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PROFESSOR TRAVIS

The following are extracts from Continuing Legal Education materials, articles, or my personal "Card File" of legal materials, which I have maintained for many years. These materials are intended to be of particular help to students who will ultimately practice in Oklahoma. They are arranged by Class Sessions, as reflected in your syllabus.

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## **CLASS SESSION 1 (CASEBOOK PAGES 5-61):**

### **Insurance - Application - Misrepresentation**

*Brunson v. Mid-western Life Ins. Co.*, 1976 OK 32, 547 P.2d 970: Where applicant for insurance accurately related information to agent, who wrote information wrong on application signed by applicant, held: Company is bound by the accurate information communicated to its agent and there is no misrepresentation voiding policy.

36 O.S. 1989 Supp. §3609: Misrep. not a defense unless: (1) Fraudulent, (2) material, or (3) insurer would not have issued policy or not issued for the amount (A). Under B., misrep. As to mortgage guaranty insurance must be fraudulent *and* material.

*Claborn v. Washington Nat. Ins. Co.*, 1996 OK 8, 910 P.2d 1046: [Quoting *Mass. Mut. Life Ins. Co. v. Allen*, 1965 OK 203, 416 P.2d 935, 940 (Okla. 1966)]  
“‘misrepresentation’ in insurance is a statement as a fact of something which is untrue, and which the insured states with the knowledge that it is untrue and with an intent to deceive, ...”

*Hays v. Jackson Nat. Life Ins. Co.*, 105 F.3d 583 (10<sup>th</sup> cir. 1997): Ins. Co. must prove the insured intended to deceive the ins. co. for misrepresentation to be a defense.

*Scottsdale Ins. Co. v. Tolliver*, 2005 OK 93, — P.3d — . The Oklahoma Supreme Court declined to answer a question certified by the federal court for the Northern District of Oklahoma, due to “controlling precedent on the issue.” In doing so, the Court restated its commitment to *Claborn v. Washington Nat. Ins. Co.*, and approved *Hays v. Jackson Nat. Life Ins. Co.*: despite language in 36 O.S. §3609 suggesting intent to deceive is not essential element of a misrepresentation defense, misrepresentation defense always requires proof of intent to deceive insurance company as well as materiality of misstatement to acceptance of risk, hazard assumed, or issuance of policy as written.

### **Insurance - Agents - Deeming Statute**

36 O.S. §1435.3.

### **Insurance - Estoppel - Agent’s Knowledge**

*Security Ins. Co. of New Haven v. Greer*, 1968 OK 3, 437 P.2d 243: Ins. Co. estopped by agent’s knowledge of hay stored on insured property to assert policy defense based on that fact.

## **Insurance - Application - Misrepresentation - Agent's Knowledge**

*Community Nat. Life Ins. Co. v. Graham*, 1966 OK 172, 418 P.2d 670, 673: Where agent knows of health problem of prospective insured & writes policy anyway, the agent's knowledge is imputed to the company & it is estopped to deny coverage.

*Allen v. Mass. Mut. Life Ins. Co.*, 416 P.2d 935 (Okla. 1965): Recovery proper where health history inaccurate on application but insured's wife testified insured gave accurate history to agent.

## **Life Insurance - Age Misrepresentation**

36 O.S. §4006: Effect of a misstatement of age is that the amount of coverage will be reduced to that which the premium would have purchased at the correct age.

## **Life Insurance - Application - Attachment to Policy**

36 O.S. §3608A: No application admissible in evidence unless copy attached to or "otherwise made a part of" application.

ADVOCATE COLUMN  
by Rex Travis  
(reprinted by courtesy of OTLA Advocate)

## **REASONABLE EXPECTATIONS: NEW KEY TO INSURANCE POLICY INTERPRETATION**

Oklahoma has adopted the "reasonable expectations" doctrine. It sounds pretty simple, but has enormous implications.

*Max True Plastering Co. v. United States Fidelity & Guaranty Co.*, 1996 OK 28, 912 P.2d 861 adopts the doctrine, in answering a certified question from the Northern District federal court in Tulsa. "What does it all mean, Rex?" you ask.

