Oklahoma Association for Justice

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INSURANCE LAW UPDATE 2020

By

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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 58 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 graduated from University of Oklahoma with a Bachelor of Arts in 1986. She earned her Juris Doctorate from the University of Oklahoma College of Law in 1991. She has practiced in the areas of insurance law, bankruptcy, and personal injury since she was admitted to the Oklahoma Bar in 1991. Margaret went back to the University of Oklahoma Health Sciences Center and earned a Master of Health Administration in 2013. Additionally, she serves the City of Oklahoma City as a Special Municipal Judge.

For the past fifteen years, Margaret practiced in the area of bankruptcy law and has developed a successful bankruptcy practice handling both Chapter 13 and Chapter 7 bankruptcies. During this time, Margaret also served Travis Law Office's insurance and personal injury clients through handling motions, making court appearances, presenting clients for depositions, and more.

Margaret has taught continuing legal education seminars (CLEs) on numerous topics in the area of bankruptcy over many years. She also presents CLEs on "Malpractice Avoidance" and a yearly "Insurance Law Update." Margaret has contributed to the Oklahoma Bar Journal's "The Back Page" feature. She has received Martindale Hubble's highest Peer Review Rating of "AV" for Legal Ability and General Ethical Standards. Margaret's numerous awards include: The Briefcase Award from the OK County Bar Association in 2000; the Mona Lambird Service to Children Award from the Oklahoma Lawyers for Children in 2003; the Pro Bono Service Award from Legal Aide Services of Oklahoma, Inc. in 2019; and she has been chosen by residents of Oklahoma City for the Oklahoman Readers' Choice Award for Best Bankruptcy Lawyer several times.

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

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BAD FAITH

Complaint (barely) states a bad faith claim sufficiently to avoid motion to dismiss – *Atlantis Car Care, Inc. v. Phoenix Ins. Co.*, No. CIV-19-524-D, 2019 WL 3892867 (W.D. Okla. Aug. 19, 2019)

Atlantis Car Care, Inc. v. Phoenix Ins. Co.[1] holds a complaint barely alleges sufficient facts to avoid a Motion to Dismiss.

Plaintiff sued its insurance company for bad faith for failure to investigate, adjust and pay a hail damage claim. Plaintiff's roofer said Plaintiff needed a new roof to repair hail damage. The insurance company said a '"partial roof repair" would suffice to repair the damage. Plaintiff sued for bad faith. The insurance company filed an F.R.C.P. 12(b)(6) Motion to Dismiss, citing *Iqbal*[2] and *Twombly*.[3]

The Court, Chief Judge Tim DeGiusti, in the Western District, said it was a close question, but he thought the allegations of fact were sufficient. He reminds us that, even under *Iqbal*[4] and *Twombly*,[5] notice pleading still is the rule, citing *Khalik v. United Air Lines*.[6]

BAD FAITH

Petition adequately alleges tortious interference to defeat motion to dismiss – *Boncic v. Permanent Gen. Assurance Corp.*, No. CIV-19-23-SLP, 2019 WL 3311218 (W.D. Okla. July 23, 2019)

Boncic v. Permanent Gen. Assurance Corp.[7] holds a petition in a removed case adequately alleges tortious interference with a contractual relation to defeat a F.R.C.P 12(b)(6) Motion to Dismiss.

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[1] No. CIV-19-524-D, 2019 WL 3892867 (W.D. Okla. Aug. 19, 2019).
[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,555 (2007).
[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,555 (2007).
[4] *Ashcroft v. Iqbal*, 556 U.S. 662,678 (2009).
[5] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,555 (2007).
[6] 671 F.3d 1188, 1191 (10th Cir. 2012).
[7] No. CIV-19-23-SLP, 2019 WL 3311218 (W.D. Okla. July 23, 2019).

Ms. Boncic's car got flooded with sea water in Galveston and was totaled. She had comprehensive coverage with Permanent General Assurance Corp. (insurance company). The insurance company had apparently contracted with General Automobile Insurance Service (Services) to adjust its claims. Services had, in turn, contracted with Audatex North America, Inc. (Audatex) to evaluate motor vehicle losses.

Audatex purported to research comparable vehicle values in various markets and place a figure on damaged vehicles. This process, Ms. Boncic claimed, caused the insurance company to value her total loss at about 5% below its actual value. She sued all three (insurance company, Services and Audatex). She based her claim against Audatex on tortious interference with her insurance contract with the insurance company. Audatex moved to dismiss. The Court, Judge Scott Palk, in the Western District, overruled the Motion to Dismiss.

Plaintiff's detailed factual pleading of the basis establishing each of the elements of tortious interference with contract set forth in *Wilspec Techs., Inc. v. Dunan Holding Grp. Co., Ltd*.[8] satisfied the pleading requirements of *Iqbal*[9] and *Twombly*.[10]

BAD FAITH

Jury questions preclude summary judgment as to bad faith and punitive damages – Hamilton v. Bayer HealthCare Pharm. Inc., No. CIV-18-1240-C, 2019 WL 5295200 (W.D. Okla. Oct. 18, 2019)

Hamilton v. Bayer Healthcare Pharmaceuticals Inc., et al[11] holds jury questions preclude summary judgment as to bad faith and punitive damages.

This is a peculiar case. A young woman who was covered by an NCAA sponsored

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[8] 2009 OK 12, para. 15, 204 P.3d 69, 74.
[9] *Ashcroft v. Iqbal*, 556 U.S. 662,678 (2009).
[10] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,555 (2007).
[11] *No. CIV-18-1240-C, 2019 WL 5295200 (W.D. Okla. Oct. 18, 2019)*.

"group catastrophic injury" policy written by Mutual of Omaha suffered a pulled muscle in her leg while at an athletic meet. Her orthopedic surgeon was concerned she had deep vein thrombosis associated with the pulled muscle. She was found on the floor of her dorm room unconscious and was discovered to have suffered from a pulmonary embolism and brain injury from a clot. She proved to be severely disabled.

Mutual of Omaha (here, Mutual) commenced paying benefits but it developed that the clots may have been caused by the athletic injury or a birth control pill, manufactured by Bayer, which she was taking, or by both. Mutual stopped paying benefits then started paying again after a great deal of public outcry (along with letters from the Archbishop and the OSU athletic director). Her parents sued Bayer and Mutual intervened in the suit against Bayer seeking subrogation. Her parents then sought actual and punitive damages against Mutual of Omaha for bad faith.

This opinion results from cross-motions for summary judgment, some of which involve Indiana insurance law (apparently the law of the place where the policy was written) and will not be discussed here but others will be because they involve Oklahoma bad faith insurance law, which the Court applies to the bad faith case.

Without much elaboration, the court overrules Mutual's motions for summary judgment as to bad faith and punitive damages, holding a jury needs to hear the evidence and decide the issue. The Court also holds Mutual is not entitled to subrogation against the proceeds of a settlement paid by Bayer because the damages for which Bayer paid were those caused by the birth control pills, not the damages from the athletic injury, for which Mutual paid.

BAD FAITH

Allegations sufficient to defeat summary judgment as to coverage, defense obligation, bad faith and punitive damages – *Country Mut. Ins. Co. v. AAA Constr. LLC*, No. CIV-17-486-SLP, 2019 WL 3069415 (W.D. Okla. July 12, 2019)

Country Mut. Ins. Co. v. AAA Constr. LLC[12] holds summary judgment for the liability insurance company is inappropriate where the insured contractor built a garage and a barn over two high-pressure gas lines in easements on the property so the structures had to be removed and rebuilt elsewhere on the property.

AAA Construction contracted with a doctor and his wife to build a garage and a barn on rural Logan County property. While the garage was under construction, the gas company discovered the structure and told the landowner and the contactor to stop and remove the partially completed garage. The doctor and his wife sued the contractor first for breach of warranty and, apparently after the coverage implications were communicated to them, amended to allege negligence.

Apparently because the damage was all or mainly dealing with having to replace or rebuild the structure elsewhere, the contractor's liability insurance company, Country Mutual, refused to defend and filed this declaratory judgment action for a declaration of no coverage and no defense obligation. The Court, Judge Scott Palk, in the Western District, overruled Country Mutual's Motion for Summary Judgment.

The thrust of the Motion for Summary Judgment was there was no occurrence or, if there was an occurrence, exclusions for damage to the insured's own work or product excluded coverage. Country Mutual argued it would be non-sensical for the contractor not to know to check for underground lines, so what was involved in the doctor's suit was faulty workmanship

[12] No. CIV-17-486-SLP, 2019 WL 3069415 (W.D. Okla. July 12, 2019).

by the contractor, which would not constitute an occurrence. Country Mutual relied on a Colorado 10th Circuit case[13] to support that argument. The case seems to have language indicating faulty workmanship is not an "accident" and, therefore, not an "occurrence."

Judge Palk found more pertinent *AutoMax Hyundai South, L.L.C. v, Zurich Am. Ins. Co*.[14] an Oklahoma 10th Circuit case where the Court said where the insured does something voluntarily but there is an unexpected bad result, there is coverage. The Court also cited with approval *Penly v. Gulf Ins. Co*. [15] where the Oklahoma Supreme Court held there was coverage when the insured's employee filled a customer's diesel road-grader with gasoline instead of diesel fuel and ruined the road-grader's engine. The employee intended to put the gasoline in the diesel road grader but didn't intend the bad result. Largely based on these cases, the Court overruled the Motion for Summary Judgment based on the argument there was no occurrence.

The Court barely addresses Country Mutual's arguments about the exclusions it claims. The Court finds Country Mutual's arguments as to the exclusions "undeveloped and conclusory" and cites *United States v. Magnesium Corp. of Am.*[16] for the proposition "Issues adverted to but unaccompanied by some effort at developed argumentation are deemed waived."

The Court goes on to say exclusions for contractual liability, professional services, damage to real property worked on, a "your product" and "your work" and impaired property exclusions are inapplicable. Likewise, the Court peremptorily rejects the summary judgment motion as to the bad faith and punitive damage claim.

I will certainly be very careful about my briefing in cases before Judge Palk after reading

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[13] *Adair Grp., Inc. v. St. Paul Fire & Marine Ins. Co.*, 477 F.3d 1186, 1187–88 (10th Cir. 2007).
[14] 720 F.2d 798, 804 (10th Cir. 2013).
[15] 1966 OK 84, 414 P.2d 305.
[16] 616 F.3d 1129, 1137, n.7 (10th Cir. 2010).

this opinion. I don't want to be the subject of an opinion like this!

BAD FAITH

Subpoena for depositions of adjusters in unrelated bad faith case quashed – *Graves v. Travelers Prop. Cas. Co. of Am.*, No. 18-CV-416-JED-FHM, 2019 WL 2601342 (N.D. Okla. June 25, 2019)

Graves v. Travelers Property Casualty Co. of America[17] holds a subpoena directed to defense counsel in an earlier bad faith case for copies of depositions of adjusters which were subject to a protective order in the earlier case would be quashed.

The Plaintiff in this bad faith case against Travelers issued and served by certified mail a subpoena to the defense lawyer in the earlier case seeking depositions taken by the attorney for the plaintiffs in an earlier bad faith case, which depositions were subject to a protective order in the earlier case. Apparently, some of the adjusters deposed in the earlier case handled the present case.

Travelers moved to quash the subpoena. The Motion to Quash the subpoena was assigned to Magistrate Judge Frank McCarthy, in the Northern District. Plaintiff's attorney said he sought the depositions by written discovery in the case and Traveler's response was he could get the depositions from its retained counsel, who was subpoenaed here. The Court here seemed unimpressed with the apparent runaround. Rather, the Court said the service of the subpoena was defective because it was served by certified mail, which is not permissible in federal court. However, the Court addressed the merits of the discovery since it recognized Plaintiff's attorney would just properly serve the subpoena and be back later.

The Court says the Court had no power to order the parties to violate a protective order entered in another court. Rather, Plaintiff's attorney would have to obtain relief from the protective

[17] No. 18-CV-416-JED-FHM, 2019 WL 2601342 (N.D. Okla. June 25, 2019).

order in the earlier case. Then this Court would consider the propriety of the discovery.

The Court said it would not order production of depositions of adjusters not involved in the handling of the present claim, even though the issues involved were the same. I had the feeling the Court was saying he was not going to get the depositions.

BAD FAITH

Summary judgment appropriate as to bad faith but not associated contract claim where liability insurance company delayed paying policy limits demand – *Dabbs v. Shelter Mut. Ins. Co.*, No. CIV-15-00148-D, 2019 WL 4747711 (W.D. Okla. Sept. 27, 2019)

Dabbs v. Shelter Mut. Ins. Co.[18] holds summary judgment is appropriate as to bad faith but not as to the associated contract claim where the liability insurance company delayed paying a policy limits demand, based on a concern other potential claims against its aggregate limit might cause the total claim to exceed the insured policy limit and an excess judgment against the insured resulted.

Ms. Dabbs was involved in an at-fault car wreck in Texas in which three people were injured. She had an Oklahoma car liability Shelter policy with 30/60 limits. One of the three injured people, Calderon, was badly injured. Within about two weeks of the wreck, Calderon's Texas lawyer made a 5-day, time-limited, policy limits demand. The Shelter adjuster said she was afraid to pay the $30,000 per-person limit to Calderon until she could ascertain what the other claims were worth. The Texas lawyer told her that, under Texas law, it didn't make any difference, she had to pay the limit or risk an excess judgment.

Eight days after the five-day demand, Shelter offered the $30,000 limit, which Calderon refused. Shelter defended the case; a verdict and judgment against Dabbs resulted. This summary

[18] No. CIV-15-00148-D, 2019 WL 4738269 (W.D. Okla. Sept. 27, 2019).

judgment motion is in the resulting excess case Dabbs brought against Shelter, which moved for summary judgment. In this order, Chief Judge DeGiusti sustained summary judgment as to the bad faith claim but overruled it as to the "contract claim."

Along the way, Chief Judge DeGiusti noted Shelter had filed a Motion to Strike an affidavit from Calderon's Texas lawyer which Dabbs had attached to her response to the Motion for Summary Judgment. He held in a separate order[19] issued the same day, the 2010 amendment adding F.R.C.P 56(c)(2) changed the procedure for dealing with attachments to Motions for Summary Judgment so, instead of moving to strike them, you can simply object to them. He simply deemed the Motion to Strike an objection to the attachment and dealt with it in ruling on the Motion for Summary Judgment.

With regard to the Texas lawyer's affidavit, he held he would consider the affidavit but not the parts of the affidavit which dealt with the lawyer's opinions about legal conclusions (the lawyer was not listed as an expert witness), the lawyer's opinions on medical matters or hearsay statements as to what other people said or their thoughts or motives.

Moving to the merits of the summary judgment motions, the Court sustained the motion as to the bad faith claim but overruled it as to the "contract" claim. He held Oklahoma law controlled as to the bad faith issue. This ruling is undoubtedly correct but for a different reason than stated. He held Oklahoma law applied because the policy was issued in Oklahoma. Actually, Oklahoma law applies pursuant to the Oklahoma case of *Martin v. Gray*.[20]

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[19] 2019 WL 4738269; he also issued much the same order in 2019 WL 4738273, *Elk City Golf and Country Club, Inc. v. Philadelphia Indemnity Ins. Co*., issued the same day.

[20] 2016 OK 114, 385 P.3d 64 (Court will apply most significant relationship test of *Brickner v. Gooden*, rather than contract law rule of 15 O.S. § 162 to determine which state's law to apply to a bad faith case, which is a separate tort action from the contract claim so bad faith case arising in Oklahoma law under a policy issued in Kansas would entail Oklahoma law.)

The Court sustained the bad faith summary judgment because bad faith requires more than negligence and there was not a showing of more than negligence in applying Texas law to the issue. However, a fact question precluded summary judgment as to what the Court called the "contract" claim.

This leaves me puzzled about what is the "contract" claim in an excess case. Since negligence is not enough to impose excess bad faith on the insurance company, what is the result of the excess judgment against Shelter's insured? I'll have to get back with you on that one!

