall return a general verdict, and no law in force nor any law hereafter enacted, shall require the court to direct the jury to make findings of particular questions of fact

Senate Bill 862

Senate Bill 862 continues an erosion of the common law rule of joint and several liability which has been going on for several years. It amends 23 O.S. 2010 Supp. § 15. You will recall that statute provided for joint and several liability on a defendant whose negligence was greater than 50% or whose conduct was willful and wanton or who acted with reckless disregard of the consequences of conduct. Those provisions are removed so that there is no more joint and several liability.

The basis of joint and several liability has always been that there is inherent in the system the risk that one or more tort-feasors will be insolvent and unable to respond in damages. The joint and several liability rule put that risk on the guilty tort-feasor, rather than the innocent victim. This statute reverses the rule and imposes the risk of insolvency on the innocent victim.

The statute applies to "civil actions based on fault that **accrue** on or after November 1, 2011." The statute purports to apply to "any civil action based on fault and not arising out of contract."

Senate Bill 865

Senate Bill 865 enacts a new law as 12 O.S. § 577.4 which requires that juries be instructed that amounts received as an award for damages for personal injury or wrongful death are not subject to income tax. That seems pretty straightforward. However, the statute further provides that "Any amount that the jury determines to be proper compensation for personal injury or wrongful death shall not be increased or decreased by any consideration for income taxes." However, it does not suggest the jury should be instructed about that.

The statute then contains a sentence which reads: "In order to be admitted at trial, any exhibit relating to damage awards shall reflect accurate tax ramifications." I have no idea what that means.

House Bill 2023

House Bill 2023 is one of the more complex of the new bills and one of the more dangerous for plaintiffs and their lawyers. It enacts a new statute, 12 O.S. § 3009.1. The thrust of the new statute is to limit an injured plaintiff's recovery for medical bills to the actual amount paid by medicare, medicaid or a health insurance company, rather than the (usually higher) amount charged by the health care provider. If the bill is paid by one of those entities, the recovery is limited to that amount, if the health care provider has agreed to accept that amount. In order for the restriction to apply, the health care provider has to agree in a signed statement that it will accept the amount paid. There is an exception where the provider has filed a lien for an amount in excess of the amount paid. In that event, the amount of the lien will be admissible.

If the bills have not been paid, the amount admissible to the jury will be the medicare reimbursement rate, less the share of recovery costs which medicare will allow, provided the health care provider states it will accept that amount. It would not appear many health care providers will agree to this as it makes the provider bear the cost of recovery and, so, receive less than it otherwise would under medicare. This statute purports to apply to civil cases involving personal injury filed after November 1, 2011.

House Bill 2024

House Bill 2024 creates a new statute, 23 O.S. § 9.3 which permits payment of future damages over a not longer than 7 year period, with interest. The court has discretion under the act to order future payment of future damages, the present value of which exceeds $100,000. There is a provision requiring the defendant to show it is adequately insured or post various forms of security to secure payment. In the event of death of the recipient of the future damages, the future damage payments will be made to the recipient's estate. Attorney fees will be calculated on the present value of the future damages. The statute does not say whether the attorney fees must likewise be paid out.

The new statute has a puzzling subsection in it: "The entry of an order for the payment of future damages by periodic payments constitutes a release of the health care liability claim filed by plaintiff."

Senate Bill 272

Senate Bill 272 is the long sought "no pay - no play" bill. It enacts a new statute, 47 O.S. § 7-116 which provides that any driver or owner in violation of the compulsory insurance law cannot recover non-economic damages if injured in a wreck. Rather, they will be limited to recovery of "medical costs, property damage, and lost income and shall not include any award for pain and

suffering." There are exceptions where the plaintiff was injured by a motorist who was under the influence of drugs or alcohol and either was convicted of or pled guilty or nolo to the offense or who was killed as a result of the wreck and is proven by a preponderance of the evidence to have been under the influence.

The statute does not apply if the plaintiff was a passenger in a motor vehicle, unless the plaintiff was the owner or if the plaintiff is a pedestrian. It does not apply to wrongful death claims or to an injury when the tort-feasor intentionally caused the wreck, left the scene or was acting in furtherance of the commission of a felony. The plaintiff is not effected by the statute if the plaintiff was claimed as a dependent on the federal income tax return of a parent and the parent or parents were the ones who did not comply with the compulsory insurance law. The statute also does not apply if the plaintiff had been previously covered by an insurance policy that was terminated or non-renewed for failure to pay the premium, unless at least 30 days before the accident notice of termination was sent to the last-known address of the policyholder. The defendant or the defendant's insurance company may assert the limitation of the statute. The bill will become effective November 1, 2011.