Historically, Oklahoma has held that insurance policies are interpreted like any other contract. If the language is clear, we will interpret it to mean exactly what it says. If the language is ambiguous, we will interpret it to provide coverage. If the policy contains exclusionary language, and the exclusion does not violate some public policy,

the exclusion will be enforced. The parties are free to negotiate any contract provision they want to.

Never mind that we do not sit down and negotiate policy terms with, say Farmers or Allstate. The older cases say a contract is a contract is a contract, as if it had been negotiated.

The old rule proceeds on the assumption the insured and the insurance company are equal in the bargaining process. In arguing for adoption of the reasonable expectation rule, I sometimes used the story of the health department inspector inspecting the little cafe.

There was "rabbit stew" on the menu. "Is this all rabbit?" the inspector asked. "No," said the cafe owner. "There's a little horse meat too." "How much?" asked the inspector. "Oh 50-50," said the owner. "Really?" Said the inspector. "Yes," the owner replied, "one horse, one rabbit."

The new decision recognizes that the insurance company and the insured, like the horse and the rabbit, are not exactly equal. The insurance company writes the policy and the insured, who may or may not read or understand the policy, buys or does not buy the policy.

Under the new rule, an ambiguous policy will receive much the same treatment as it did under the old. The test will be whether, under the reasonable expectation of the insured, there would have been coverage.

This is not a new test to Oklahoma law. All along, the rule for interpreting an ambiguous policy has been that the policy would be interpreted favorably to coverage, except where that would violate reasonable expectations. That rule remains.

Where there will be a tremendous change will be in the other application of the reasonable expectation doctrine: Where there is an exclusion from coverage written in technical or obscure language, or language which is hidden in other policy provisions, that language may not be enforced.

It will be enforced only if it meets the reasonable expectation of the insured. If not, the exclusion will be disregarded and there will be coverage, even if a careful reading of the policy language would indicate there is no coverage.

The Court is careful to note that the insured's expectation of coverage must be reasonable. The insured will not be able to make a reasonable expectations case just by saying "I thought it would be covered."

Rather, the court will look, in each instance, at what a reasonable insured would expect to be covered and, if technical language or language buried in the policy would defeat that expectation of coverage, there will be coverage.

As a practical matter, we must now be very careful to re-examine the cases which defeat coverage. Those cases may or may not be changed with the enhanced scrutiny mandated by the reasonable expectations doctrine. Virtually every insurance coverage question will require that analysis. A fair number will require litigation, to determine the result under the new test.

The Court does not make clear whether the question of what is the reasonable expectation of the insured will be a question for the court or for the jury. It is quite possible that the rule will be that the question will be for the jury, unless the minds of reasonable men cannot differ on the issue.

Vice Chief Justice Kauger wrote the opinion. All of the other Justices concurred except Justice Opala, who concurred in part but dissented in part, and Justice Hodges, who dissented. Neither wrote a separate opinion.

The bottom line of all this is that we should stand by for a wave of coverage litigation. The Supreme Court may have just repealed all we ever knew about coverage.

## **CLASS SESSION 2 (CASEBOOK PAGES 61-103, 172-173, 197-211):**

### **Estoppel by Silence**

*Allen v. Allen*, 1987 OK 45, 738 P.2d 142, 144: "If you do not speak when you ought to speak, you shall not speak when you want to speak," quoting *Darrough v. Davis*, 135 Okla. 263, 275 Pac. 309 (1929).

*Oklahoma Oil & Gas Exploration v. W.M.A. Corp.*, 1994 OK CIV APP 11, 877 P.2d 605, 609: Working interest owner was estopped to deny operator's status as operator, despite lack of formal selection as operator, by having failed to object for several years to operator's status. "If a party leads one to believe that he will not insist upon literal performance of a contract term and the other party detrimentally relies thereon, the first party will be estopped from demanding literal compliance," citing *Poteau State Bank v. Denwalt*, 1979 OK 102, 597 P.2d 756, 759.

### **Insurance - Group - Master Policy v. Individual Certificate**

*Martin v. Okl. Farmers Union*, 1981 ok 34, 622 P.2d 1078, *Evans v. Lincoln Income Life*, 1978 OK CIV APP 50, 585 P.2d 407: Restriction on coverage valid only if in certificate of insurance, not just master plan.