BAD FAITH – DAUBERT MOTIONS

Court deals with Daubert motions for experts being asked to testify about legal conclusions – *Hamilton v. Bayer HealthCare Pharm. Inc.*, No. CIV-18-1240-C, 2019 WL 5295200 (W.D. Okla. Oct. 18, 2019)

Hamilton v. Bayer HealthCare Pharm. Inc.[21] holds the Plaintiff's expert witness will be permitted to testify about legal issues in a bad faith case while Defendant's expert will not.

On the same day, the federal court, Judge Cauthron, in the Western District ruled on Daubert motions in a pending bad faith case. Plaintiff proposed to use as an expert witness Diane Luther, a long-time adjuster, and have her testify about legal issues dealing with claim handling. Defendant proposed to use for that purpose Professor Allan Windt, a professor at the Iowa University Law School.[22] Ironically, Judge Cauthron permitted the insurance adjuster (a non-lawyer) to testify and denied the use of the law professor. Perhaps this illustrates it is often more important what the expert will testify about than the expert's professional qualifications.

The opinion deals with the use of experts who will testify about matters of law arising in bad faith cases based on Tenth Circuit authority dealing with the issue.[23] It is important to note

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[21] No. CIV-18-1240-C, 2019 WL 5295200 (W.D. Okla. Oct. 18, 2019).
[22] Dealt with in No. CIV-18-1240-C, 2019 WL 5295201 (W.D. Okla. Oct. 18, 2019).
[23] For example, *Specht v. Jensen*, 853 F.2d 805, 809–10 (10th Cir. 1988).

the courts will generally not let a proposed expert, no matter their qualifications, testify to what the law is. However, the courts will let experts, lawyers or non-lawyers, testify to the normal practices of claim-handling in the community.

BAD FAITH – DAUBERT MOTION

Scope of bad faith expert strictly limited – *Koontz v. CSAA Fire & Cas. Ins. Co.*, No. CIV-18-801-SLP, 2019 WL 8331472 (W.D. Okla. Aug. 22, 2019)

Koontz v. CSAA Fire & Cas. Ins. Co.[24] holds the court will strictly limit a bad faith expert's testimony.

This opinion, by Judge Scott Palk, in the Western District, limits Plaintiff's expert witness to testifying as to standard industry practices and whether, in the expert's experience, particular damage to shingles requires replacement of the shingle. He will not be permitted to testify to the duty the insurance company owes or whether the insurance company has been in good or bad faith and may not use the terms good faith, bad faith or whether the company's investigation or claim decision was reasonable or unreasonable.

For the most part the opinion bases its ruling on the basis jurors are capable of determining without expert assistance whether an insurance company's handling of a claim was reasonable or unreasonable. It appears doubtful the Plaintiff will get in any testimony under this ruling which will be helpful.

BAD FAITH – MOTION IN LIMINE

Common bad faith motions in limine ruled on – *Godfrey v. CSAA Fire & Cas. Ins. Co.*, No. CIV-19-00329-JD, 2020 WL 1056306 (W.D. Okla. Mar. 4, 2020)

Godfrey v. CSAA Fire & Cas. Ins. Co.[25] holds various common motion in limine items

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[24] No. CIV-18-801-SLP, 2019 WL 8331472 (W.D. Okla. Aug. 22, 2019).
[25] No. CIV-19-00329-JD, 2020 WL 1056306 (W.D. Okla. Mar. 4, 2020).

are either sustained or denied.

The Godfreys sued CSAA for roof damage following a hail claim. This opinion, by Judge Jodi Dishman in the Western District gives some insight into how this fairly new Judge may be expected to rule on some common Motion in Limine subjects.

First, with some irony, CSAA listed as exhibits in this 2019 case, the pleadings in a 2004 bad faith case against Travelers the Godfreys had filed for damage to a former home they owned. The purpose, CSAA said, was to show the Godfreys were "litigious." (One would think maybe, based on the maxim about people who live in glass houses, CSAA might not want to encourage evidence of being litigious!)

Judge Dishman noted some cases[26] holding evidence of a plaintiff's prior litigation to prove the plaintiff is litigious is not admissible. Further, the Court here says the fact the earlier litigation was dissimilar (involving a different home and different damages) made the litigation less likely to have relevance.

CSAA wanted to put in evidence the company for which the estimator worked who did an estimate for the Godfreys (but not the estimator) had been charged with home repair fraud and embezzlement since the estimate in this case. Saying she needed to see the context in which that evidence might be offered, she declared the motion premature but concluded she would likely reject the evidence.

CSAA wanted to show other claims by the Godfreys against CSAA, including a couple of auto policy claims. The Court denied a limine motion as to this evidence, noting the Godfreys claimed CSAA had a long history of wrongly denying claims. However, the Court granted

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[26] *Gastineau v. Fleet Mortg. Corp.*, 137 F.3d 490, 495–96 (7th Cir. 1998) and *Outley v. City of New York*, 837 F.2d 587, 592 (2d Cir. 1988).

Godfreys' limine motion to exclude earlier personal injury claims.

The Court granted CSAA's limine motion to keep the attorneys or witnesses from referring to the Unfair Claim Settlement Practices Act[27] on the theory the Act does not set forth a claim-handling standard. The Court reaches that conclusion on the basis of a non-precedential Oklahoma Court of Civil Appeals case.[28]

The Court denied CSAA's motion to exclude testimony or argument about what conduct is or is not "fair" or "reasonable." The Court rejects the argument such language embraces an issue of ultimate fact.

The Court limines out arguing punishment in the first phase of the case but will permit Plaintiff to let the jury know they will be asked, if they find for the Plaintiffs whether the insurance company acted intentionally or with reckless disregard, which would trigger a second stage where they can talk about punishment.

The Court limined any discussion about Plaintiffs' "litigation-induced stress." The Court notes the insurance company has a right to litigate the claim and the accompanying stress is just part of that process.

CSAA moved to restrict Plaintiffs from referring to an "independent" adjuster hired by CSAA as their "employee" or "agent." The Court noted the duty CSAA owed with regard to the claim-handling involved a non-delegable duty and denied the motion but without prejudice to CSAA reasserting the argument at the time the issue arises.

Finally, the Court denied a motion to exclude CSAA's own claim-handling guidelines.

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[27] 36 O.S. §1250.11, *et seq*.
[28] *Aduddell Lincoln Plaza Hotel v. Certain Underwriters at Lloyd's of London*, 2015 OK CIV APP 34, 348 P.3d 216.

These are admissible.

BAD FAITH – PLEADING

Petition adequately states bad faith claim – *Tikk-A-Wok, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 18-CV-570-JED-FHM, 2019 WL 3219999 (N.D. Okla. July 17, 2019)

Tikk-A-Wok, Inc. v. Travelers Cas. Ins. Co. of Am.[29] holds a state court petition adequately states a claim for bad faith and withstands a partial Motion to Dismiss as to Bad Faith.

Desi Wok (presumably a Chinese restaurant) suffered a fire and was closed for repairs about 7 months. Part of the restaurant's insurance coverage with Travelers included business income loss for times when there was a covered loss and a business interruption. Desi Wok claimed its business was off over $30,000 for the maximum business loss period of 60 days. Travelers paid them $650.88. The insured sued in state court on the contract and for bad faith.

The case was removed to federal court where Travelers moved for partial dismissal for failure to state a claim. The Court, Judge John Dowdell, in the Northern District, overruled the motion. He reminds us *Twombly* [30] does "not require heightened fact pleading of specifics but only enough facts to state a claim to relief that is plausible on its face and be enough to raise a right to relief above the speculative level."

CAR INSURANCE PREMIUM

Suit for $120 premium overcharge ends up in federal court (go figure!) – *Pratt v. Safeco Ins. Co. of Am.*, No. CIV-20-93-D, 2020 WL 1922216 (W.D. Okla. Apr. 20, 2020) and No. CIV-20-93-D, 2020 WL 1874123 (W.D. Okla. Apr. 15, 2020)

Pratt v. Safeco Ins. Co. of Am.[31] holds a suit for a $120 premium overcharge had the

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[29] No. 18-CV-570-JED-FHM, 2019 WL 3219999 (N.D. Okla. July 17, 2019).
[30] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,570 (2007).
[31] No. CIV-20-93-D, 2020 WL 1922216 (W.D. Okla. Apr. 20, 2020).

potential, with the possibility of emotional distress and punitive damages to exceed $75,000 so there was an amount in excess of $75,000 in controversy and federal court diversity jurisdiction.

The Pratts had car coverage with Safeco. Their car got damaged in a rear-end wreck which was not their fault. A collision claim resulted. Apparently, someone at Safeco didn't know about 36 O.S. Sec. 941A, which says an insurance company can't raise the premium for a wreck that is not the insured fault. Safeco raised the rate by $120.60, which the Pratts paid.

Then they sued Safeco in state court for the $120, "an amount in excess of $10,000" for emotional distress and punitive damages. The suit alleged (1) breach of contract (2) "constructive fraud/negligent misrepresentation" and (3) unjust enrichment. Safeco removed the case, claiming diversity of citizenship and an amount in controversy in excess of $75,000.

Safeco moved to dismiss the constructive fraud claim for failure to state a claim. The Pratts filed a motion to remand. In two separate orders, the Court, Chief Judge DeGiusti, in the Western District, (1) sustained the motion to dismiss the constructive fraud claim, with leave to amend[32] and overruled the Pratts' Motion to Remand.[33]

As to the Motion to Dismiss, the Court found the Pratts' conclusory allegation of constructive fraud and suggested the Pratts' reliance on a bad faith theory, citing *Christian v. American Home Assurance Co*.[34] was inappropriate, the Court felt they should be given an opportunity to amend.

As to the Motion to Remand, the Court says it is at least theoretically possible the damages could get from $120 to an amount in excess of $75,00, so the Motion to Remand should

[32] No. CIV-20-93-D, 2020 WL 1922216 (W.D. Okla. Apr. 20, 2020).
[33] No. CIV-20-93-D, 2020 WL 1874123 (W.D. Okla. Apr. 15, 2020).
[34] 1977 OK 141, 577 P.2d 899.

be overruled. And that's how a $120 premium overcharge became a federal case!

DECLARATORY JUDGMENT – DEFERRAL TO STATE COURT

Federal District court declines to defer to state court action between same parties which insured filed after insurance company sued for declaratory judgment in state court – *State Farm Fire & Cas. Ins. Co. v. Jun Shao*, No. 19-CV-0496-CVE-FHM, 2020 WL 3429036 (N.D. Okla. June 23, 2020)

State Farm Fire & Cas. Ins. Co. v. Jun Shao[35] holds a federal district court will decline to defer hearing a declaratory judgment action (DJA) by the insurance company in favor of an action the insured filed nearly a month after the DJA was filed.

State Farm and its insured had a dispute about whether the insured house was "unoccupied" when the pipes froze and burst. The insureds sued in state court and the insurance company removed the case to federal court. The insureds continued to pursue the claim and State Farm sued in federal court for a declaration of no coverage.

Nearly a month later, the insureds sued State Farm and the agent in state court and moved to dismiss the DJA on the basis there was another action pending in state court which would resolve the action. The federal court, Judge Eagan, in the Northern District, exercised her discretion in favor of not dismissing the DJA in deference to the later-filed state action.

She noted it is possible for the federal court to defer to a later-filed state case, citing *St. Paul Fire & Marine Ins. Co. v. Runyon*[36] but notes that case involved a DJA filed after the insured threatened to file suit for bad faith and it appeared to the court the insurance company was trying to beat the insured to the punch.

Here, the Court considered the factors prescribed by *State Farm Fire & Cas. Co. v.*

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[35] No. 19-CV-0496-CVE-FHM, 2020 WL 3429036 (N.D. Okla. June 23, 2020).
[36] 53 F.3d 1167 (10th Cir. 1995).

Mhoon[37] and finds it is the insureds who are playing games. Under those circumstances, no deferral is required or appropriate.

DECLARATORY JUDGMENT – PROPER PARTIES

The claimants under a liability policy are proper parties to be joined in a federal declaratory judgment action – *Shelter Mut. Ins. Co. v. Fritz*, No. CIV-19-36-SPS, 2019 WL 4781867 (? Sept. 30, 2019)

Shelter Mut. Ins. Co. v. Fritz[38] holds the injured parties with claims under a disputed liability insurance policy are proper parties to be joined in a federal declaratory judgment action (DJA).

The Defendants in this federal declaratory judgment action are people injured in a truck wreck alleged to have been caused by the negligence of an escort driver employed by Shelter's insured. The injured people, Defendants here, are Plaintiffs in a Texas action against the escort service. They moved in the DJA to dismiss them, arguing they were not necessary or even proper parties since they had no contractual relationship with the insurance company. This Order, by Magistrate Judge Shreder, in the Eastern District, overrules their Motion to Dismiss.

The insurance company in a DJA needs the claimants to be parties. Otherwise, the insurance company could win the DJA holding there is no coverage and yet be confronted after judgment in the underlying tort action against its insured with a garnishment by the injured parties who would not be bound by the judgment in a suit to which they were not parties.

Judge Shreder recognizes that in overruling the Motion to Dismiss. He cites significant 10th Circuit and Supreme Court authority for his holding that the claimants are not only proper but also necessary parties to the DJA.

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[37] 31 F.3d 979 (10th Cir. 1994).
[38] No. CIV-19-36-SPS, 2019 WL 4781867 (? Sept. 30, 2019).

This ruling differs from the state court rule. *Knight v. Miller*[39] holds a third-party claimant has no standing to sue a liability insurance company for declaratory judgment. In addition to being a nightmare as a practical matter, due to the potential inability of a DJA to bind all the necessary parties, the Oklahoma Supreme Court's ruling is there is a case or controversy between the insurance company and the claimant but not between the claimant and the insurance company. (Full disclosure: I lost *Knight v. Miller*!)

DISCOVERY – 30(b)(6) DEPOSITION

Court approves 30(b)(6) deposition against Blue Cross – *Terry v. Health Care Serv. Corp.*, No. CIV-18-0415-C, 2019 WL 5197561 (W.D. Okla. Feb. 1, 2019)

Terry v. Health Care Serv. Corp.[40] holds a plaintiff may take a F.R.C.P. 30(b)(6) deposition on various topics in a proposed class action over air ambulance bills.

Terry is a proposed class representative in a proposed class action against Oklahoma Blue Cross/Blue Shield (BC/BS) over coverage for air ambulance evacuation. Typically, what happens is a patient must be helicopter evacuated to a larger hospital for life-saving care. The medical helicopter service charges about $50,000. The health insurance treats the evacuation as an "out of network" service and pays a couple of thousand dollars, leaving the insured with a huge bill, which at least impairs the patient's credit and perhaps is collectible. Usually, you find there is no "in network" helicopter evacuation service and, even if there is, the patient can't wait to locate and use it. This proposed class action seeks to correct that situation.

Plaintiff issued a 30(b)(6) Notice to Take the Deposition of a Corporate Representative of BC/BS on various subjects. BC/BS objected and the Court, Judge Cauthron, in the Western District, issued this order. The case valuable as it gathers authorities in the Tenth Circuit on

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[39] 2008 OK 81, 195 P.3d 372.
[40] No. CIV-18-0415-C, 2019 WL 5197561 (W.D. Okla. Feb. 1, 2019).

30(b)(6) depositions.

Three of the topics about which a 30(b)(6) deposition was sought involved the deliberative process by which BC/BS wrote the policy provisions dealing with out-of-network charges. BC/BS argued, in addition to the usual irrelevant and burdensome objection that the discovery sought privileged material since BC/BS's attorneys participated in the policy-drafting process. Judge Cauthron rejects this argument and orders the discovery.

Five topics sought statistical information about the number of insureds who had had such claims within PPO (preferred provider organization) plans and how many were paid, reduced or paid in full. BC/BS argued this discovery would involve only the class action portion of the case while, at this early stage in the case, discovery was limited to the class representative's claim. Judge Cauthron agreed with Plaintiff the discovery went to a "pattern or practice" applicable to the individual as well as the class claims and allowed the discovery.