Senate Bill 704

Senate Bill 704 amends 12 O.S. § 2023, dealing with class actions. It adds a provision that the petition must contain "factual allegations sufficient to demonstrate a plausible claim for relief." Otherwise, it makes only housekeeping changes to render references in the statute gender-neutral. It does not appear to me to make a significant change.

TO SUE OR NOT TO SUE, THAT IS THE QUESTION (With apologies to Will Shakespeare)

By Rex Travis

With the effective date of the so-called "tort reform" legislation upon us on November 1, 2011, the question arises, should we rush to file every claim in our offices before that date or can we wait and file after November 1 and still escape the ravages of the new statutes. The short and general answer is that we should file everything we can before November 1, although some specific pieces of legislation (most of them, in fact) will probably not apply to claims or causes of action arising before November 1. It should also be noted that some of the new statutes are almost certainly unconstitutional. However, that is a subject for another article. But it simply doesn't make sense to delay filing, particularly since more than one of the new statutes may effect your case.

One of the bills on its face does not purport to apply to pre-existing claims or causes of action. Senate Bill 862, which amends 23 O.S. 2010 Supp. §15, and does away with joint and several liability purports to apply only to actions that accrue after November 1, 2011. To avoid that bill, it should not be necessary to file before November 1.

As to the remainder of the bills, there are some general rules which give guidance as to whether they will apply to a pre-existing claim or cause of action. The "default" rule is that statutes apply prospectively only. If the statue creates, enlarges or diminishes vested or contractual rights then it applies prospectively absent clear legislative intent. Statutes that are merely procedural can be applied retroactively and can apply to pending actions or procedures. Article 5 section 54 of the Oklahoma Constitution provides that " The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by

virtue of such repealed statue."[1] In *Cole v. Silverado Foods, Inc*., the Oklahoma Supreme Court said that this provision is intended to "protect from legislative extinguishment by retroactive enactments accrued rights acquired or proceedings begun under a repealed or amended statute."[2] The statute at issue in *Cole v. Silverado* shortened from five to three years the time that a workers compensation claim had to be pursued prior to becoming barred by lapse of time.[3] In finding the amendments inapplicable, the Court held that"[t]he statute in effect at the claim's filing, which affects the parties' substantive rights and liabilities, is shielded from amendatory change"[4]

This constitutional provision also raises a question of when a claim is said to "accrue" for purposes of barring retroactive application of a statute. In *Barry v. Board of Com'rs of Tulsa County,*[5] the plaintiffs filed suit seeking relief from a property tax assessment for the years 1931 and 1932.[6] The defendant Board initially denied the plaintiffs' application citing a statutory amendment which became effective approximately 60 days prior to the plaintiff's application, which divested the Board of jurisdiction to hear such claims.[7] The Supreme Court said the plaintiffs had an "accrued right"in the form of a cause of action, prior to the effective date of the1933 amendments.[8] In determining what the

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[1] Art. 5 §54, Okla. Const.

[2] *Cole v. Silverado Foods, Inc*., 2003 OK 81, ¶14, 78 P.3d 542, 548.

[3] *Cole v. Silverado Foods, Inc*., 2003 OK 81, ¶1, 78 P.3d 542, 544.

[4] *Cole v. Silverado Foods, Inc*., 2003 OK 81, ¶15, 78 P.3d 542, 549.

[5] *Barry v. Board of Com'rs of Tulsa County*, 1935 OK 701, 49 P.2d 548.

[6] *Barry v. Board of Com'rs of Tulsa County*, 1935 OK 701, ¶2, 49 P.2d 548, 549.

[7] *Barry v. Board of Com'rs of Tulsa County*, 1935 OK 701, ¶3, 49 P.2d 548, 549.

