

## RETROACTIVE APPLICATION OF STATUTES

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The “default” rule is that statutes apply prospectively only. If the statute creates, enlarges or diminishes vested or contractual rights then it applies prospectively absent clear legislative intent. Statutes that are merely procedural can be applied retroactively and can apply to pending actions or procedures. Article 5 section 54 of the Oklahoma Constitution provides that “The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute.”<sup>1</sup> In *Cole v. Silverado Foods, Inc.*, the Oklahoma Supreme Court said that this provision is intended to “protect from legislative extinguishment by retroactive enactments accrued rights acquired or proceedings begun under a repealed or amended statute.”<sup>2</sup> The statute at issue in *Cole v. Silverado* shortened from five to three years the time that a workers compensation claim had to be pursued prior to becoming barred by lapse of time.<sup>3</sup> In finding the amendments inapplicable, the Court held that “[t]he statute in effect at the claim’s filing, which affects the parties’ substantive rights and liabilities, is shielded from amendatory change”<sup>4</sup>

This constitutional provision also raises a question of when a claim is said to “accrue” for purposes of barring retroactive application of a statute. In *Barry v. Board of Com’rs of Tulsa County*,<sup>5</sup> the plaintiffs filed suit seeking relief from a property tax assessment for the years 1931 and 1932.<sup>6</sup> The

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<sup>1</sup> Art. 5 §54, Okla. Const.

<sup>2</sup> *Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶14, 78 P.3d 542, 548.

<sup>3</sup> *Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶1, 78 P.3d 542, 544.

<sup>4</sup> *Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶15, 78 P.3d 542, 549.

<sup>5</sup> *Barry v. Board of Com’rs of Tulsa County*, 1935 OK 701, 49 P.2d 548.

<sup>6</sup> *Barry v. Board of Com’rs of Tulsa County*, 1935 OK 701, ¶2, 49 P.2d 548, 549.

defendant Board initially denied the plaintiffs' application citing a statutory amendment which became effective approximately 60 days prior to the plaintiff's application, which divested the Board of jurisdiction to hear such claims.<sup>7</sup> The Supreme Court said the plaintiffs had an "accrued right" in the form of a cause of action, prior to the effective date of the 1933 amendments.<sup>8</sup> In determining what the words "proceedings begun" means, the Court has held "proceeding begun" refers to essential steps or measure to invoke, establish, or vindicate a right,<sup>9</sup> and any proceedings that were begun before the effective date of the new legislation are unaffected.<sup>10</sup> Considering this it would seem that the best way to protect yourself from the impending effective date of the "tort reform" legislation would be to institute "proceedings" prior to November 1, 2011.

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

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

<sup>8</sup> *Barry v. Board of Com'rs of Tulsa County*, 1935 OK 701, ¶8, 49 P.2d 548, 550.

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

<sup>10</sup> *Nantz v. Nantz*, 1988 OK 9, ¶8, 749 P.2d 1137, 1143 (Opala, J. Dissenting).

<sup>11</sup> *Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, 295 P.2d 765.

<sup>12</sup> *Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, ¶ 6, 295 P.2d 765, 767.

are to be construed to have only prospective operation unless the purpose and intent of the legislature to give them a retrospective effect is expressly declared or implied from the language used.”<sup>13</sup> The Court determined that the amendment was not purely procedural but conferred a right to recovery that was not available prior to the enactment.<sup>14</sup>

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

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<sup>13</sup> <sup>13</sup> *Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, ¶ 11, 295 P.2d 765, 767.

<sup>14</sup> <sup>14</sup> *Phillips v. H.A. Marr Grocery Co.*, 1956 OK 104, ¶ 15, 295 P.2d 765,767.

<sup>15</sup> <sup>15</sup> *MFA Ins. Co. v. Hankins*, 1980 OK 66, ¶ 1, 610 P.2d 785, 785.

<sup>16</sup> <sup>16</sup> *MFA Ins. Co. v. Hankins*, 1980 OK 66, ¶ 1, 610 P.2d 785, 785.

<sup>17</sup> <sup>17</sup> *MFA Ins. Co. v. Hankins*, 1980 OK 66, ¶ 7, 610 P.2d 785, 787.

<sup>18</sup> <sup>18</sup> *MFA Ins. Co. v. Hankins*, 1980 OK 66, ¶ 7, 610 P.2d 785, 787.

<sup>19</sup> <sup>19</sup> *MFA Ins. Co. v. Hankins*, 1980 OK 66, 610 P.2d 785.

In *Thomas v. Cumberland Operating Co.*,<sup>20</sup> the Oklahoma Supreme Court held “Statutes are to be construed as having a prospective operation.”<sup>21</sup> Barring express language to the contrary, the court will presume against retroactivity.<sup>22</sup> On the other hand, remedial or procedural statutes are applicable to all actions, whether or not pending on the statute’s effective date.<sup>23</sup> *Thomas* was a wrongful death case. Before 1975, the wrongful death statutes provided only pecuniary loss for the death of a child. In 1975, the Legislature enacted 12 O.S. §. 1055, providing for non-pecuniary damages -“ . . . loss of companionship and love of the child, destruction of parent-child relationship . . .” and the cost of rearing the child to the date of death. The question was whether this new statute would apply to a death which occurred before the statute’s effective date. The Supreme Court held it did not. The rules the Oklahoma Supreme Court used in this case may serve as a guide to how the court would interpret the most recent “tort reform” legislation:

House Bills 2128 and 2023, both state that they will apply to civil actions filed on or after November 1, 2011. This language would seem to encompass claims that arise before November 1, 2011 but are not filed until on or after that date. House Bill 2128 amends 23 O.S. §61.2, and limits the amount of recovery for a cause of action based on bodily injury to Three Hundred Fifty Thousand Dollars (\$350,000.00), while House Bill 2023 enacts 12 O.S. §. 3009.1, and limits an injured plaintiff’s actual recovery to the amount actually paid by Medicare, Medicaid or health insurance. Both of these statutes attempt to limit the amount that a plaintiff may recover. The Supreme Court has held “Limitations on

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<sup>20</sup> <sup>20</sup>*Thomas v. Cumberland Operating Co.*, 1977 OK 164, ¶4, 569 P.2d 974, 975.

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damages, whether actual or punitive can constitute a change in substantive rights.”<sup>24</sup> The Court in *Thomas* said, “[u]nder the great weight of authority, the measure and elements of damages are matters of substance and right not the remedy.”<sup>25</sup> It would follow that regardless of the fact that the legislation purports to encompass “civil actions filed on or after November 1, 2011,” the fact that they implicate substantive rights would prohibit them being applied retroactively to claims arising before November 1, 2011.

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

Senate Bill 865 enacts a new section of law codified under 12 O.S. § 577.4 which changes the Oklahoma Uniform Jury Instructions. It requires that any exhibit relating to damage awards reflect the tax ramifications, and provides for an instruction that no part of the damages awarded in wrongful death

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

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

<sup>26</sup> <sup>26</sup>47 O.S. § 7-601.

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

and personal injury cases are subjected to federal income taxes. This legislation can be argued to be only procedural in nature and would be applicable to all actions regardless of the stage the proceeding.

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

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

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