Two of the topics sought information about BC/BS's efforts to negotiate in-network arrangements with helicopter evacuation companies. This would be important, Plaintiff claimed, to make insureds whole by paying the claims in their entirety. The Court agreed and authorized the discovery.

An important topic in dispute sought information as to the numbers of similar claims and the claims procedures BC/BS used to handle those claims over a 4-year period. The Court agreed with Plaintiff the subject was not overly burdensome and ordered the discovery.

The only topic as to which the Court denied discovery was a "Market Conduct Examination Report" BC/BS submitted to the Oklahoma Insurance Department in response to complaints to the Department. The Court said 36 O.S. Sec. 306(A) protects such reports from disclosure.

If you get into a 30(b)(6) dispute, you will want to read this case.

DISMISSAL – CERTIFICATION OF QUESTIONS

10th Circuit predicts Oklahoma will not recognize claim for causing earthquakes and increasing insurance premiums and 10th Circuit will not certify questions to Oklahoma Supreme Court where certification not requested in trial court – *Meier v. Chesapeake Operating L.L.C.*, 778 F. App'x 561 (10th Cir. 2019)

Meier v. Chesapeake Operating L.L.C.[41] holds the 10th Circuit will not certify a question of law to the Oklahoma Supreme Court where certification was not requested in the trial court and the 10th Circuit predicts Oklahoma will not find a cause of action exists for oil companies causing earthquakes and thereby requiring everyone to buy earthquake insurance at a higher premium.

Meier and others filed a prospective class action in Payne County against a number of oil companies they claimed caused earthquakes by injecting salt water into the Arbuckle formation and thereby caused them and many others to have to buy earthquake insurance at a higher rate because the earthquakes caused insurance companies to increase their earthquake insurance premiums. The oil companies removed the case to federal court under the Class Action Fairness Act,[42] which permits removal without diversity.

The oil companies moved to dismiss on grounds that (1) the proposed class action representatives had no standing to sue, having not sustained earthquake damage and (2) that Oklahoma would not recognize a cause of action for having caused the necessity to buy earthquake insurance and an increase in earthquake insurance premiums. The trial court, Judge Stephen Friot, in the Western District, found the Plaintiffs had standing but sustained a Motion to Dismiss finding Oklahoma would not recognize such a claim. The 10th Circuit affirmed, in an

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[41] 778 F. App'x 561 (10th Cir. 2019).
[42] CAFA, 28 U.S.C.A. 1332(d).

opinion by Judge Carolyn McHugh.

The opinion denies Plaintiffs' request to certify the question whether Oklahoma will recognize such a claim because the Plaintiffs had not requested certification in the District Court. The 10th Circuit has ruled for some time failure to request certification in the trial court is fatal to a request to certify in the Circuit. Judge Hartz concurs in the denial of certification but says he does so only because he believes he knows what the Oklahoma Supreme Court would do on the issue presented.

However, he says in his concurring opinion he believes the Circuit should not presume the Oklahoma Supreme Court would prefer questions not be certified to them. He perceives the Oklahoma Supreme Court might prefer to be asked and given the opportunity to answer questions of state law, rather than have the Circuit take a guess and maybe be wrong, in which case it may be awhile before the issue gets to the Supreme Court. He says: "If the appellate court is confronted with an important unresolved issue of state law, it should seriously consider certification regardless of whether any party is requesting or has requested it in district court." He suggests, with some sense, "the federal courts should discuss the matter periodically with the state courts."

With regard to whether Oklahoma will recognize a claim for damages by people who have not yet suffered earthquake damage but who feel required to buy earthquake insurance, the Court is unanimous Oklahoma will not find such a claim or cause of action. The Court notes there is no Oklahoma case on the subject but bases its decision on what it believes is a majority rule across the country.

EARTHQUAKE INSURANCE – BAD FAITH

Insured waived objection to insurance company defending at trial on a ground different than that upon which the claim was denied by not objecting when the evidence was presented at trial – *Thomas v. Farmers Ins. Co., Inc.*, No. 16-CV-17-TCK-JFJ, 2020 WL 1673102 (N.D. Okla. Apr. 6, 2020)

Thomas v. Farmers Ins. Co., Inc.[43] holds the insureds waived their right to object to the insurance company relying at trial on a ground for denying a claim other than the ground upon which the insurance company denied the claim.

Mr. and Mrs. Thomas bought a Farmers' earthquake policy on their home in 2012. There had been an earthquake in 2011 55 miles from their Sand Springs home. In 2014, there was an earthquake 112 miles away. Two days later, the insureds found a crack in the slab floor.

Farmers investigated and denied the claim, saying it was not caused by an earthquake. When the insureds' suit on the policy and for bad faith came to trial, Farmers defended on the ground the damage was caused by the 2011 earthquake, which predated the Farmers policy. The insureds did not object to Farmers proof. The jury found for Farmers.

On appeal, the10th Circuit affirmed in this opinion by Judge Briscoe, holding the insureds' failure to object to the change in position by Farmers as to the cause of the loss waived their objections.

ERISA

No duty under ERISA to search public records to pay death benefit to correct person – *Hartford Life & Accident Ins. Co. v. Jones-Atchison*, No. CIV-17-654-D, 2019 WL 4007218 (W.D. Okla. Aug. 23, 2019)

Hartford Life & Accident Ins. Co. v. Jones-Atchison[44] holds there is no duty under ERISA for an ERISA administrator to search public records to make sure a death benefit is paid

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[43] No. 16-CV-17-TCK-JFJ, 2020 WL 1673102 (N.D. Okla. Apr. 6, 2020).
[44] No. CIV-17-654-D, 2019 WL 4007218 (W.D. Okla. Aug. 23, 2019).

to the correct people.

Mr. Atchison, an employee insured for life insurance under an ERISA plan was murdered. While nobody had been charged, his ex-wife was a suspect. His father produced a "Preference Benefit Affidavit" reciting the deceased had no children or siblings and his parents were the proper people to whom his $225,000 life insurance benefit should be paid. On that basis, Hartford paid the parents. Hartford paid other benefits into court in an interpleader after the ex-wife said she was entitled to share. Hartford was dismissed from the suit.

Then children began to surface and sought to pursue a claim against Hartford for an ERISA violation for paying the parents the life insurance proceeds without checking publicly available records they said would have revealed the employee did have children, who would have had preference over the parents. Hartford filed this Motion to Dismiss, claiming there was, as a matter of law, no ERISA violation. The trial court, Chief Judge DeGiusti, in the Western District, sustained the Motion to Dismiss.

There is no duty under ERISA for an ERISA administrator to search public records (here, the employee's obituary and divorce records) and ascertain the parents were not the proper persons to whom to pay the death benefit. Since there was no duty, there was no ERISA violation and any state-law based duty was preempted by ERISA. The proper remedy for the children, if they have one, is to recover from the decedent's parents.

ERISA LONG – TERM DISABILITY

Court will not reverse ERISA plan administrator's decision to deny long-term disability benefits – *McNeal v. Metro. Life Ins. Co.*, No. 15-CV-289-JED-JFJ, 2019 WL 4751549 (N.D. Okla. Sept. 30, 2019)

McNeal v. Metro. Life Ins. Co.[45] holds the Court will not reverse an ERISA plan

[45] No. 15-CV-289-JED-JFJ, 2019 WL 4751549 (N.D. Okla. Sept. 30, 2019).

administrator's decision to deny long-term disability benefits to an employee whose treating physician found she was unable to work due to complications from a failed knee replacement surgery.

Ms. McNeal, a psychological counselor for a non-profit, fell and injured her knee. She drew short-term disability (STD) until that ran out but had complications including infection of the surgery requiring removal and replacement of the knee prosthesis. Her treating orthopedic told her she was unable to work due to on-going pain, although the surgical wound eventually healed.

Metropolitan Life Insurance Co. (MetLife) sent her medical records to two hired orthopedic expert witnesses, who each concluded she could work, but did not address the issue of her on-going pain. MetLife, which was both the Plan Administrator and the entity which would have to pay the LTD benefits if they were granted rejected her "appeals" to MetLife to reverse the denial. Chief Judge John Dowdell, in the Northern District affirmed.

He found the conflict of interest created because MetLife was both the Plan Administrator and the payor of the LTD benefits was not sufficient to reverse the administrative decision. So, we have an employee found unable to work by the treating orthopedic denied benefits by the decision of two hired experts who never ever saw the injured employee. This is the sort of decision which supports the argument ERISA is bad and should be done away with.

ESTOPPEL

Estoppel not applicable in an action at law – *Star Ins. Co. v. K & J Telecommnications LLC*, No. CIV-19-960-D, 2020 WL 1845239 (W.D. Okla. Apr. 10, 2020)

Star Ins. Co. v. K&J Telecommunications, LLC[46] holds estoppel is not applicable in a

[46] No. CIV-19-960-D, 2020 WL 1845239 (W.D. Okla. Apr. 10, 2020).

legal action but applies only in an equitable action.

This is such a brief order it is hard to tell exactly what it is about. Apparently, Stanford was injured, allegedly by the negligence of K&J Telecommunications, LLC, which had liability coverage with Star Insurance Company. Star sued K&J and Stanford for a declaratory judgment of no coverage.

Stanford responded with an answer asserting, among other things, "laches and estoppel" as a defense, based on a delay in denying coverage. Star moved to strike that defense. For some reason, no response was filed to the Motion to Strike. In this very brief opinion, the trial court, Judge DeGiusti, in the Western District, sustained the Motion to Strike holding "both estoppel and laches have no applicability in actions at law."

This conclusion is simply wrong. It is true of laches but not of estoppel. The opinion cites three cases in support of that proposition: *Short v. Am. Biomedical Grp., I*nc.;[47] *Dunavent v. Evans;*[48] and *Burtrum v. Gomes.*[49] None of them holds estoppel is not a defense in a legal action.

Short and *Burtrum* hold only laches, not estoppel, is not a defense in a legal action. *Dunavent* actually applies equitable estoppel in a legal action: "¶12 . . . by reason of the silence and inaction of the defendant, an equitable estoppel has arisen which precludes her from defending this action on the ground the deed involved is a forgery, and from asserting title to the land."

Federal courts for years have applied estoppel against insurance companies in coverage cases. For example, *Braun v. Annesley*[50] holds defense by a liability insurance company without

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[47] 60 P.3d 518, 520 (Okla. 2002).
[48] 1942 OK 162, 191 Okla. 208, 127 P.2d 190, 193.
[49] 1952 OK 365, 207 Okla. 349, 249 P.2d 717.
[50] 936 F.2d 1105, 1110 (10th Cir. 1991).

reservation of rights waives coverage defenses, even where there was no coverage in the first place: "Under Oklahoma law, an insurer may by its conduct be estopped from denying its policy provides coverage for a risk the insured has been led honestly to believe was covered under the terms of the policy."

Fortunately, this error will not affect the law. *Davis v. Davis*[51] holds a Decision in which the losing party failed to file a brief is entitled to no precedential value. The rule is the same in federal courts. *United States v. Tucker Truck Lines, Inc.*[52]

FEDERAL APPEALS – ATTORNEY FEES

Insurance company gets appellate attorney fee for winning appeal of sustained motion to dismiss – *Coonce v. Auto. Club of Am.*, No. CIV-17-279-RAW, 2019 WL 1553675 (? Jan. 11, 2019)

Coonce v. Auto. Club of Am.[53] is a Magistrate Judge's recommendation to a U.S. District Judge to award a $7,000 fee to an insurance company after it won an appeal of a Motion to Dismiss. The insurance company won in the trial court. It is included here as a lesson for those of us who sue insurance companies.

Ms. Coonce sued AAA in state court on a claim under an insurance policy, the nature of which the opinion does not show. AAA removed it to federal court. The trial judge, Judge White, in the Eastern District, sustained a motion to dismiss. The 10th Circuit Court of Appeal affirmed. AAA moved for appellate attorney fees, which the 10th Circuit granted but remanded to the trial court to determine the amount. Judge White referred the matter to Magistrate Judge Kimberly West, who wrote this recommendation.

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[51] 1985 OK 85, ¶19, 708 P.2d 1102, 1110 (Superseded by statute on other grounds: *Matter of Adoption of R.R.R.*, 1988 OK 109, 763 P.2d 94.
[52] 344 U.S. 33, 73 S. Ct. 67, 69, 97 L. Ed. 54 (1952).
[53] No. CIV-17-279-RAW, 2019 WL 1553675 (? Jan. 11, 2019).

Plaintiff's attorney failed to timely respond to the ordered briefing schedule. Two months past the time his response was due, Judge West entered this order for $7,000+ in attorney fees.

In addition to the lesson we all know (the failure to adhere to orders and briefing schedules will have a bad outcome), there are other lessons here: in all cases, it should be your practice to tell clients, in writing, about the hazard of costs being awarded if you lose the case. In those insurance cases in which 36 O.S. § 2629B allows an attorney fee (all insurance cases except UM cases) you should always advise the client of the potential for an attorney fee award.

Of course, the attorney should also consider carefully the risk of an adverse result and share the result of that analysis with the client. If the client is not judgment-proof, this may cause some to fail to pursue a potentially meritorious claim. However, this is preferable to facing criticism from a former client saying they were not adequately informed of the risk or (God forbid!) the lawyer failed to properly handle the matter and caused the bad result.

FEDERAL COURT REMOVAL AND REMAND

Fraudulent joinder of an engineering firm alleged to have wrongly investigated claim results in denial of remand – *Jonnada v. Liberty Ins. Corp.*, No. CIV-19-456-D, 2019 WL 6119233 (W.D. Okla. Nov. 18, 2019)

Jonnada v. Liberty Ins. Corp[54] holds joinder of an engineering firm which Plaintiff alleges wrongly investigated the claim, causing claim denial, results in denial of a motion to remand, based on fraudulent joinder.

The insured bought insurance from Liberty Mutual which placed the coverage with Liberty Insurance Corporation, apparently without the insured realizing it. The insured sued Liberty Mutual, in state court, for a roof loss, water damage and bad faith. Liberty Mutual removed to federal court and moved to dismiss on ground the coverage was actually with

[54] No. CIV-19-456-D, 2019 WL 6119233 (W.D. Okla. Nov. 18, 2019).

Liberty. The insured filed an amended complaint, against Liberty Mutual and the engineering company, an Oklahoma corporation. This Motion to Remand, based on fraudulent joinder, resulted.

The Court, Chief Judge DeGiusti, in the Western District, sustained the Motion to Remand. There was no claim or cause of action against the engineering company, so its joinder was fraudulent. The result was there was complete diversity between the Oklahoma Plaintiff and the only properly joined Defendant, so the federal court had diversity jurisdiction.

The Court notes the dismissal of the fraudulently joined Defendant must be without prejudice because the federal court is without jurisdiction to enter a dismissal with prejudice, citing *Brereton v. Bountiful City Corp*.[55] and *Albert v. Smith's Food & Drug Centers, Inc*.[56]

FEDERAL COURT REMOVAL AND REMAND

Dismissal of non-diverse defendant after one year did not permit removal where the case against the non-diverse defendant was in good faith. – *Graham v. CSAA Fire & Cas. Ins. Co.*, No. CIV-19-00793-PRW, 2020 WL 1699554 (W.D. Okla. Apr. 8, 2020)

Graham v. CSAA Fire & Cas. Ins. Co.[57] holds Plaintiff's dismissal of the non-diverse defendant did not permit removal if the non-diverse Defendant's joinder was in good faith.

Graham sued CSAA (California State Automobile Association – AAA's insurance arm) along with Automobile Club of Oklahoma and its agent, Wise. She sued CSAA on a policy claim and joined AAA Oklahoma and Wise claiming Wise fraudulently told her she had to join AAA to be able to insure with CSAA. This joinder prevented removal because both Plaintiff and Defendant, Wise were Oklahoma citizens.