### **Liability Insurance - Reservation of Rights**

*Braun v. Annesley*, 936 F.2d 1105 (10<sup>th</sup> Cir. 1991): Defense w/o reservation of rights waives coverage defenses.

### **Liability Insurance - Punitive Damages**

*Dayton Hudson Corp. v. Amer. Mutual*, 621 P.2d 1155 (Okla. 1980): Punitive damages covered, but public policy precludes coverage, if damages are for insured's own (as opposed to employee's) gross negligence.

*Oliver v. Producers Gas Co.*, 1990 OK CIV APP 28, 798 P.2d 1090: Insurance company payment on judgment had to be applied first to actual, then to punitive damages.

*Aetna Cas. and Sur. Co., v. Craig*, 1989 OK 43, 771 P.2d 212: Public policy forbids UM coverage of punitives.

### **Insurance - Insurable Interest - Statutory Provisions**

36 O.S. §3604 - As to personal insurance (Must exist as of date policy issued.)

36 O.S. §3605 - As to property insurance (Must exist as of date of loss.)

### **Insurable Interest - Co-owner Recovers Entire Value but Holds in Trust for Other Owners**

*Delk v. Markel American Insurance Company*, 2003 OK 88, 81 P.3d 629, holds that the value of a co-tenant's insurable interest in property is the amount she insured it for, not the amount of her 1/6th legal interest. In effect, a co-tenant represents all co-tenants' interest in the property and recovers in trust for the co-tenants.

### **Liability Insurance - Insurable Interest**

*Allstate v. Smith*, 442 F.Supp. 89 (E.D.Okl. 1977): No liability coverage under H's policy where W had been awarded car in divorce and W, who gave permission to driver to operate car, was not living w/H. Fact H was liable to bank on mortgage for car did not alter, since insurable interest as to liability relates to the legal liability of the insured, not property right; See also: *Farmers v. Thomas*, 1987 OK 84, 743 P.2d 1080: Divorced husband who was named insured had no insurable interest in car awarded wife in divorce so passenger had no UM claim against husband's policy.

### **Insurance - Insurable Interest - Foreclosed Property**

*Carr v. Union Mutual Ins. Co.*, 1979 OK CIV APP 15, 598 P.2d 269: Where within policy term of homeowner's policy, mortgage was foreclosed and property sold but sale not yet confirmed, insureds had equity of redemption so that they had an insurable interest and policy remained in force both as to real estate and personal property. Insurance interest terminates with equity of redemption.

## **Insurance - Insurable Interest - Vendor & Purchaser**

12A O.S. §2-501: Buyer has insurable interest from time of purchase, even if goods are non-conforming. Seller retains insurable interest so long as he retains title or a security interest.

## **Fire Insurance - Statutory Policy - Limitations**

36 O.S. § 4803: 12 month limitation; *Springfield Fire & Marine Ins. Co. v. Biggs*, 1956 OK 114, 295 P.2d 790: 12 month statutory limitation is applicable to loss under hail endorsement to statutory fire policy.

*Walton v. Colonial Penn. Ins. Co.*, 1993 OK 115, 860 P.2d 222: One-year limitation of §4803 is not unconstitutional as a “special law,” under Okla.Const. Art. 5, §46.

*Wagon v. State Farm Fire & Casualty Co.*, 1997 OK 160, 951 P.2d 641: Limitation not applicable to theft claim because theft coverage is casualty insurance subject to limitation of 36 O.S. § 3617 that time to sue may not be reduced to less than 2 years.

## **Insurance - Property - Loss Pending Sale**

*Acree v. Hanover Ins. Co.*, 561 F.2d 216 (10<sup>th</sup> Cir. 1977): Where fire destroyed property seller had insured after contract of sale but before closing and buyer completed purchase after fire, seller received insurance proceeds in trust for buyer. Uniform Vendor & Purchaser Act (16 O.S. §202) did not apply because it applies only absent contract. Here, contract provided buyer had option to terminate deal if property was damaged or destroyed by fire.