[8] *Barry v. Board of Com'rs of Tulsa County*, 1935OK 701, ¶8, 49 P.2d 548,550.

words "proceedings begun" means, the Court has held "proceeding begun" refers to essential steps or measure to invoke, establish, or vindicate a right, "[9] and any proceedings that were begun before the effective date of the new legislation are unaffected.[10] Considering this it would seem that the best way to protect yourself from the impending effective date of the "tort reform" legislation would be to institute "proceedings" prior to November 1, 2011.

In *Phillips v. H.A. Marr Grocery Co.*, the Oklahoma Supreme Court held that a statute that granted extraterritorial jurisdiction to the Industrial Commission over injuries that were sustained outside of the state was not merely procedural and could be applied prospectively only.[11] Before the 1955 legislative enactment, the Industrial Commission did not have authority under the Workmen's Compensation Act to provide compensation to workers who sustained injuries outside of the state, regardless of the fact that the contract to perform the work was made within the state.[12] The Court first looked to the face of the legislation and found no clear language or legislative intent in the Act that expressly stated that it was to have retrospective effect. The Court said the "general rule is that statues are to be construed to have only prospective operation unless the purpose and intent of the legislature to give them a retrospective effect is expressly declared or implied from the language used."[13] The Court

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[9] *First Nat. Bank of Pauls Valley v. Crudup*, 1982 OK 132, ¶5, 656 P.2d 914. (Internal Quotations omitted).

[10] *Nantz v. Nantz*, 1988 OK 9, ¶8, 749 P.2d 1137,1143 (Opala, J. Dissenting).

[11] *Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, 295 P.2d 765.

[12] *Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, ¶ 6, 295 P.2d 765,767.

[13] *Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, ¶ 11, 295 P.2d 765, 767.

determined that the amendment was not purely procedural but conferred a right to recovery that was not available prior to the enactment.[14]

MFA Insurance Company v. Hankins, deals with the ability to apply a statute retroactively, Hankins sued for personal injury as result of a one-vehicle car wreck that occurred on April 24, 1974.[15] On March 16, 1976, the Legislature amended the Uninsured Motorist Statute, 36 O.S. 3636(c), to include claims for underinsured motorist coverage. Thereafter, Hankins notified his insurance company that he would be seeking underinsured motorist coverage under his policy. [16] After the insurance company intervened in the original suit, Hankins argued that the change to the Uninsured Motorist Statue was applicable retrospectively to provide coverage in excess of the original tortfeasor's liability limits.[17] The Court held that since the 1976 amendments increased the damages covered by uninsured motorist protection, it effected the substantive rights of litigants and could not be applied retroactively.[18] In doing so the court cited with approval the analysis contained in the *Thomas* decision.[19]

In *Thomas v. Cumberland Operating Co.,*[20] the Oklahoma Supreme Court held "Statutes are to be construed as having a prospective operation."[21] Barring express language to the contrary, the court

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[14]*Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, ¶ 15, 295 P.2d 765,767.

[15] *MFA Ins. Co. v. Hankins*, 1980 OK 66, ¶ 1, 610 P.2d 785, 785.

[16] *MFA Ins. Co. v. Hankins*, 1980 OK 66, ¶ 1, 610 P.2d 785, 785.

[17] *MFA Ins. Co. v. Hankins*, 1980 OK 66,¶ 7, 610 P.2d 785, 787.

[18] *MFA Ins. Co. v. Hankins*, 1980 OK 66,¶ 7, 610 P.2d 785, 787.

[19] *MFA Ins. Co. v. Hankins*, 1980 OK 66, 610 P.2d 785.

[20]*Thomas v. Cumberland Operating Co.,* 1977 OK 164, ¶4, 569 P.2d 974, 975.

[21]*Thomas v. Cumberland Operating Co.,* 1977 OK 164, ¶4, 569 P.2d 974, 975.

will presume against retroactivity.[22] On the other hand, remedial or procedural statutes are applicable to all actions, whether or not pending on the statute's effective date.[23] *Thomas* was a wrongful death case. Before 1975, the wrongful death statutes provided only pecuniary loss for the death of a child. In 1975, the Legislature enacted 12 O.S. §. 1055, providing for non-pecuniary damages -" . . . loss of companionship and love of the child, destruction of parent-child relationship . . ." and the cost of rearing the child to the date of death. The question was whether this new statute would apply to a death which occurred before the statute's effective date. The Supreme Court held it did not. The rules the Oklahoma Supreme Court used in this case may serve as a guide to how the court would interpret the most recent "tort reform" legislation:

House Bills 2128 and 2023, both state that they will apply to civil actions filed on or after November 1, 2011. This language would seem to encompass claims that arise before November 1, 2011 but are not filed until on or after that date. House Bill 2128 amends 23 O.S. §61.2, and limits the amount of recovery for a cause of action based on bodily injury to Three Hundred Fifty Thousand Dollars ($350,000.00), while House Bill 2023 enacts 12 O.S. §. 3009.1, and limits an injured plaintiff's actual recovery to the amount actually paid by Medicare, Medicaid or health insurance. Both of these statutes attempt to limit the amount that a plaintiff may recover. The Supreme Court has held "Limitations on damages, whether actual or punitive can constitute a change in substantive rights."[24] The Court in *Thomas* said, "[u]nder the great weight of authority, the measure and elements of damages are matters

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[22] *Thomas v. Cumberland Operating Co.,* 1977 OK 164, ¶4, 569 P.2d 974, 975.

[23] *Thomas v. Cumberland Operating Co.,* 1977 OK 164, ¶4, 569 P.2d 974, 975.

24 *Majors v. Good*, 1992 OK 76, ¶ 8, 832 p.2d 420, 422 (Holding that a cap on punitive damages should be applied prospectively only).

of substance and right not the remedy."[25] It would follow that regardless of the fact that the legislation purports to encompass "civil actions filed on or after November 1, 2011," the fact that they implicate substantive rights would prohibit them being applied retroactively to claims arising before November 1, 2011.

Senate Bill 272 enacts 47 O.S. §. 7-116 (the so-called "no pay, no play" law). It limits recovery to economic damages for injured drivers who violate the Compulsory Insurance Law.[26] The Act states that it will become effective on November 1, 2011, but does not state if it is applicable to claims arising prior to that date but filed on or after that date. New legislation that does not expressly provide to the contrary should be viewed as prospective only, absent a showing of a contrary intent on the part of the legislature.[27] Furthermore, this act diminishes the rights of individual injured in automobile accidents by limiting the amount that can be recovered if the individual fails to comply with the Compulsory Insurance Law. Considering the substantive rights implicated by this legislation, and the fact that the legislature did not indicate a contrary intent, this provision should be applied prospectively only.

Senate Bill 865 enacts a new section of law codified under 12 O.S. § 577.4 which changes the Oklahoma Uniform Jury Instructions. It requires that any exhibit relating to damage awards reflect the tax ramifications, and provides for an instruction that no part of the damages awarded in wrongful death and personal injury cases are subjected to federal income taxes. This legislation can be argued to be only procedural in nature and would be applicable to all actions regardless of the stage the proceeding.

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[25] *Thomas v. Cumberland Operating Co.,* 1977 OK 164, ¶10, 569 P.2d 974, 977; see also, *Majors*, 1992 OK at ¶ 8, 832 P.2d 421.

[26] 47 O.S. § 7-601.

[27] *State ex rel. Crawford v. Guardian Life Ins. Co. of America,* 1997 OK 10, ¶ 8, 954 P.2d 1235, 1238; *Forest Oil Corp. v. Corporation Com'n of Oklahoma*, 1990 OK 58 § 11, 807 P.2d 774, 781.

However, this legislation does seem to possibly limit the amount that can be recovered by a consideration of tax ramifications. In that case the traditional methods of statutory interpretation would seem to show that this legislation be applied prospectively only.

The remaining bills enacted under the guise of "tort reform" seem to be more procedural in nature and may be applied retroactively. House Bill 2024 creates a new statute, 23 O.S. §. 9.3. It allows payment of future damages over a period not to exceed 7 years, with interest. This provision would seem to apply to be procedural and related to the remedy, rather than the right. In the absence of language to the contrary it could be applied to claims in existence its effective date, regardless of the stage of the matter. However, one could certainly argue that, before the statute's effective date, the injured plaintiff had a right to recover all damages due at once and not merely a right to receive damages over time. This would seem to make it substantive.

Senate Bill 704 amends 12 O.S. §. 2023, and adds a provision pertaining to the petition in class actions. This act becomes effective on November 1, 2011 and since it deals with pleading requirements it would be viewed as procedural and applicable to cases that are filed on or after the date of enactment.