After the usual summary judgment motions and some negotiations, just before trial in

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[55] 434 F.3d 1213, 1249 (10th Cir. 2006).
[56] 356 F.3d 1242, 1249 (10th Cir. 2004).
[57] No. CIV-19-00793-PRW, 2020 WL 1699554 (W.D. Okla. Apr. 8, 2020).

state court, more than a year after filing and service, Graham dismissed Wise and AAA Oklahoma. CSAA removed the case to the Western District federal court despite 28 U.S.C.A. § 1446(c)(1)'s prohibition on removal after one year from the date the non-diverse defendant was served. CSAA argued the original joinder of the non-diverse Defendant was in bad faith and intended only to prevent removal.

The Court, Judge Wyrick, remanded in this Order. The fact Plaintiff actually litigated Wise's Motion for Summary Judgment and negotiated the claim indicated Wise's joinder was not in bad faith, intended solely to defeat diversity and prevent removal. He noted the negotiations included an offer by CSAA not to remove if he would dismiss AAA from the suit.

The statute, 28 U.S.C.A. § 1447, provides for a discretionary award of costs and attorney fees for seeking remand. The Court here found CSAA had no objectively reasonable basis to conclude removal was appropriate and so ordered CSAA to pay Plaintiff's costs and attorney fees.

FEDERAL COURT REMOVAL AND REMAND

Lack of diversity between a not-yet served defendant and plaintiff requires remand – *Johnson v. Sanders*, No. CIV-2019-814-R, 2019 WL 4932921 (W.D. Okla. Oct. 7, 2019)

Johnson v. Sanders[58] holds a lack of diversity between the Plaintiff and a Defendant not yet served at the time of removal requires remand and payment of costs and attorney fees by the removing Defendant.

Sanders and Johnson were in a wreck in Oklahoma. Johnson sued Sanders and State Farm in an Oklahoma District Court. (The opinion does not say who State Farm insured. One would assume it had UIM coverage on Johnson so the case was a double-insured case with State

[58] No. CIV-2019-814-R, 2019 WL 4932921 (W.D. Okla. Oct. 7, 2019).

Farm insuring both drivers.) State Farm's house counsel filed an answer for Sanders. Before Sanders was served, State Farm, represented by outside counsel, removed the case to federal court alleging diversity between State Farm (an Illinois citizen) and Johnson, whom I believe to be an Oklahoma citizen, but said nothing about Sanders' citizenship. However, she was served with the state court summons after removal. State Farm described Sanders as a "forum defendant."

Johnson moved to remand. This Order sustains that motion and remands the action. State Farm argued the "forum defendant" rule[59] (if one of the defendants is a citizen of the same state as Plaintiff, there can be no removal) does not apply because State Farm removed before service on Sanders. This is sometimes called "snap removal" and does not seem to be favored.

Judge David Russell noted in sustaining the Motion to Remand the cases on which State Farm relied as justifying not remanding where the non-diverse defendant was not served were all cases in which the not-yet-served defendant was not a citizen of the same state as the plaintiff.

The Court further finds State Farm had no "objectively reasonable basis" for its removal and ordered it to pay attorney fees and costs to Plaintiff. This is the second case in this group of cases to order attorney fees and costs to the plaintiff resisting removal. I confess I have yet to get a federal court to do that.

FEDERAL COURT REMOVAL AND REMAND

Joinder of tortfeasor in bad faith suit against property insurer can defeat removal and justify remand – *Greer v. State Farm Fire & Cas. Co.*, No. CIV-19-378-PRW, 2019 WL 2578087 (W.D. Okla. June 24, 2019)

Greer v. State Farm Fire & Cas. Co.[60] holds joinder of a tortfeasor with a bad faith claim

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[59] 28 U.S.C.A. § 1441(b)(2).
[60] No. CIV-19-378-PRW, 2019 WL 2578087 (W.D. Okla. June 24, 2019).

against a property insurer can defeat removal and justify remand.

While the facts are a little short in this case, it appears an individual drove his vehicle into Plaintiff's property and damaged it. Plaintiff sued in state court in Canadian County joining his tort claim against the tortfeasor and his contract and bad faith claim against State Farm.

State Farm removed the case to federal court, claiming the joinder of the two claims was fraudulent. The federal judge, Judge Wyrick, in the Western District, sustained Plaintiff's Motion to Remand. He found the Plaintiff could join in the same lawsuit his tort claim against the tortfeasor for the damage to the property and the contract claim and associated bad faith claim against State Farm. The Court declined to award costs and attorney fees against State Farm, finding there was a reasonable basis for State Farm's removal of the case.

FEDERAL COURT REMOVAL AND REMAND

One-year limit on removal applied where removing defendant does not prove bad faith by plaintiff in joining and then settling with resident defendant; plaintiff awarded costs and fees – *Rowan v. State Farm Fire & Cas. Co.*, No. CIV-19-00205-PRW, 2019 WL 4166697 (W.D. Okla. Sept. 3, 2019)

Rowan v. State Farm Fire & Cas. Co.[61] holds the one-year time limit for a non-removing party to remove a case will be applied where the removing party does not show bad faith on the non-removing party in joining and then settling with the non-diverse defendant after the year and that, in this case, the removing party should be ordered to pay the non-removing party's attorney fees and costs.

Plaintiff sued in state court after a homeowner's loss. He joined his insurance company, State Farm, and ServPro, claiming ServPro worked with State Farm to hold down the amount of his claim. State Farm removed the case. Plaintiff moved for remand, claiming no fraudulent

[61] No. CIV-19-00205-PRW, 2019 WL 4166697 (W.D. Okla. Sept. 3, 2019).

joinder. In an earlier proceeding, the federal judge remanded, finding no fraudulent joinder.

Slightly more than a year after the remand, Plaintiff settled with ServPro for an undisclosed amount and Plaintiff dismissed ServPro. State Farm again removed, this time claiming the one-year time limit for a defendant to remove, provided by 28 U.S.C.A. § 1446 (c)(1) did not apply because of the "bad faith" exception added to the removal statute in 2012.

The federal court, Judge Wyrick, in the Western District, remanded the case again, finding no proof of bad faith on Plaintiff's part. He also ordered State Farm to pay Plaintiff's attorney fees and costs for the second removal. He found a lack of good faith on State Farm's part, including being less than candid with Court about the facts pertaining to the removal and subsequent settlement with the non-diverse Defendant.

FEDERAL COURT REMOVAL AND REMAND

Joinder of local agent who sold policy precludes remand; insureds' failure to read the policy and discover it didn't provide the coverage requested did not keep the insureds from reforming the policy on constructive fraud grounds – *Ford v. Liberty Mut. Ins. Co.*, No. CIV-19-925-G, 2020 WL 259554 (W.D. Okla. Jan. 16, 2020)

Ford v. Liberty Mut. Ins. Co.[62] holds that, under the circumstances of the case, Plaintiffs' joinder of the local agent who wrote the policy precludes remand and the insureds' failure to read the policy and discover the policy did not provide the coverage requested did not prevent the insureds from reforming the policy on grounds of constructive fraud by the agent.

Mr. and Mrs. Ford went to an Oklahoma agent and bought a homeowners' policy. They were issued a policy which contained a "water damage" exclusion which they did not discover because they did not read the policy. The home was damaged by a sewer backup. The agent did not tell them they could buy a "water backup endorsement" which would have given them

[62] No. CIV-19-925-G, 2020 WL 259554 (W.D. Okla. Jan. 16, 2020).

coverage for a sewer backup.

Liberty Mutual denied the claim. The insured sued in state court, joining the Oklahoma agent and seeking to reform the policy based on his constructive fraud for failing to properly write the policy. Liberty Mutual removed the case to federal court and the Fords moved to remand. The federal court, Senior Judge Cauthron, in the Western District, remanded the case to state court.

The Fords primarily relied on *Gentry v. American Motorist Ins. Co.*[63] to support their claim of constructive fraud. In that case, the insured told the agent he wanted theft coverage. The policy issued provided theft coverage but excluded embezzlement. The insured had a loss when a contractor took building materials from the insured's construction site and used them on the contractor's job site. The Oklahoma Supreme Court reformed the policy on the theory an error by the agent ought not to work to the advantage of the insurance company and the disadvantage of the insured. Judge Cauthron found this a sufficiently plausible theory of liability the joinder of the agent, which destroyed diversity, was not a fraudulent joinder.

Judge Cauthron rejected Liberty Mutual's argument the agent's failure to properly write the policy could not be the proximate cause of the failure because, if the insureds had read and understood the policy, they would have known they were not getting the coverage they claimed they had expected. The Court quotes *Gentry v. American Motorist Ins. Co*: "It is no defense to the insurance company [the insured] failed to read his policy when he received it thirty to sixty days after it was issued." Rather, the Court says *Gentry* holds: the agent had a duty to advise of the exclusion at the time of the negotiation.

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[63] 1994 OK 4, ¶12, 867 P.2d 468, 471.

Actually, the Tenth Circuit has been pretty ecumenical about the duty of an insured to read the policy, holding, under Oklahoma law, in *Travelers v. Morrow*[64] the insured has a duty to read the policy and in *Business Interiors, Inc. v. Aetna*[65]the insured has no duty to read the policy.

FEDERAL COURT REMOVAL AND REMAND

> **Fraudulent joinder, to prevent removal, requires more than that recovery against the non-diverse defendant is unlikely but requires it be impossible, so joinder of a claim for intentional infliction of emotional distress against the insurance company's adjuster bars diversity and requires remand – *Johnson v. State Farm Fire & Cas. Co.*, No. 19-CV-250-JED-FHM, 2019 WL 5388521 (N.D. Okla. Oct. 22, 2019)**

Johnson v. State Farm Fire & Cas. Co.[66] holds joinder of a claim for intentional infliction of emotional distress against the insurance company's adjuster bars removal and requires remand.

Plaintiff/insureds had a property claim against State Farm. When they were unable to settle it, they sued on the policy and for bad faith. They included a claim against State Farm's adjuster, like Plaintiffs, an Oklahoma citizen, for intentional infliction of emotional distress (IIED). State Farm removed to federal court, claiming diversity based on its argument the joinder of the adjuster was fraudulent. Plaintiffs moved to remand.

The federal court, Judge Dowdell, in the Northern District, remanded the case. He held the party claiming fraudulent joinder faces a heavy burden and proving it is unlikely the claim against the resident defendant will succeed is not sufficient to establish fraudulent joinder. He says a stronger showing of impossibility of proving a case is required and the showing must be stronger than that required for a 12(b)(6) motion to dismiss. The difficulty of proving IIED under

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[64] 645 F.2d 41 (10th Cir. 1981).
[65] 751 F.2d 361 (10th Cir. 1984).
[66] No. 19-CV-250-JED-FHM, 2019 WL 5388521 (N.D. Okla. Oct. 22, 2019).

Oklahoma law is not a ground for denying remand.

FEDERAL COURT REMOVAL AND REMAND

California State Automobile Association is not liable on a policy issued by AAA so diversity is not destroyed on the theory both the AAA insured and CSAA are parties – *DeSmet v. CSAA Ins. Exch.*, No. 19-CV-0624-CVE-JFJ, 2019 WL 7284769 (N.D. Okla. Dec. 27, 2019) and *Strome v. CSAA Ins. Exch.*, No. 19-CV-0573-CVE-FHM, 2020 WL 930493 (N.D. Okla. Feb. 26, 2020)

DeSmet v. CSAA Ins. Exch.[67] holds California State Automobile Association (CSAA) is not liable on a policy issued by AAA so diversity is not destroyed between a plaintiff insured by AAA and CSAA and a removed case need not be remanded.

DeSmet, an Oklahoma citizen was insured by American Automobile Association (AAA), which writes in Oklahoma through California State Automobile Association (CSAA). He sued in state court AAA and CSAA on a UM claim and for bad faith. He argued CSAA is a reciprocal insurance carrier and because CSAA has members who are Oklahoma Citizens, this prevents diversity of citizenship. AAA removed the case. DeSmet argued, since all members of the reciprocal insurer are liable on the policy, there was no diversity and the case should be remanded.

The same fact situation occurs in *Strome v. CSAA*,[68] Ms. Strome had homeowners' insurance with CSAA. Claiming CSAA underpaid her on a hail claim, she sued CSAA and the CSAA Exchange in state court, arguing the exchange, as a reciprocal insurer had members (including her) so diversity did not exist. CSAA removed to federal court, alleging there was diversity because insureds of CSAA were not members of the reciprocal exchange. (A reciprocal insurance exchange is, like USAA an unincorporated association so there are members in every

[67] No. 19-CV-0624-CVE-JFJ, 2019 WL 7284769 (N.D. Okla. Dec. 27, 2019).
[68] No. 19-CV-0573-CVE-FHM, 2020 WL 930493 (N.D. Okla. Feb. 26, 2020).

state and there is no diversity and, therefore, no federal court jurisdiction.)

The federal court, Judge Egan, in the Northern District, in both cases, overruled Plaintiffs' Motions to Remand. She held the policies did not provide CSAA was liable on the policies so the rule all members of a reciprocal insurance carrier are liable did not destroy diversity so the case was subject to remand.

In her ruling, Judge Eagan notes a contrary ruling on the same issue (in fact involving the same sets of lawyers on each side) in the Western District, in *McDonald v. CSAA Insurance Exchange*.[69] There, Judge Russell held CSAA had not been able to meet its heavy burden of proving there was diversity.

These cases raise interesting questions of how the issue of CSAA's diversity with its insureds will get resolved. An order overruling a Motion to Remand is not appealable. The only way this will reach the Tenth Circuit is by an appeal from a final judgment in which the appellate court will be required to rule on its, and the District Court's jurisdiction. Stay tuned!

GENERAL LIABILITY

No coverage to bank for liability claim by bank customer shot by police while being used as a human shield by a fleeing bank robber – *Great Lakes Ins. SE v. Bank of Eufaula*, 391 F. Supp. 3d 1060 (? 2019)

Great Lakes Insurance SE v. Bank of Eufaula[70] holds an insured bank had no liability coverage because the injury was intentional and not accidental and because of an assault and battery exclusion where a bank robber took a bank customer hostage and used her for a human shield.

A bank customer was seized by a bank robber who shot the bank President and a teller

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[69] No. CIV-16-336-R, 2017 WL 887108 (W.D. Okla. Mar. 6, 2017).
[70] 391 F. Supp. 3d 1060 (? 2019).

who resisted his demand for money and killed the President. The robber forced the customer to drive him away from the bank and then used her as a human shield in a resulting gun battle with police. She was shot 9 times by police, who were shooting at the robber.

She sued the bank whose liability carrier defended under reservation and filed this declaratory judgment action for a declaration there was no coverage nor a duty to defend. The Court, Judge White, in the Eastern District, granted the insurance company summary judgment.

The basis for the summary judgment was an argument there was no "occurrence" (required by the policy) because the shooting was not "accidental" but rather was "intentional." The Court also found an "assault and battery" exclusion applied and precluded coverage.

This is a bad decision. The opinion does not indicate the Court was aware the question whether a loss was accidental is decided, not from the standpoint of the assailant (here, the bank robber) but from the standpoint of the insured. It seems to make no sense the insured bank intended to be robbed or its customer be taken hostage and shot by the police. The Oklahoma Supreme Court decided that issue in a similar case in which a fleeing felon shot a police officer. The Court there held that, while the fleeing felon intended the injury, the police officer who was shot (the insured under a UM policy) did not intend to be shot so the injury was not, as a matter of law, intentional.[71] As to the "assault and battery" exclusion, it seems a real stretch to argue the police officers who shot at the robber but hit the bank customer committed an assault and battery.

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[71] *Willard v. Kelley*, 1990 OK 127, 803 P.2d 1124.

GENERAL LIABILITY

General liability policy did not protect roofing company due to exclusions – *Evanston Ins. Co. v. A&S Roofing, LLC*, No. CIV-17-870-SLP, 2019 WL 3976852 (W.D. Okla. Aug. 22, 2019)

Evanston Ins. Co. v. A&S Roofing, LLC[72] holds a commercial general liability policy did not protect a roofing contractor from claims arising from a roofing job due to exclusions.