## **CLASS SESSION 3 (CASEBOOK PAGES 211-268):**

**Insurance Column - Why an Exception Is Not an Exclusion - Rex Travis** (Reprinted by courtesy of OTLA Advocate)

Although the recent mold “hysteria” seems to have died down somewhat, mold cases still abound—and homeowners policies generally still contain more than one clause directed at mold. So, today we revisit *Kelly v. Farmers Ins. Co.*, 281 F.Supp.2d 1290 (W.D. Okla. 2003) in which Judge Miles-LaGrange examined the doctrine of “efficient proximate cause,” concluded the doctrine applies in Oklahoma, and held that where a homeowners policy “excepts” mold as a peril, or cause of loss, without also

“excluding” mold as a category of damage, mold damage is a covered loss—if proximately caused by a covered peril.

In the summer of 2001, Mrs. Kelly opened the closet in an unoccupied room in the Kellys’ Norman home and discovered wet carpeting and mold growing on the walls. The couple called their homeowners carrier, Farmers. A Farmers adjuster examined the damage and determined that water had leaked from a frost-damaged faucet causing the damage to the closet.

The policy excluded water damage unless caused by a “covered peril;” freezing pipes was a peril covered by the policy. Farmers approved the repairs, including mold remediation. Before repairs had even begun, the couple found similar damage in an adjoining bedroom. Further investigation by the Farmer’s claims adjuster revealed extensive mold damage. Still Farmers approved payment and the restoration was completed early in the fall of 2001.

Around the time the restoration was wrapping up Mr. Kelly underwent gastro-esophageal reflux surgery. His recovery was hampered by respiratory problems which his doctor attributed to “dangerous levels of mold in his system.” Late in the fall of 2001 it was discovered that the house was still heavily infested with mold. Once again, the Kellys contacted Farmers; this time a different adjuster came to the Kellys’ house and this time Farmers denied the claim, citing a “mold-exclusion” in the policy.

The case came before Judge Miles-LaGrange on Farmers’ Motion for Summary Judgment. Although the Kellys’ named-perils policy covered loss from freezing plumbing, another clause said “[w]e do not insure for loss either consisting of, or caused directly or indirectly by . . . rust, mold, wet or dry rot.” Farmers claimed that this

“mold” clause eliminated all potential liability for mold even when “resulting from” the covered peril, freezing pipes.

The Kellys argued that the issue was really “efficient proximate cause” and accordingly, since a covered peril, freezing pipes, proximately caused the mold loss, it did not matter that an excluded peril, mold as a “cause” of loss, may have also contributed. Farmers countered that mold was not a “cause” but rather a type of loss and thus the doctrine did not even apply.

Judge Miles-LaGrange rejected Farmers’ argument, agreeing with the Kellys that mold can be both a cause and a loss. Quoting from a treatise on mold, Judge Miles-LaGrange noted that the efficient cause doctrine applies “when two or more identifiable causes, at least one of which is covered . . . and at least one of which is excluded, contribute to a single property loss.” Further, said the judge, where the insured risk sets an excluded risk in motion “in an unbroken sequence between the insured risk and the ultimate loss” the insured risk is deemed the proximate cause of the entire loss and coverage is afforded.

Here, said Judge Miles-LaGrange, the policy defines mold solely as a peril (or cause). Thus, the mold “loss” may have been caused by a covered peril—freezing pipes, or may instead have been caused by the excepted mold peril; so the doctrine of efficient cause did apply and if the frozen pipe was the efficient cause of the damage, the resulting mold was covered. However, noted the Judge, the causation is a jury matter and could not be decided on Farmers’ motion.

While Judge Miles-LaGrange was probably correct that efficient proximate cause is the rule in Oklahoma, and surely correct in her explication of the doctrine, it may well

be that Farmers was nonetheless entitled to summary judgment in this case. While the opinion does not quote the entire policy, the “we do not insure for loss either consisting of, or caused” by language quoted above would seem to both “except” mold as a peril and “exclude” mold as a type of loss. If so the mold damage, though possibly resulting from a covered peril would have been excluded nonetheless as an item of damage.