A&S Roofing did roof jobs on three commercial properties. The roofs leaked, causing damage to the buildings and the contents of tenants' offices in the buildings. A&S had a CGL policy with Evanston, which denied coverage and filed this declaratory judgment action for a declaration it had no duty to either defend or pay claims. The trial court, Judge Scott Palk, in the Western District, granted the insurance company summary judgment.

The Court rejected the insurance company's claims there was no coverage due to there being no "occurrence" because of the fact the underlying suit against the roofing contractor claimed only breach of warranty, not negligence. The Court found the insurance policy applied to contract claims, including breach of warranty, as well as negligence claims, subject to exclusions in the policy. The Court then found exclusions in the policy precluded coverage.

The Court found a "combination general endorsement" to the policy applied and excluded coverage: "This insurance does not apply to claims arising out of breach of contract, whether written or oral, express or implied, implied-in law, or implied -in-fact contract." This exclusion caused there to be no coverage because the underlying case pleaded only breach of warranty, a contract claim.

The Court also found applicable an exclusion for "any damages arising out of any 'operations' involving hot tar, wand, open flame, torch or heated application and/or heat welding

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[72] No. CIV-17-870-SLP, 2019 WL 3976852 (W.D. Okla. Aug. 22, 2019).

in order to install them" because the roofs the contractor put on involved "membrane roofing, which requires heat to apply.

The Court then rejects the roofing company's suggestion reformation would be appropriate, since that was the only kind of roofing the contactor used and the coverage became meaningless. The Court seemed not too impressed with this argument and held reformation would not be an option.

GENERAL LIABILITY

Injured party's assault on insured bar's employees triggered "assault and battery" exclusion – *Mesa Underwriters Specialty Ins. Co. v. Boot Scooters, LLC*, No. CIV-18-806-R, 2019 WL 4918766 (W.D. Okla. Oct. 4, 2019)

Mesa Underwriters Specialty Ins. Co. v. Boot Scooters, LLC[73] holds an injured victim's assault and battery on the insured bar's employees triggered an assault and battery provision limiting $1 million policy's coverage to $25,000.

This case could serve as an ad for Alcoholics Anonymous. A patron at "Scooters'" a bar owned by the insured, Boot Scooters, LLC, got in a dispute with his girlfriend, early one morning. Another patron alerted a bouncer at the bar the man was arguing with his girlfriend and poking her in the chest. She was crying and told the bouncer who responded the patron was threatening to leave and take with him her wallet and phone.

The bouncer told the patron to give her the property. He refused and while the two bouncers attempted to carry him out of the bar, he kicked the bouncer carrying his feet and legs. The bouncers either threw him down (his version, somewhat impaired by his lack of memory) or the patron did an "alligator roll" and fell (the bouncer's version). The patron ended up with traumatic brain injury, a subdural hematoma and a brain bleed. He sued.

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[73] No. CIV-18-806-R, 2019 WL 4918766 (W.D. Okla. Oct. 4, 2019).

The Bar's insurance company brought a declaratory judgment action claiming it had only a $25,000 limit for assault and battery, despite the policy being $1 million, because the patron originally alleged an intentional assault, even though he later amended to claim the bouncers negligently injured him.

The court, Judge Russell, in the Western District, noted Oklahoma does not follow the rule the coverage depends on the allegation of the injured party's petition or complaint but the insurance company must look to the actual facts. Thus, the allegation did not determine the nature of the claim. The assault and battery provision applied if the injury occurred due to conduct "by you, your employees, patrons or any other persons."

This includes, the Court says, the injured patron himself who committed an assault and battery by kicking the bouncer. This triggered the $25,000 restriction, which included defense costs, so there was no more obligation to defend or pay after $25,000 was expended in defense costs. The bottom line here might be "sobriety pays!"

GENERAL LIABILITY - PROPERTY INSURANCE

Individual Insured covered only for business listed in policy, not other business – *Smith v. Burlington Ins. Co.*, 772 F. App'x 723 (10th Cir. 2019)

Smith v. Burlington Ins. Co.[74] holds an individual insured is covered only for the business listed in the policy and not for another business the individual insured owns.

Benjy Smith owned a courier service and a security service. He bought a liability policy from Burlington Insurance Company describing him as the named insured and his courier service as the business covered.

One of the armed guards of the security service shot and killed a man whose estate sued

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[74] 772 F. App'x 723 (10th Cir. 2019).

Smith dba the security service. Burlington denied coverage. Smith sued Burlington in state court for a declaratory judgment it had coverage and a duty to defend. The trial judge, Judge James H. Payne, granted Burlington summary judgment. The 10th Circuit Court of Appeals affirmed in this non-precedential opinion by Judge Hartz.

The Court rejected Smith's argument the policy was ambiguous. It said the policy was clear it covered Smith, the named insured, only for his business, described in the policy as a courier service.[75]

HEALTH INSURANCE

Bariatric revision surgery covered under state health plan even though original surgery was not – *Wake v. State ex rel. Office of Mgmt. & Enter. Servs. Employees Grp. Ins. Div.*, 2019 OK CIV APP 47, 447 P.3d 1187

Wake v. State ex rel. Office of Mgmt. & Enter. Servs. Employees Grp. Ins. Div.[76] holds a revision of an earlier bariatric surgery was covered under a state health insurance plan even though the original surgery needing revision was not covered.

Ms. Wake had bariatric surgery before she was covered by the state health insurance plan. The surgery worked for a time but, after she became insured under the state plan, needed to be revised. Because bariatric (weight-loss) surgery was not covered by the state plan when she had the earlier surgery, the State denied the claim due to a policy provision:

> Services covered include, but are not limited to sleeve, bypass, duodenal switch, revision and conversion of sleeve, bypass and duodenal switch, and complications from these procedures performed under the HealthChoice plans.

The State argued the revision was not covered because the original procedure having to be revised was not performed under the State plan. An internal appeal affirmed denial of

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[75] Under 10th Circuit Rule 32.1 and Fed. R. App. P. 32.1, the opinion is non-precedential but may be cited for its persuasive value.
[76] 2019 OK CIV APP 47, 447 P.3d 1187.

precertification for the procedure. The District Court, Judge Balkman, in Cleveland County affirmed the denial, resulting in this appeal. The Court of Civil Appeals reversed, in an opinion by Judge, Bay Mitchell.

The underlined language above did not clearly indicate revision of a bariatric surgery performed before the State plan provided for bariatric surgery was not covered. The policy should have specifically provided that, if the State's testimony this was the intent, was to be the result. Because the policy language was not ambiguous, the State's testimony by the people who wrote it as to their intent was "impermissible extrinsic evidence."

HOMEOWNERS – EARTHQUAKE DAMAGE

Court will exercise discretion in favor of letting plaintiff use expert defendant hired and then decided not to use – *Smith v. CSAA Fire & Cas. Ins. Co.*, No. CIV-17-01302-D, 2019 WL 4577109 (W.D. Okla. Sept. 20, 2019)

Smith v. CSAA Fire & Cas. Ins. Co.[77] holds the trial court has discretion whether to permit one side to use an expert whom the other side designates as a testifying (as opposed to a consulting) expert and that, in this case, the Court will permit the testimony.

The insurance company hired an expert in a case involving earthquake damage under a homeowners' policy to testify as to the cost to repair the damage. Plaintiff hired an expert to rebut his testimony and then deposed him. Evidently, the deposition did not go well for the insurance company. The insurance company withdrew its designation of him as their expert. Then the Plaintiff designated him as their expert. The insurance company then objected and moved to strike the expert and prevent him from testifying.

The trial court, Chief Judge DeGiusti, in the Western District, wrote a lengthy opinion, recognizing the trial court has great discretion in deciding whether one side may hire and use an

[77] No. CIV-17-01302-D, 2019 WL 4577109 (W.D. Okla. Sept. 20, 2019).

expert hired and designated by the other side.[78] After much back and forth, the Court concludes Plaintiff can use Defendant's expert.

HOME REPAIR WARRANTIES – ARBITRATION

Home repair warranties were insurance and so not covered by the Oklahoma Uniform Arbitration Act or Federal Arbitration Act so forced arbitration not enforceable – *Sparks v. Old Republic Home Prot. Co., Inc.*, 2020 OK 42, 467 P.3d 680

Sparks v. Old Republic Home Prot. Co., Inc.[79] holds home appliance warranties were insurance so neither the Oklahoma Arbitration Act nor the Federal Arbitration Act applied and a forced arbitration clause in the warranty contract was not enforceable.

Sparks bought a home appliance warranty contract offered by Old Republic Home Protection Co., Inc. Sparks claimed Old Republic contracted with appliance repair contractors who would find little or no repair needed and sued Old Republic over an air conditioner claim.

Old Republic answered saying it was an insurance company and its product was insurance and demanded arbitration pursuant to its contract. When the trial court Judge Thad Balkman, in Cleveland County, denied arbitration, Old Republic filed an amended answer saying it was not an insurance company and its product was not insurance.

Old Republic appealed, pursuant to 12 O.S. §1879(A)(1), which permits a direct appeal from an order denying arbitration. The Court of Civil Appeals affirmed denial of arbitration and the Supreme Court affirmed in this near unanimous opinion by Justice Edmondson. Only Justice Winchester did not join in the opinion but he concurred in result, without separate opinion.

The big issue became whether the home warranty product Old Republic sold was

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[78] *Carbajal v. Lucio*, No. 10-CV-02862-PAB-KLM, 2019 WL 141864, at *9 (D. Colo. Jan. 9, 2019)(laying out relevant factors); *Brigham Young Univ. v. Pfizer, Inc.*, No. 2:12-MC-143 TS BCW, 2012 WL 1029304, at *4–5 (D. Utah Mar. 26, 2012) (defendants were entitled to call plaintiff's previously-designated expert witness at trial).
[79] 2020 OK 42, 467 P.3d 680.

insurance because, if it was 12 O.S. § 1855(D) exempted it from the Oklahoma Uniform Arbitration Act and the federal McCarran-Ferguson Act[80] deferred regulation of insurance to the states, permitting Oklahoma to deny application of the forced arbitration provision.

Old Republic hurt its argument pretty severely by first alleging in its answer it was an insurance company and its product was insurance and then apparently conveniently switching positions when the trial court denied arbitration on that basis. It was also hurt by reason of having taken the opposite position in a California case, *Campion v. Old Republic Home Protection Co.*[81] in order to take advantage of provisions favorable to it in the California Insurance Code.

The Supreme Court also rejected Old Republic's argument the warranties came within the Oklahoma Home Service Contract Act.[82] The Court held it was not within that Act because Old Republic didn't repair anything, it just agreed to pay contractors who did.

INTERPLEADER

UM carrier may interplead amount it believes it owes, even if less than its limit – *Grain Dealers Mut. Ins. Co. v. Advanced Neuro Sols., LLC*, No. 19-CV-0572-CVE-JFJ, 2020 WL 127975 (N.D. Okla. Jan. 10, 2020)

Grain Dealers Mut. Ins. Co. v. Advanced Neuro Sols.[83] holds a UM carrier may interplead the amount of money it thinks it owes, based on its evaluation of the claim even if that amount is less than the UM limit.

Conklin was injured in a car wreck while on the job. Hartford paid Workers' Compensation and claimed subrogation, while various health care providers and Conklin's

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[80] 15 U.S.C.A. § 1011-1015.
[81] 272 F.R.D. 517 (S.D. Cal. 2011).
[82] 36 O.S. §§6751 *et seq.*
[83] No. 19-CV-0572-CVE-JFJ, 2020 WL 127975 (N.D. Okla. Jan. 10, 2020).

attorneys claimed liens.[84] Conklin was apparently badly hurt. The tortfeasor paid a $25,000 liability limit. Conklin's personal UM paid $250,000. Grain Dealers had an additional $1 million in UM on the employer's vehicle but wanted to pay only $200,000 of it.

Grain Dealers asked how to make its check for the $200,000. The response was to put Conklin and all the lien claimants and the comp carrier on one check. Gain Dealers said it couldn't put that many names on one check and filed this interpleader action to pay the $200,000 into court and let the court split it up. The many claimants to the fund contended Grain Dealers could not interplead less than its policy limit.

The Court, Judge Eagan, in the Northern District, held it could. It is not clear from the Order what sort of order the Court will enter with regard to Grain Dealers. Normally, after an interpleader, the insurance company paying in the funds is discharged upon the payment. That obviously will not work here until there is some determination of the extent of Grain Dealers' total liability.

LAWYER MALPRACTICE

"Related claims" clause did not save lawyer malpractice claim from being barred by late notice where claims were separate and distinct from one another – *Shad's Inc. v. Key*, No. CIV-17-1031-SLP, 2019 WL 3022201 (W.D. Okla. July 10, 2019)

Shad's Inc. v. Key[85] holds a "related claims" provision in a lawyer malpractice policy did not save coverage from being excluded by late notice where the claim relied upon to save the coverage was wholly separate and unrelated.

A lawyer, Craig Key, appears to have had a meltdown in the 2011-2013 timeframe. He resigned from the Bar to avoid disciplinary action in April 2013. In 2011, he accepted a $4,000

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[84] The opinion does not make clear why there would be medical liens since Workers' Comp. applied and should have paid the bills.
[85] No. CIV-17-1031-SLP, 2019 WL 3022201 (W.D. Okla. July 10, 2019).

fee to defend the owners of Shad's Bar in a suit in the Western District federal court. He did not enter an appearance or file anything. A default judgment resulted, which a subsequent lawyer was unable to get vacated. The ultimate result was a default judgment in a malpractice case against Key for $460,487.49. This case is a garnishment to attempt to recover that judgment from Continental Casualty Company, which had Key's malpractice coverage.

The malpractice policy expired February 1, 2014. It was a "claims made" policy which required claims be reported by 60 days after the policy expiration. Key did not report the claim within that time, so Continental denied coverage.

Key did, however, timely report another malpractice claim. In 2012, he failed to respond to a motion for summary judgment in a case in Payne County, failed to appear for the hearing and filed a motion to vacate, which he withdrew without telling the clients. He reported this claim in January 2014, within the policy period. Continental paid this claim.

Shad's, Inc. argued in this garnishment the Payne County case was a "related claim" to the Shad's, Inc. claim so the timely reporting of the Payne County case claim satisfied the timely reporting requirement as to the Shad's claim. In this opinion, the Court, Judge Scott Palk, in the Western District, sustains Continental's F.R.C.P 12(c) Motion for Judgment on the Pleadings, holding the two claims were wholly separate and unrelated.

The Continental policy provided "related claims" are "considered a single claim first made and reported . . . within the policy period in which the earliest of the related claims was first made and reported . . ." The policy provides "related claims" are "all claims arising out of a single act or omission or arising out of related acts or omissions in the rendering of legal services." While the Payne County and Shad's Bar claims may be "temporally" or in a time-sense, related, the court finds Key's malpractice occurred "in two different cases for two

different clients in two different courts." The Court suggests the "related claims" provision would refer to "an illness, a common bad intent, or another common modus operandi . . . or . . . malfunctioning docketing software that miscalculated dispositive motion response deadlines . . .."

LEGAL MALPRACTICE INSURANCE

"Comingling" and "Conversion" by lawyer triggered crime/fraud exclusion of legal malpractice policy without necessity for proof of misappropriation – *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, 440 P.3d 75

Oklahoma Attorneys Mut. Ins. Co. v. Cox[86] holds judicial findings of "Comingling" and "Conversion" were sufficient to trigger a "crime/fraud" exclusion and preclude legal malpractice coverage.

Mansfield was a probate lawyer who went bad. He was charged with federal crimes and suspended from the practice of law for having comingled and converted funds from estates he represented. Various client estates sued him alleging negligence, along with intentional wrongs. His malpractice carrier, Oklahoma Attorneys Mutual Insurance Company, sued for a declaratory judgment it had no coverage due to a "crime/fraud" exclusion in the policy.

The trial court, Judge Nightingale, in Tulsa County, granted summary judgment for the insurance company. The Court of Civil Appeals affirmed, in this opinion by Judge Buettner. The basis for the summary judgment were the findings of the federal court in the criminal case and the Oklahoma Supreme Court in the ethics prosecution by the Bar Association.

Judge Buettner held the fact the Supreme Court did not find misappropriation but rather suspended the lawyer for commingling and conversion did not create a fact question precluding the insurance company's summary judgment.

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[86] 2019 OK CIV APP 25, 440 P.3d 75.

LIABILITY – INTENTIONAL ACT

Outcome of underlying civil or criminal case not necessarily determinative of whether injury was inflicted accidentally or intentionally for coverage purposes – *State Farm Fire & Cas. Co. v. Ray*, No. CIV-17-164-RAW, 2019 WL 7605674 (? Mar. 27, 2019)

State Farm Fire & Cas. Co. v. Ray[87] holds the outcome of underlying civil or criminal cases is not necessarily determinative of whether an injury was inflicted intentionally or accidentally for purposes of determining coverage.

Mr. and Mrs. Ray were married but apparently not necessarily happily so. They lived in separate homes. Mr. Ray, the insured under a State Farm farm/ranch liability policy, went to Mrs. Ray's home one evening. There, he encountered a "male guest." An argument ensued, in the course of which shots were fired from a pistol Mr. Ray carried. Mrs. Ray was shot in the neck and became a paraplegic.

Mr. Ray was charged criminally and convicted of assault and battery with a deadly weapon. Mrs. Ray sued Mr. Ray in state court, claiming he negligently shot her. State Farm hired counsel to defend him under the liability policy. State Farm's defense counsel argued to the jury the shooting was not accidental but rather was intentional while Mr. Ray contended the shooting was accidental. The state court jury found the shooting was accidental and gave Mrs. Ray a verdict for $68,500,000 and made a finding the shooting was accidental.

Both the civil verdict and the criminal conviction resulted in appeals while State Farm filed this declaratory judgment action (DJA) in federal court, seeking a declaration it had no liability because the shooting was intentional. State Farm argued the criminal conviction was conclusive of the issue in the DJA so there was no coverage. Mr. and Mrs. Ray argued the jury's

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[87] No. CIV-17-164-RAW, 2019 WL 7605674 (? Mar. 27, 2019).

finding in the civil case the shooting was accidental was conclusive of the fact it was accidental so there was coverage. While the DJA was pending, the criminal conviction was affirmed and became final. The civil appeal remained pending.

The federal court, Judge White, in the Eastern District, first held the jury finding in the civil case was conclusive and did not need to be relitigated in the DJA and denied State Farm's Motion for Summary Judgment. Then, on State Farm's Motion to Reconsider[88] he held his earlier ruling the jury finding in the underlying state court case was not determinative of the intentional act issue so that issue would have to be retried to the jury in the DJA. He struck language to the contrary from his original order and overruled Motions for Summary Judgment on the issue by both sides. The case was settled at that point so there will not apparently be another resolution of the issue whether the shooting was accidental or intentional.

Judge White's order is probably correct but for a reason he does not discuss in either of his orders. *State Mut. Life Assur. Co. v. Hampton*[89] holds it would violate due process to bind a party to the outcome of a judicial proceeding to which they were not a party. Under that rule, State Farm could not constitutionally be bound by the verdict in the civil case while Mrs. Ray could not be bound by the verdict in the criminal case, to which she was not a party.

LIABILITY INSURANCE – OCCURRENCE

No liability coverage where an insured's negligence results in a murder by another – *State Farm Fire & Cas. Co. v. Williams*, 776 F. App'x 971 (10th Cir. 2019)

S*tate Farm Fire & Cas. Co. v. Williams*[90] holds there can be no liability coverage where an insured commits a negligent act which results in a murder by another insured.

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[88] Reported at No. CIV-17-164-RAW, 2020 WL 1879656 (? Jan. 10, 2020).
[89] 1985 OK 19, ¶29, 696 P.2d 1027.
[90] 776 Fed. Appx 971 (10th Cir. 2019).

A gay couple was insured by State Farm. One of the insureds, Mr. Majors, took a gun belonging to his husband, Mr. Schmauss, and used it to kill their neighbor, Mr. Jabara. Mr. Jabara's personal rep, Williams, sued Majors and Schmauss. State Farm denied coverage as to both insureds, arguing there was no coverage as there was no "occurrence" because the murder was intentional on the part of Mr. Majors. State Farm sued for a declaratory judgment there was no coverage as to either insured. The trial court, Judge Claire Egan, in the Northern District, granted State Farm summary judgment and refused to certify the question whether the insured guilty only of negligence is barred from coverage based on an earlier 10th Circuit decision to that effect, *Farmers Alliance Mutual Ins. Co. v. Salazar*.[91]

Judge Eagan, and the 10th Circuit here, took the position they were bound to follow the 10th Circuit's decision in *Salazar*, even though the Oklahoma Supreme Court has arguably since held to the contrary in *Mayer v. State Farm Mut. Auto. Ins. Co*.[92] *Mayer*, while it held the Murrah building bombing did not give rise to a UM claim, also held the question of what is intentional is determined from the point of view of the insured, not the assailant. *Mayer* cited and relied on *Willard v. Kelley*[93]where a police officer was held entitled to UM from being shot by a fleeing felon, so long as the officer did not intend to be injured. The decision of what was intentional was determined from the insured's point of view, not that of the assailant.

Ironically, the liability claim involved in *Salazar* also gave rise to a UM claim on the part of the victim in that case, Byus. The Oklahoma Supreme Court held there were fact questions precluding summary judgment as to whether the shooting of Byus was covered by his family's

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[91] 77 F.3d 1291,1294. 1297 (10th Cir. 1996).
[92] 944 P.2d 288, 290 (1997 OK 67, 944 P.2d 288, 290).
[93] 1990 OK 127, 803 P.2d 1124.

UM coverage.[94] This opinion does not mention the *Byus* case at all.

This opinion affirms the grant of summary judgment and likewise holds the 10th Circuit cannot (or will not) certify the question due to the 10th Circuit's rule only the 10th Circuit, sitting *en banc*, or the Oklahoma Supreme Court can overrule a 10th Circuit case deciding a point of state law.

To make this decision a little worse, the State Farm policy contains a "Severability of Insurance" provision providing "This insurance applies separately to each insured." Under this provision, it is clear the insurance should apply separately to Mr. Schmauss (the negligent insured) and Mr. Majors (the killer). The Court does not let this impede it from holding there is no coverage and the Oklahoma Supreme Court should not be permitted to weigh in on the issue. The 10th Circuit's position certainly calls to mind the quote from Charles Dickens, who has Mr. Bumble saying: "If the law supposes that, the law is a ass –a idiot."

The result of this decision is there will be a stark difference in the outcome of a case between whether it is decided in state or federal court. That's not supposed to happen under *Erie v. Thompkins*![95]

LIABILITY – TRUCK INSURANCE

Liability coverage excluded where truck was leased but on way to pick up cargo, rather than hauling cargo – *Great W. Cas. v. Fast Haul, Inc.*, No. CIV-19-775-C, 2020 WL 1814915 (W.D. Okla. Apr. 9, 2020)

Great W. Cas. v. Fast Haul, Inc.[96] holds a standard liability exclusion applied and precluded coverage where the insured truck with the exclusion on its policy had been leased out to another trucking company was on the way to pick up cargo for that company but not yet

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[94] *Byus v. Mid-Century Ins. Co.*, 1996 OK 25, 912 P.2d 845.
[95] 304 U.S. 64 (1938).
[96] No. CIV-19-775-C, 2020 WL 1814915 (W.D. Okla. Apr. 9, 2020).

hauling cargo.

A truck-tractor owned by Fast Haul was leased by Fast Haul to Domino Transports, Inc. Fast Haul had it insured by Great Western under what is sometimes called a "dead-head" policy, which provides it insures the truck only when it is not either hauling cargo (the term for which is "dead-heading") or not being used in the business of anyone to whom the truck is "rented, leased or loaned."

Domino's driver was using the tractor to pull a trailer on the way to pick up freight when a wheel came off the trailer and hit and killed a woman. Her family and personal rep sued Fast Haul and Domino for her wrongful death.

Great West sued in federal court for a declaratory judgment it had no duty to defend or coverage. Judge Cauthron, in the Western District, granted Great West summary judgment in this Order. The Court later denied reconsideration.[97]

Judge Cauthron rejected the argument by the Estate and family there was ambiguity in the policy provision where the insured truck was rented to another company for the purpose of hauling freight but on the way to pick up freight, rather than already hauling freight. The exclusion unambiguously excluded coverage.

LIFE INSURANCE

Slayer statute requires only a conviction, not a final conviction to bar beneficiary's right to life insurance proceeds – *PHL Variable Ins. Co. v. Magness*, 785 F. App'x 531 (10th Cir. 2019)

PHL Variable Insurance Co. v. Magness[98] holds a conviction for murder is enough to bar a life insurance beneficiary from taking policy proceeds, even if the conviction is reversed on

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[97] *Great W. Cas. Co. v. Fast Haul, Inc.*, No. CIV-19-775-C, 2020 WL 476386 (W.D. Okla. Jan. 29, 2020).
[98] 785 F. App'x 531 (10th Cir. 2019).

appeal.

Magness was tried and convicted of murdering his wife. The life insurance company paid the policy proceeds into court and filed an interpleader against Magness and the personal representative of his wife's estate. The trial court, Judge White, in the Eastern District, held Magness was barred from recovery by the Oklahoma "slayer statute," 84 O.S. § 231, which bars one convicted of killing the insured from recovering life insurance proceeds. Magness, acting *pro se*, appealed, arguing there was likely error in the conviction so it would be reversed on appeal.

The 10th Circuit Court of Appeals affirmed, in a non-precedential opinion by Judge Mary Beck Briscoe. She held all the slayer statute required to deny a life insurance recovery was a conviction, which would bar recovery even if the conviction were reversed on appeal.

The only case on which the opinion relies does not support the conclusion. She cites *State Mut. Life Assurance Co. of America*,[99] That was a case in which the wife was never convicted of any crime for killing her husband. The Court held she would have been barred even without a conviction but a jury finding in a civil case she did not kill the husband feloniously permitted her to recover. It seems a bit of a reach to rely on that case to hold recovery would be barred even if the conviction was reversed and the alleged killer not ever convicted or found to have feloniously killed the insured.

[99] 1985 OK 19, 696 P.2d 1027, 1032-33.

LIFE INSURANCE

15 O.S. § 178, providing divorce revokes a beneficiary designation does not apply to a policy issued in another state – *Am. Nat'l Ins. Co. v. Marlow*, No. CIV-18-1098-C, 2019 WL 2616188 (W.D. Okla. June 26, 2019)

Am. Nat'l Ins. Co. v. Marlow[100] holds 15 O.S. § 178, which provides divorce revokes a beneficiary designation, does not apply to a policy issued in another state.

Mr. Lamb was issued a life insurance policy which named his wife as beneficiary, while he was a resident of Mississippi. They apparently moved to Oklahoma and had a child. In Oklahoma, they were divorced. The divorce decree ordered Mr. Lamb to maintain the policy in force with the wife and child as beneficiaries.

He then died without having designated a new beneficiary. The life insurance company interpleaded the policy proceeds, on the theory 15 O.S. § 178, which says a divorce revokes a beneficiary designation created a question as to the right of the child to the proceeds.

The Court, Judge Cauthron, in the Western District, ordered the proceeds paid into court and the life insurance company discharged. Then, the opinion says: "all Defendants joined in a Motion for Summary Judgment" to which no response was filed.

The Court concludes 15 O.S. § 178 does not apply to a policy issued in another state. This would seem to be almost certainly so as 15 O.S. § 162 requires an Oklahoma court to apply the law of the state where the contract was made. However, the Court concludes, since no other beneficiary has been designated, the now ex-wife is the beneficiary and the proceeds are to be paid by the Court Clerk to her.

The Court then says: "However, the Court makes no determination on the issue of whether or not the policy was in breach of the divorce decree or whether or not the minor child

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[100] No. CIV-18-1098-C, 2019 WL 2616188 (W.D. Okla. June 26, 2019).

has a claim based on any such breach. Those matters are more properly decided by the appropriate state court."

So, if Mom doesn't share the proceeds with the child, what happens? I'm sure glad I'm not involved in handling that case!

PROPERTY INSURANCE

Claim splitting prohibition requires dismissal of subrogation suit to be joined with the insured's tort suit– *Steadfast Ins. Co. v. Eagle Rd. Oil LLC*, No. 18-CV-457-GKF-JFJ, 2019 WL 2410083 (N.D. Okla. June 7, 2019)

Steadfast Ins. Co. v. Eagle Rd. Oil LLC[101] holds a separate suit by the property insurance company of an insured suffering damage must be dismissed to avoid the rule against splitting claims.

Steadfast insured the Pawnee Indian Nation's buildings when they were allegedly damaged by earthquakes caused by various oil field companies' fracking operations. The tribe filed a suit for $400,000 for the damages. Then Steadfast filed this suit for $324,269.98 representing its subrogation claim for damages it paid the tribe.

The Defendants in this suit (who were the same defendants as in the earlier suit) moved to dismiss this case. Judge Gregory Frizzell, in the Northern District, dismissed the insurance company's suit without prejudice so the insurance company could intervene in the pending, earlier suit.

This was the proper result, the Court says, because otherwise there would be an unnecessary duplication of judicial resources as the same claims are involved in each suit. The insurance company simply stands in the shoes of the insured in recovering the subrogation. Where the insurance does not pay all the damages, then both are real parties in interest in the

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[101] No. 18-CV-457-GKF-JFJ, 2019 WL 2410083 (N.D. Okla. June 7, 2019).

litigation and both should be joined in the same lawsuit. Only when the insurance company pays all the damages can the insurance company proceed with the subrogation claim in its own name. The insured may also sue and recover the subrogation for the insurance company.

PROPERTY INSURANCE

Bad faith allegation adequate to avoid summary judgment – *Surfside Japanese Auto Parts & Serv. v. Berkshire Hathaway Homestate Ins. Co.*, No. 18-CV-487-TCK-FHM, 2019 WL 2648814 (N.D. Okla. June 27, 2019)

Surfside Japanese Auto Parts & Serv. v. Berkshire Hathaway Homestate Ins. Co.[102] holds bad faith allegations were sufficient to withstand a Motion for Summary Judgment.

Berkshire-Hathaway wrote coverage on a business property in Tulsa. The insured claimed a roof loss due to hail and wind. Berkshire denied the claim, based on an engineering report the damage predated the policy. The insured sued on the contract and for bad faith. It alleged the insurance company turned over its claim-handling responsibility to a third-party engineering company and then refused to furnish the insured the report of the engineering firm. Berkshire moved for partial summary judgment on the bad faith claim.

The Court, Judge Terry Kern, in the Northern District, held the complaint adequately alleged bad faith, when tested by *Iqbal*[103] and *Twombly*[104] and overruled the Motion for Summary Judgment. The Court noted: the complaint "alleges . . . that the Defendant's denial of coverage was based on 'fraudulent and negligent engineering reports' and . . . failed to promptly investigate and promptly provide acceptance or denial of the claim.'" That was, the Court concluded, sufficient.

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[102] No. 18-CV-487-TCK-FHM, 2019 WL 2648814 (N.D. Okla. June 27, 2019).
[103] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[104] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,570 (2007).

PROPERTY INSURANCE

Insured's affidavit policy did not contain "time to sue" endorsement precludes summary judgment but insurance company's good faith belief it had a defense gets it summary judgment on bad faith – *Employers Mut. Cas. Co. v. Sportchassis Holdings, Inc.*, No. CIV-18-766-C, 2019 WL 6719000 (W.D. Okla. Dec. 10, 2019)

Employers Mut. Cas. Co. v. Sportchassis Holdings, Inc.[105] holds an insured's affidavit the policy as issued did not contain a "time to sue" endorsement precluded summary judgment on that ground but the insurance company's good faith belief it had a defense to the claim entitled it to summary judgment on a bad faith claim.