There is perhaps as much variation in homeowners policy language as there are companies writing the coverage. Particularly where mold is involved, it is always crucial to examine the precise language of the particular policy. Some policies attempt to “except” mold as a cause of loss, others try to “exclude” mold as a category of damage; still others attempt both. *Kelly* shows, once again, that where an insurance company is not careful in its drafting (and perhaps even when it is), the creative plaintiff may find coverage despite apparently insurmountable policy language.

### **Subrogation - Insurance Company Has No Right of Subrogation Against Tenant of Insured**

*Morris Zeligson Properties, LLC v. South East Auto Trim, Inc.*, 2004 OK CIV APP 78, 99 P.3d 744, holds that an insurance company that insures a landlord against loss to leased property has no rights of subrogation against a tenant responsible for a covered loss.

### **Subrogation - Insurance Company must Protect Subrogation Interest**

*Strong v. Hanover Ins. Co.*, 2005 OK CIV APP 9, 106 P.3d 604, holds that an insurer may not fail to protect its subrogation rights and then deny coverage when its insured settles with and releases the tort-feasor.

### **Subrogation - Own Insured**

*Sutton v. Jondahl*, 1975 OK CIV APP 2, 532 P.2d 478: Landlord’s insurer could not subrogate against tenant for negligently caused fire. Tenant was a co-insured, since part of rent went to pay ins.; *Travelers Ins. Co. v. Dickey*, 1990 OK 109, 799 P.2d 625: Insurer may not subrogate against co-insured. However, contractor was not owner’s

co-insured, where contract required owner to insure only contractor's work and damage was not to contractor's work.

### **Subrogation - Release of Tort-feasor as Releasing Subrogated Interest**

*Aetna Cas. & Surety Co. v. Associates Transports, Inc.*, 1973 OK 62, 512 P.2d 137 : Where tort-feasor settled w/ins'd., after notice of subro. for less than ins'd. and uninsured portion of claim taking general release and dismissal w/prej., held: (1) settlement will be treated as settlement of uninsured portion of claim only, (2) insurer could sue in insurer's name w/o violation of rule against splitting cause of action or real party in interest statute (reversing earlier cases). *State Farm v. Hubbard*, 1988 OK CIV APP 10, 763 P.2d 720: *Aetna* applied even where ins. co's lawyer settled first case.

### **Subrogation - Insurance - Loan Receipt**

See Anno. 13 A.L.R.3d 42.

*C. & C. Tile Co. v. Independent School Dist.*, 1972 OK 137, 503 P.2d 554: Trust agreement proper form of settlement under fire policy and created express trust in the insured.

*Lusk v. State Farm*, 1977 OK 169, 569 P.2d 985: "Med payment coverage is not the kind of insurance which lends itself to settlement under a loan receipt trust transaction" and such transaction is void.

### **Fire Insurance - Arson Defense - Co-owner**

*Kiddie V. Great Southwest Fire Ins. Co.*, 1979 OK 141, 601 P.2d 740: Where H was sole named insured and owned property prior to marriage and W's interest in property was that divorce court gave her an interest in the insurance proceeds, she was not a "joint owner" so as to raise the question.

*Short v. Okla. Farmers Union*, 1980 ok 155, 619 P.2d 588: W barred by H's arson where property jointly owned and both were co-insureds.

### **Insurance - "Vacant or Unoccupied"**

*Monarch Ins. Co. v. Rippy*, 1962 OK 6, 369 P.2d 622 (Okla. 1962): Home not "vacant or unoccupied" where freezing loss occurred while owners were gone on 3 month vacation.

## **CLASS SESSION 4 (casebook pages 268-277, 297-346)**

### **Life Insurance - Conditional Receipt - Validity**

*Wilson v. Mass. Indem. and Life Ins. Co.*, 920 F.2d 1548 (10<sup>th</sup> Cir. 1990): Oklahoma recognizes and will enforce literally conditional receipt provision that there is no coverage unless the insured is insurable as a standard risk.

### **Life Insurance - Negligent Delay in Application Process**

*Peddicord v. Prudential Ins. Co. of Amer.*, 1972 OK 96, 498 P.2d 1388: If ins. co. fails to act on application w/in a reasonable time, during which loss occurs, the insured or beneficiary has the option to sue on implied contract to process the application timely or in negligence for failure to do so.