The business insured claimed a hail loss. The insurance company claimed, apparently based on weather reports, the only date on which hail larger enough to damage the roof occurred was 18 days before the date two years before the insured filed suit so the claim was barred by a two-year "time to sue" clause in the policy. The insured sued April 21, 2017. The insurance company said the only hail large enough to damage the roof fell on March 31, 2015 so the suit was filed 18 days after the two-year time to sue provision in the policy ran. The insurance company moved for summary judgment on that ground.

The insured responded with an affidavit the policy as issued did not have the two-year time to sue provision. This would mean the five-year written contract statute of limitations would apply. The Court, Judge Cauthron, in the Western District, overruled the insurance company's motion for summary judgment on that ground because it created a fact question.

This will be an interesting one to watch. If the time to sue clause is in a separate endorsement, the insured may be able to win this one. Insurance companies do not keep a complete copy of the policies they issue. Rather, they have a computer record of what form of

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[105] No. CIV-18-766-C, 2019 WL 6719000 (W.D. Okla. Dec. 10, 2019).

"jacket" the policy has. This is the bulk of the verbiage of the policy. The computer (and the declarations page) will then have a list of the endorsements which, together with the dec page and the jacket will make up the complete policy.

It would be hard to convince a jury a time to sue clause in a printed jacket got left out of the copy used in the Plaintiff's policy. On the other hand, it is easy to see how an endorsement containing the time to sue clause could be left off and not attached to the policy.

PROPERTY INSURANCE – BAD FAITH

Defendant precluded from asserting late-blooming fraud defense to bad faith claim, comparative bad faith claim, adding late witnesses not included in final witness list and evidence of prior claims under policy – *Elk City Golf & Country Club, Inc. v. Philadelphia Indem. Ins. Co.*, No. CIV-18-196-D, 2019 WL 6499137 (W.D. Okla. Dec. 3, 2019)

Elk City Golf & Country Club, Inc. v. Philadelphia Indem. Ins. Co.[106] holds an insurance company defending a bad faith claim will be precluded by rulings on motions in *limine* from asserting a late-blooming claim of fraud on the part of the insured, asserting a comparative bad faith claim, adding late witnesses not included in its final witness list and asserting evidence of prior claims under the policy.

The Country Club, Plaintiff in a bad faith claim arising from a tornado claim, moved in *limine* to preclude the Defendant from mentioning several matters. The insurance company did not specifically plead in its answer fraud on the part of the insured but then added an assertion of fraud and witnesses to prove their fraud claim to the pretrial order after discovery had closed. The trial court, Judge DeGiusti, in the Western District, sustained a Motion in Limine not to permit the fraud defense and strike from the pretrial order the witnesses not previously listed on the final witness list.

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[106] No. CIV-18-196-D, 2019 WL 6499137 (W.D. Okla. Dec. 3, 2019).

The insurance company claimed the affirmative defense in their answer: "Conditions precedent and subsequent to an entitlement to certain benefits under the subject insurance contract are not satisfied, by way of which the claim is barred" plead fraud. The Court held the requirement of F.R.C.P. 9(b) that fraud be stated with particularity applied and was not met.

The Court found a late-blooming claim by the insurance company it could assert as a defense to the bad faith claim a defense of "comparative bad faith" was precluded by *First Bank of Turley v. Fid. and Deposit Ins. Co. of Md*.[107]

The insurance company tried to add witnesses to the pretrial order who were not included in its final witness list. The Court struck those witnesses, leaving to testify to what the insurance company claimed was an attempt by the insured to inflate the claim only the golf course manager, who had also been listed as a witness for Plaintiff.

The Court also precluded proof of earlier claims under the same policy to show the claim for loss of the roof in the present claim was inflated. The insurance company had earlier refused to produce the claim files for the earlier claims but then decided after depositions were taken the prior claims were relevant and belatedly produced the earlier claim files.

In an earlier order in the same case,[108] Judge DeGiusti granted the Plaintiff discovery of claim reserve information, finding it relevant and discoverable under *Charles A. Shadid, L.L.C. v. Aspen Specialty Ins. Co.*[109]

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[107] 1996 OK 105, ¶22, 928 P.2d 298, 308.
[108] *Elk City Golf & Country Club, Inc. v. Philadelphia Indem. Ins. Co.*, No. CIV-18-196-D, 2019 WL 6053020 (W.D. Okla. Nov. 15, 2019).
[109] No. CIV-15-595-D, 2018 WL 3420816 (W.D. Okla. July 13, 2018).

RELEASES

Attorney's equitable lien in federal coverage case not affected by releases in underlying state court cases in which attorney was not involved – *Zurich Am. Ins. Co. v. Good to Go, LLC*, No. CIV-16-1067-F, 2019 WL 3976849 (W.D. Okla. Aug. 22, 2019)

Zurich Am. Ins. Co. v. Good to Go, LLC[110] holds an equitable attorney lien in a federal insurance coverage case is not affected by a release provision in the underlying state tort cases that each party will bear its own attorney fees.

This one requires some explanation outside the facts stated in this brief opinion. The case arises out of the opioid crisis which has been so much in the news. Good-to-Go, LLC (here, GTG) owned a medical clinic. It offered doctors an opportunity to practice medicine "good-to-go" without the doctor having to worry about facilities, nurses, equipment or supplies. GTG furnished all that and the doctor and GTG divided the fees earned.

GTG did not buy its own medical malpractice coverage. Instead, it carried general liability insurance and required the doctors who used its services to carry malpractice insurance. One of the doctors who operated in the clinic let his malpractice coverage lapse and continued practicing. He was later found to have been operating a "pill mill," overprescribing opioids on a large scale. He is now doing a long prison sentence for murder because some of his patients died of overdoses, while others became addicted but survived. A number of lawsuits were filed against the doctor, GTG and principal owner of GTG, who operated the clinic.

Two insurance companies had the general liability coverage on GTG, Continental Casualty Co. and Zurich, over the years, both written by the same agent. Both denied coverage due to "professional acts" exclusions in the policies. Zurich filed this declaratory judgment

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[110] No. CIV-16-1067-F, 2019 WL 3976849 (W.D. Okla. Aug. 22, 2019).

action (DJA) for a declaration of no coverage.

However, GTG's owner testified he had told the agent when he bought the liability coverage he wanted coverage for "whatever could go wrong in the clinic." He said he told the agent about an earlier episode at the clinic, in which a nurse was accused of reusing needles and syringes in giving flu shots.

GTG owned very limited assets. The real estate was leased from the owner's family trust. The owner threatened to cancel the lease, abandon the LLC and form a new one to continue the business under another name. This would have left the claimants without any source of recovery.

Instead, he hired a plaintiffs' lawyer (Travis) who approached the lawyers for the claimants with a proposal that Travis, with a conflict waiver from the claimants which was approved by the Oklahoma Bar Ethics Counsel, would represent all the Defendants in the DJA on a contingent fee basis for 15% of whatever coverage resulted from the DJA. Some, but not all, of the claimants' attorneys agreed to this and Travis agreed to represent GTG in the DJA. After Travis got committed to represent GTG, the claimants' attorneys refused to have him represent their clients but instead hired an insurance defense lawyer to represent them on an hourly rate basis. Travis put "Attorney Lien Claimed" on his pleadings in the DJA and another he filed against Continental.

On cross-motions for summary judgment, GTG argued for reformation of the policies, based primarily on *Gentry v. American Motorist Ins. Co.*,[111] which held constructive fraud justified reformation where the agent is asked for a particular coverage and then sells a policy which does not provide that coverage. The claimants argued the professional acts exclusion was

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[111] 1994 OK 4, 867 P.2d 468.

ambiguous so it provided coverage. The Court, Judge Friot, in the Western District, held the provision was not ambiguous so the policy as written provided no coverage. However, he denied the insurance companies summary judgment on the reformation claim. He also held the claimants had no standing to participate in the reformation claim, because they were not parties to the insurance contract.

Faced with the prospect of a jury trial on the reformation issue, the insurance companies began to settle the cases. Eventually, the cases all settled. Travis filed a motion to enforce his attorney lien. The Court held Travis had no statutory lien on the settlement proceeds because the settlements were paid on behalf of, but not to, GTG, with whom Travis had a fee contract. However, the Court held Travis had an equitable lien for a *quantum meruit* attorney fee and set the case for a hearing on the proper percentage for a *quantum meruit* recovery.

Then, the claimants' attorneys filed motions to defeat Travis's attorney fee claim based on provisions in the releases settling the underlying cases each side would bear its own attorney fees. Some filed for summary judgment while others filed motions to enforce settlement agreements. Judge Friot treated them as all the same and denied them. He said Travis was not bound by the releases in cases to which he was not a party and which he never saw or signed. He also notes the specific language of the releases was each party "shall bear their own attorney fees and costs incurred in the litigation." The Court rejected the argument "the litigation" referred to the federal court coverage litigation, as opposed to the state court, tort litigation.

This case has significant implications. If you have a plaintiff's case against an individual or a small company and the insurance company denies coverage, you really need some way to enable the insured to obtain representation in the coverage litigation. If you tell that small defendant he must pay a coverage lawyer $400 or $450 an hour for representation, he will get to

the bankruptcy court right away and your claim will not be paid. The best result would be a statutory lien for a contingent fee, but an equitable lien is the next best thing.

SURETY

Surety claim from federal construction contract may include insurance bad faith claim – *United States for Use & Benefit of Metal Sales Mfg. Corp. v. A.C. Dellovade, Inc.*, No. CIV-19-373-C, 2019 WL 4060876 (W.D. Okla. Aug. 28, 2019)

United States for the Use & Benefit of Metal Sales Mfg. Corp. v. A.C. Dellovade, Inc.[112] holds a Miller Act surety bond case may include a state-law based insurance bad faith claim.

Plaintiff supplied a contractor doing construction at Tinker Air Force Base and got from the contractor a surety bond for almost $5 million. The contractor failed to pay for the materials. Liberty Mutual failed to pay the bond claim. The contactor sued, among others, Liberty Mutual. The contractor included a bad faith claim against Liberty, which claimed in a Motion to Dismiss the Miller Act[113] and its remedies preempted the state law-based bad faith remedy. Judge Robin Cauthron disagreed and overruled Liberty Mutual's Motion to Dismiss.

Judge Cauthron says the preemption argument is primarily based on *F.D. Rich Co., Inc. v. United States ex rel. Indus. Lumber Co., Inc*.[114] There, the Supreme Court held an attorney fee award based on state law was improper where the Miller Act provided remedies not including attorney fees. Since then, however, federal cases have diverged on whether that case precludes all state law remedies. The 10th Circuit held in *United States ex rel. Sunworks Div. of Sun Collector Corp. v. Ins. Co. of N. Am*.:[115]"Recovery under the Miller Act is not a supplier's exclusive remedy against a general contractor."

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[112] No. CIV-19-373-C, 2019 WL 4060876 (W.D. Okla. Aug. 28, 2019).
[113] 40 U.S.C.A. § 3133.
[114] 417 U.S. 116 (1974).
[115] 695 F.2d 455,458 (10th Cir. 1982).

Based on that decision, Judge Cauthron held preemption did not apply. She also held the allegation of the bad faith claim was sufficient to avoid dismissal. This case appears likely to answer some questions about preemption and the availability of bad faith as a remedy in surety cases. Watch for it.

UNINSURED MOTORIST

UM carrier gets credit against judgment where UM carrier waives subrogation and makes uncontested amount payment – *Phillips v. Farmers Ins. Co., Inc.*, No. 17-CV-547-JED-JFJ, 2019 WL 3302817 (N.D. Okla. July 23, 2019)

Phillips v. Farmers Insurance Co., Inc.[116] holds a UM carrier gets credit for the amount the tortfeasor's liability carrier paid where the UM carrier waived subrogation and paid an uncontested amount and the insured tried the case against the tortfeasor.

Ms. Phillips had a $1 million UM policy with Farmers. She was badly injured by a tortfeasor who had $100,000 liability limits. The liability carrier tendered the $100,000 limit and paid it after Farmers waived subrogation. Farmers valued her claim at $184,165 and paid $84,165 as an uncontested amount. Ms. Phillips then sued Farmers for her total damages.

In the trial, before Judge John Dowdell, in the Northern District, Ms. Phillips and Farmers stipulated in the pretrial order the jury would be instructed to find Ms. Phillips' total damages from which the $100,000 liability and the $84,165 UM payment Farmers made would be deducted from the verdict to determine the amount of Ms. Phillips' judgment against Farmers. Ms. Phillips also stipulated she was not seeking to recover medical expenses incurred before trial.

Then, after pretrial and 20 days before trial, Ms. Phillips' lawyer changed his mind and moved to amend the stipulation so he could argue Farmers was not entitled to credit against the

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[116] No. 17-CV-547-JED-JFJ, 2019 WL 3302817 (N.D. Okla. July 23, 2019).

verdict for the $100,000 the liability carrier paid and Farmers got no credit against the verdict for the $100,000 payment because Farmers' waived subrogation and the provisions of 36 O.S § 3636F meant Farmers got no credit for the payment. Judge Dowdell refused to permit the amendment to the stipulations, finding it came too late and was inconsistent with a proper reading of § 3636F.

The jury found Ms. Phillips' damages from the wreck totaled $237,500, from which Judge Dowdell subtracted the $184,165 paid by the liability carrier and Farmers to arrive at a net verdict for Ms. Phillips of $53,335. Ms. Phillips filed a motion under FRCP 59(e) (the federal equivalent of a motion for new trial) to argue Farmers did not get credit for the $100,000 liability payment. Ms. Phillips also argued the jury should have returned a verdict for past and future medical, despite her failure to claim past medical at pretrial and her statement at an instruction conference future medical had not been proven and should not be included in the instructions. Judge Dowdell's opinion does not instruct us on Ms. Phillips' lawyer's argument for these latter positions.

Rather, the opinion deals at length with, and rejects, Ms. Phillips' counsel's argument O.S § 3636F did not permit credit for the liability payment, in the face of Farmers' subrogation waiver because of the last sentence of § 3636F:

> 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.

Judge Dowdell rejects Ms. Phillips' argument the effect of crediting the liability payment is the same as allowing subrogation, noting the purpose of the UM payment is to compensate the insured and not to cause the insured to be paid $100,000 more than her damages, as found by the jury. There is logic to that position as well as some argument for Ms. Phillips' lawyer's position.

We'll hear more about this later.

UNINSURED MOTORIST

Third Amended Petition did not relate back to a time before the removing defendant was joined and served in lawsuit so as to make removal within 30 days of service but more than 2 years after earlier, Second Amended Petition was filed – *Klintworth v. Valley Forge Ins. Co.*, No. 20-CV-0178-CVE-FHM, 2020 WL 3497468 (N.D. Okla. June 29, 2020)

Klintworth v. Valley Forge Ins. Co.[117] holds removal was proper and remand would be denied where the removing defendant filed the removal within 30 days of being served a Third Amended Petition but more than two years after the filing of a Second Amended Petition to which the Plaintiff claimed the Third Amended Petition would relate back.

Klintworth was a high-level employee, injured in a car wreck sometime in or before 2016. He sued in state court the person he evidently thought was the driver of an uninsured vehicle in the wreck. He filed an Amended Petition to add a newly named driver, neither of which answered or entered an appearance. Then in 2017, he dismissed the individual defendants and filed a Second Amended Petition to join Valley Forge Ins. Co., which removed but got remanded, apparently because of non-diversity of the two drivers of the UM vehicle. Also, in 2017, Plaintiff's attorney received another policy by Continental Casualty Co. (CCC) which covered Klintworth's employer and provided "key man" coverage for an injured or disabled key employee such as Klintworth. Finally, in 2020, Plaintiff filed a Third Amended Petition naming CCC and suing CCC for bad faith, based on the key man policy.

CCC removed to federal court, resulting in this Motion to Remand, which Judge Claire Eagan, in the Northern District, overruled. There was no way CCC could have realized it would be joined three years later and there would be no way CCC could have removed the case within

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[117] No. 20-CV-0178-CVE-FHM, 2020 WL 3497468 (N.D. Okla. June 29, 2020).

the year permitted for removal by 28 U.S.C.A. § 1446(c).

As an alternative ground for denying remand, Judge Eagan suggests the fact Plaintiff's attorney had notice of the CCC policy since 2017 and did not file the Third Amended Petition until 2020 indicated bad faith by manipulating his filings to deny CCC an opportunity to remove.

UNINSURED MOTORIST BAD FAITH

Differing inferences in double-insured case preclude summary judgment as to bad faith – *Mayes-Tyler v. GEICO Gen. Ins. Co.*, No. CIV-18-00681-PRW, 2019 WL 5553285 (W.D. Okla. Oct. 28, 2019)

Mayes-Tyler v. GEICO Gen. Ins. Co.[118] holds differing permissible inferences from undisputed facts preclude partial summary judgment in a double-insured, UM case.

Ms. Mayes-Tyler and the tortfeasor who injured her were both insured by GEICO. The tortfeasor had $100,000 liability limits. Ms. Mayes-Tyler had $50,000 UM. GEICO conceded early in the claim the liability was clearly on the tortfeasor, although it first denied liability in its defense of the tortfeasor.

Ms. Mayes-Tyler hired a lawyer who tried to settle with GEICO, but GEICO offered only $74,424.13 while her medical bills were $50,649.13. That lawyer referred the case to other counsel, who filed suit against the tortfeasor. GEICO declined to offer any UM, based on the low evaluation by the liability adjuster.

Then, the liability adjuster offered the $100,000 liability limit, first saying she evaluated the case at $101,298.26 but then saying she offered the liability limit based on a "business decision" and the evaluation in excess of the $100,000 liability limit was "inadvertent" and a mistake. GEICO still didn't offer any UM. The UM adjustor "consulted" with the liability adjuster but said she made her own evaluation.

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[118] No. CIV-18-00681-PRW, 2019 WL 5553285 (W.D. Okla. Oct. 28, 2019).

The second lawyer (who was me) took the $100,000 liability limit and sued on the UM and for bad faith. GEICO removed the case to federal court. GEICO moved for partial summary judgment on the bad faith claim. The Court, Judge Wyrick, in the Western District, denied the partial summary judgment.

He said the inferences from the admitted facts could lead to the conclusion GEICO was in bad faith. The decision became a moot point because the jury in the resulting trial found the damages to be within the $100,000 liability limit.

UNINSURED MOTORIST BAD FAITH

UM Carrier's obligation to pay first dollar does not apply where UM carrier waives subrogation; low ball evaluation does not cause bad faith claim to survive summary judgment – *Shotts v. GEICO Gen. Ins. Co.,* 943 F.3d 1304 (10th Cir. 2019)

Shotts v. GEICO Gen. Ins. Co.[119] holds the obligation of a UM carrier to pay first dollar benefits when damages exceed the adverse liability limits does not apply where the UM carrier waives subrogation and a low ball evaluation and offer did not cause a bad faith claim to survive the UM carrier's summary judgment motion.

Mr. Shotts was injured in a car wreck which was the fault of a Farmers insured who had a $25,000 liability policy. He got a back injury which apparently included an aggravation of a pre-existing degenerative condition. He had a $25,000 UIM policy with GEICO.

Farmers offered its $25,000 liability limit. GEICO waived subrogation but evaluated the claim within the $25,000 liability limit. When Shotts' attorney objected to the evaluation, GEICO re-evaluated and offered $3,210.87. Shotts sued for bad faith. GEICO removed the case to federal court.

The trial court, Judge Palk, in the Western District, sustained GEICO's Motion for

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[119] 943 F.3d 1304 (10th Cir. 2019).

Summary Judgment. The 10th Circuit Court of Appeals affirmed, in this opinion by Judge Matheson.

Shott's attorney argued GEICO was in bad faith for failing to pay the first dollar, as required by *Burch v. Allstate Ins. Co.*[120] The Appeals Court held *Burch's* requirement the UM carrier pay all of the insured's damages, up to the UM limit, once the UM carrier determines the value of the claim exceeds the liability limit does not apply where the UM carrier waives subrogation.

The Court says to rule otherwise would make it possible for the insured to make a double recovery because the UM carrier would be unable to recover subrogation against the liability carrier because it had waived subrogation. This rationale might work if the value of the claim is somewhere between the amount of liability coverage and the UIM coverage. However, if the value of the claim exceeds the total of the two, then the UM carrier would not have subrogation and the insured would be entitled to both the liability and the UIM coverage.

The Court also held the insurance company had properly evaluated the claim at $3,210.87 over the $25,000 liability limit or $28,210.87. It seems strange the federal district judge is able to rule as a matter of law and determine the value of a bodily injury claim. State Court judges certainly don't have that capability. So, we have from this case two instances in which the outcome will be different depending on whether your claim is in state or federal court.

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[120] 1998 OK 129, 977 P.2d 1057.

UNINSURED MOTORIST BAD FAITH

UM carrier's good faith belief it has a defense supports summary judgment as to bad faith claim – *Sober v. Columbia Nat'l Ins. Co.*, No. CIV-18-736-C, 2019 WL 5068662 (W.D. Okla. Oct. 9, 2019)

Sober v. Columbia Nat'l Ins. Co.[121] holds a UM carrier's good faith belief it has a defense to a UM clam supports summary judgment for the UM carrier on the bad faith claim.

Mr. Sober had a low-speed accident. Neither driver appeared injured. About two months later, he went to a chiropractor complaining of back, neck and right leg pain. The chiropractor treated him 5 times and noted his back and leg pain were resolved and his right leg pain improved. Soon after this, he had a colonoscopy.

As his wife was driving him home, he was hungry so they pulled into a McDonald's. After eating a few bites, he felt ill, opened the car door and fell face-first to the ground. He ended up being paralyzed from the neck down from a spinal contusion from the C-2 to the C-5 vertebrae.

Sober presented a UM claim. The UM carrier hired a board-certified neurologist who concluded his paralysis resulted from his fall from the car and not the earlier car accident or chiropractic treatment. The UM carrier denied the claim and he sued. In this opinion, Judge Cauthron, in the Western District federal court, granted the UM carrier summary judgment on the bad faith claim, leaving the contract claim to go to the jury.

The Court relied on a long line of Oklahoma cases, from *Christian v. American Home Assurance Co.*[122] to *Badillo v. Mid Century Ins. Co.*[123] in holding that, if the insurance company in good faith denies and defends coverage, it is not in bad faith.

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[121] No. CIV-18-736-C, 2019 WL 5068662 (W.D. Okla. Oct. 9, 2019).
[122] 1977 OK 141, 577 P.2d 899.
[123] 2005 OK 48, 121 P.3d 1080.

UNINSURED MOTORIST BAD FAITH

Bad faith motion for summary judgment granted as to the underlying bad faith, in light of belated payment, but denied as to an emotional distress and punitive damage claim; Daubert motion overruled – *Graves v. Pennsylvania Manufacturers' Indem. Co.*, No. CIV-19-60-SLP, 2019 WL 10058880 (W.D. Okla. Oct. 24, 2019)

Graves v. Pennsylvania Manufacturers' Indem. Co.[124] holds an insurance company's motion for summary judgment should be overruled to the extent of the bad faith claim in light of the insurance company's belated payment of its limit but the insured's emotional distress claim and punitive damage claim will be permitted to continue in a bad faith claim for delay in paying a $1 million UIM limit and Plaintiff's expert witness will be permitted to testify.

The Plaintiff, widow and personal rep of a tribal police officer sued the tribe's UM carrier after he was killed when an oncoming driver, passing in a no passing zone, hit him head-on and killed him. The at-fault driver had $100,000 liability limits, which were soon tendered.

The tribe's UM carrier delayed tendering its $1 million limit until September 2018, following the death in January of 2017 and paid only after the widow hired a lawyer because of the non-payment. The insurance company spent the intervening time investigating whether a car which had already passed in the no-passing zone might also be liable.

In this opinion, the Court, Judge Scott Palk, in the Western District, sustained the insurance company's summary judgment motion as to recovery under the policy, because the policy was ultimately paid. The Court also refused to allow recovery of the attorney fee the widow had to pay because of the delay, citing *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*,[125] and held she otherwise had no financial loss. However, he permitted the case to continue for the widow's emotional distress and punitive damage claim.

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[124] No. CIV-19-60-SLP, 2019 WL 10058880 (W.D. Okla. Oct. 24, 2019).
[125] 2000 OK 55, ¶45-46, 11 P.3d 162, 178-82.

He also (under a separate Westlaw number)[126] overruled the insurance company's *Daubert* motion to exclude the testimony of Plaintiff's bad faith expert witness, Deborah Rankin. This might be good to know in future UM bad faith cases before Judge Palk. He noted she was a retired State Farm adjuster with many years' experience handling UM claims.

UNINSURED MOTORIST – TEMPORARY SUBSTITUTE VEHICLE

Substitute for temporary substitute vehicle could be a temporary substitute vehicle for the insured vehicle so summary judgment of no coverage overruled – *Travelers Indem. Co. of Connecticut v. Beyl-Davenport House Moving, Inc.*, No. 18-CIV-269-D, 2019 WL 4602822 (W.D. Okla. Sept. 23, 2019)

Travelers Indem. Co. of Connecticut v. Beyl-Davenport House Moving, Inc.[127] holds a temporary substitute for a temporary substitute vehicle could be a temporary substitute vehicle for the insured vehicle.

The named insured was a house-moving company. It was preparing to move an historic home to a museum and had all of its vehicles working in preparation for the big move. One of the vehicles named on the policy was a 1981 Kenworth semi-truck. It needed to be serviced so it would be sure to pass the DOT inspection for the move. It was at the truck repair facility for that purpose.

The owner of the insured company needed to drive the proposed route to be followed in the move. He testified he would have driven the Kenworth, if it had not been in the shop so he instead chose to use his personal truck, not insured under the policy but the personal truck developed a mechanical problem and was put in the shop so he instead used another truck not insured under the policy. While driving the route, that truck was involved in a wreck, resulting in

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[126] *Graves v. Pennsylvania Manufacturers' Indem. Co.*, No. CIV-19-60-SLP, 2019 WL 10058881 (W.D. Okla. Oct. 24, 2019).
[127] No. 18-CIV-269-D, 2019 WL 4602822 (W.D. Okla. Sept. 23, 2019).

a UM claim against the Kenworth policy.

The injured insured claimed the "second substitute vehicle" was a temporary substitute vehicle for the Kenworth so the UM coverage applied. Travelers denied the UM claim, arguing the first substitute vehicle would have been a temporary substitute vehicle and covered but the second vehicle was not covered.

The policy provided the coverage applied to anyone occupying the insured vehicle or a temporary substitute for a covered vehicle. It provided a temporary substitute vehicle required the insured vehicle be "out of service because of its breakdown, repair, servicing, 'loss' or destruction."

Chief Judge DeGiusti, in the Western District, denied Travelers' summary judgment motion. He cites *Houston Gen. Ins. Co. v. Am. Fence Co.*[128] as the leading 10th Circuit authority holding what is the purpose of the temporary substitute vehicle provision. He says the purpose is not to defeat liability but rather to afford the insured additional coverage when the insured vehicle is out of service for one of the specified reasons and limit the insurance company's risk to one operating vehicle at a time.

He made clear he was not holding the vehicle being occupied was a temporary substitute but rather was holding it could be so summary judgment was not appropriate. That leads to an interesting question in light of the fact the determination of coverage is a matter of law for the Court. Will he decide at a later date whether the vehicle being occupied was a temporary substitute vehicle?

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[128] 115 F.3d 805 (10th Cir. 1997).

WORKERS' COMP PREMIUM

Insured owes premium whether there was a claim or not – *Zurich Am. Ins. Co. of Illinois v. Chaffin Tower Servs., Inc.*, No. CIV-18-367-RAW, 2019 WL 7606263 (? Aug. 5, 2019)

Zurich Am. Ins. Co. of Illinois v. Chaffin Tower Servs., Inc.[129] holds the insured owed Workers' Comp premiums even though there was no claim during the policy term.

Chaffin Tower Services, Inc. bought Workers Comp insurance from Zurich. The policy called for an advance premium payment followed by a payroll audit. Audits for a two-year period showed the payroll justified a total premium $173,369 higher than the estimated premium.

Chaffin refused to pay, arguing it had gone the two year period for which premiums were claimed without a claim being filed so the "audit calculation does not represent 'just damages'" so charging the premium would result in unjust enrichment. The federal court, Judge White, in the Eastern District, granted the insurance company summary judgment in this decision.

The Court distinguished *ROC ASAP, L.L.C v. Starnet Ins. Co.*[130] where the court held unjust enrichment valid as a defense where the insurance company claimed allowing the insured a recovery for deterioration of insured property would result in unjust enrichment of the insured. Rather, the case was more like *Moeller v. Theis Realty, Inc.*[131] where the seller claimed paying the realty company a commission on a sale not accomplished by the Realty Company would have resulted in unjust enrichment of the insurance realty company. There, the contract provided the commission would be due on a sale whether the realty company procured the sale or not. Here, the policy provided the premium was due without regard to whether claims were paid.

The lawyer who brought this suit may have been a better man than I. I'm not sure I would

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[129] No. CIV-18-367-RAW, 2019 WL 7606263 (? Aug. 5, 2019).
[130] No. CIV-12-461-D, 2014 WL 4631121 (W.D. Okla. Sept. 15, 2014).
[131] 13 Ark. App. 266 (1985).

have made this argument before Judge White.

WORKERS' COMP – SUBROGATION – INTERVENTION

Subrogated work comp carrier can intervene to perfect a lien right to recovery – *Sinclair v. Hembree & Hodgson Constr., L.L.C.*, No. CIV-18-938-D, 2019 WL 3755502 (W.D. Okla. Aug. 8, 2019)

Sinclair v. Hembree & Hodgson Constr., L.L.C.[132] holds a subrogated workers' compensation carrier may intervene in the injured employee's suit against tort-feasors to protect its right to a first lien for recovery of its subrogation under 85A O.S. § 43(A)(1)(c).

A dump truck driver was badly injured when a tire blew out on another dump truck he was meeting, causing a collision. Twin City Insurance Company had workers' comp coverage on the injured driver. It sought to intervene in the employee's tort suit to recover for his injuries. The federal court, Chief Judge DiGiusti, in the Western District, first denied intervention, holding the work comp carrier's rights were adequately protected by the attorneys representing the injured employee.[133]

Twin City filed a "Motion to Reconsider" arguing its subrogation rights were not adequately protected by the Plaintiff's lawyers' representation because 85A O.S. § 43(A)(1)(c) gave it a first lien right only if it sued and made a recovery.

Judge DiGiusti noted the Federal Rules of Civil Procedure do not recognize a motion to reconsider. He said he could treat the motion as a motion to alter or amend judgment under F.R.C.P. 59(e) or a motion seeking relief from the judgment under F.R.C.P. 60(b). He chose to treat it under Rule 59(e), since it was filed within the 28 days allowed to file such a motion.

He concluded the peculiar wording of the administrative workers' compensation act

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[132] No. CIV-18-938-D, 2019 WL 1179419 (W.D. Okla. Mar. 13, 2019).
[133] *Sinclair v. Hembree & Hodgson Constr., L.L.C.*, No. CIV-18-938-D, 2019 WL 1179419 (W.D. Okla. Mar. 13, 2019).

meant the interest of the comp carrier may not be adequately protected by the injured workman's suit. The comp carrier argued, and the Court agreed, the provision of 85A O.S. § 43(A)(1)(c) that "if the . . .carrier join in the action against a third party . . . they [the comp carrier] shall be entitled to a first lien on two-thirds" of the proceeds meant the comp carrier's rights might not be completely protected if it were denied intervention.