*Wilson v. Mass. Indem. and Life Ins. Co.*, 920 F.2d 1548 (10<sup>th</sup> Cir. 1990): Insured has no claim for negligent failure to timely process application unless he can show another company would have written the coverage had the ins. co. timely rejected the application.

### **Insurable Interest - Effect of no insurable interest**

36 O.S. § 3604(B): If the beneficiary made in violation of insurable interest rule in case of death, disability or injury gets proceeds to which they are not entitled, an insured, executor or administrator may sue to recover the proceeds.

### **Insurable Interest - Business Has No Insurable Interest in Rank and File Employees**

*Tillman ex rel. Estate of Tillman v. Camelot Music, Inc.*, 408 F.3d 1300 (10<sup>th</sup> Cir. 2005), holds that, in Oklahoma, a business does not have an insurable interest in its rank and file employees. With 36 O.S. 3604, Oklahoma's legislature codified the insurable interest doctrine previously found in the state's common-law. According to the statute, a policy owner must have:

a lawful and substantial economic interest in the having the life, health, or bodily safety of the individual insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the individual insured.

The Court pointed to *Hulme v. Springfield Life Ins. Co.*,<sup>1</sup> decided by the Oklahoma Supreme Court after the legislature passed Section 3604, which holds that a business

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<sup>1</sup>1977 OK 108, 565 P.2d 666.

associate has such an insurable interest in the life of his partners. However, noted the Circuit Court in *Tillman*, the partners in *Hulme* enjoyed a “significant mutual reliance.” Camelot, by contrast, failed to establish Mr. Tillman’s “special importance to the company.” Tillman was simply an ordinary rank and file employee and Camelot had not shown how his loss resulted in any particular hardship to the company.

### **Life Insurance - Beneficiary Change - Divorce Pending**

*Graham v. Farmers New World Life Ins. Co.*, 1992 OK CIV APP 133, 841 P.2d 1165: Pending divorce petition did not preclude the husband from changing the beneficiary on his life insurance, where the divorce court had not entered an order forbidding the change.

### **Life Insurance - Divorce - Ex-spouse as Beneficiary**

15 O.S. §178: Divorce revokes beneficiary designation, but statute inapplicable to a beneficiary designation in force before statute’s effective date (11/1/87).

*Williams v. Old American Ins. Co.*, 1994 OK CIV APP 61, 882 P.2d 576: Ins. co. liable to ex-wife beneficiary where it paid proceeds to new wife, even though policy naming ex-wife beneficiary predated 15 O.S. §178, providing that divorce revokes beneficiary. Federal constitutional prohibition on impairment of contract precluded applying statute to policy in existence.

### **Life Insurance - Beneficiary Change - Federal Employee Insurance**

*Campbell v. Metropolitan Life Ins. Co.*, 812 F.Supp. 1173 (E.D.Okla. 1992): Strict compliance required to change federal employee’s beneficiary designation.

### **Life Insurance - Beneficiary Designation - Unexecuted Intent**

*Shaw v. Loeffler*, 1990 OK 109, 796 P.2d 633: “Well settled” exception to rule beneficiary designation must be by form prescribed in policy is that change will be treated as done if the insured has done all in his power to change it. Exception factually inapplicable where insured didn’t get around to filling out the form.

### **Life Insurance - Slayer Statute**

*United Presidential Life Ins. Co. v. Moss*, 1992 OK CIV APP 19, 838 P.2d 1011: Where primary beneficiary was disqualified by slayer statute, contingent beneficiary, rather than heirs took, despite provision in statute that benefits will go by descent and distribution and policy provision that contingent beneficiary will take only when the primary beneficiary does not survive.

## **Life Insurance - Incontestable Clause**

36 O.S. §4004 (requires 2 year clause)

36 O.S. §4015 (clause limited - doesn't preclude claim not in coverage)

36 O.S. §4405A2(a): Health insurance incontestable after 2 years except for fraud.

## **Life Insurance - Incontestable Clause - Group Membership As Included**

*Hulme v. Springfield Life Ins. Co.*, 1977 OK 108, 565 P.2d 666: Incontestable clause barred rescission after two years based on misrepresentation that insured was member of insured group.

## **Insurance - Incontestable Clause - Limitation of Risk Distinguished**

*Prudential Ins. Co. v. Elias*, 1940 OK 488, 188 Okl. 420, 109 P.2d 815 (1940): Uncontestable clause does not prevent defending on ground condition pre-existed policy and, therefore, was not covered.

## **CLASS SESSION 5 (casebook pages 346-382, 401-420):**

### **HEALTH INSURANCE**

#### **“MAKE WHOLE RULE” IS PART OF FEDERAL COMMON LAW OF ERISA**

*Equity Fire and Cas. Co. v. Youngblood*,<sup>2</sup> arises out of an ERISA claim. (ERISA, the Federal Employee Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.*, applies to any employer-provided employee benefit plan, including health insurance.) State and federal courts have concurrent jurisdiction over ERISA questions. This one ended up in state court.

The employer-provided health plan paid more than \$30,000 in medical bills for a person injured by a tort-feasor whose coverage was such that there was only \$40,000 in liability and UM coverage. The trial court ordered the \$40,000 paid to the injured person, based on the make whole rule.

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<sup>2</sup>1996 OK 123, 927 P.2d 572.

The Court of Appeals reversed the trial court, holding that ERISA controlled and that ERISA would not recognize the make whole rule. The Supreme Court reversed the Court of Appeals and affirmed the trial court, in an opinion by Justice Watt, concurred in by all Justices except Opala, who concurred in part and dissented in part, without separate opinion.

The Supreme Court agreed that ERISA applied and was controlling. However, the court held that the make whole rule will apply as a part of the federal common law of ERISA. In the process, the Supreme Court says that the make whole rule is the majority rule and refers to it as the “Oklahoma make whole rule.” This would seem to effectively reverse the federal court’s prediction in *Fields v. Farmers Ins. Co., Inc.*<sup>3</sup> that Oklahoma will not adopt the make whole rule as a matter of state law.

This is an important decision. However, it leaves some significant problems. First, it is a state court interpretation of federal common law. The federal district courts in Oklahoma and the Tenth Circuit Court of Appeals will not necessarily feel compelled to follow it, as opposed to *Fields*, when deciding a matter of federal common law. ERISA provides a basis for federal question jurisdiction so that the ERISA plan can get the question into federal court without meeting diversity jurisdiction requirements.

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<sup>3</sup>847 F.Supp. 160 (W.D.Okla. 1993), aff’d, 18 F.3d 831 (10<sup>th</sup> Cir. 1994). In *Fields*, the federal courts considered a government employee’s claim under a government sponsored health insurance program for government employees. The employee was catastrophically injured by a tort-feasor having only limited liability coverage. Clearly, if the government health insurance company took subrogation, the government employee would be less than fully compensated or made whole. The federal courts found that state law determined the issue. However, both the District Court and the Court of Appeals predicted that Oklahoma would not accept the “make whole” rule, so that the health plan was entitled to subrogation, leaving the employee uncompensated.

Second, the Supreme Court suggests that it might rule differently if the ERISA plan specifically provides that the plan is entitled to reimbursement even if the employee will not be fully compensated or if the plan is given full discretion to interpret such questions under the plan.

These are somewhat peculiar reservations, but they are based on federal court ERISA decisions. Specifically, the federal courts treat ERISA claims decisions as matters of administrative law. The administrative law rule is that a court will reverse a technical decision (such a that by an administrative agency) only if the decision is shown to be arbitrary and capricious.

The “deference” or “arbitrary and capricious” rule is based on the theory that the courts should be reluctant to interfere with technical decisions by agencies which specialize in the subject at hand. This makes a lot of sense in determining whether (for example) a pilot’s license should be revoked.

It even makes a little sense when the issue is whether a particular illness is covered by a policy or health plan. The plan administrator, to whom the courts are deferring is something of an expert in the matter of health insurance claims, albeit one with an ax to grind.

However, the question of whether the “make whole” rule applies is a matter of federal common law. This leaves the courts deferring to insurance claim guys (non-lawyers) as to what the federal common law is or should be. Yet this is the position which the Seventh Circuit Court of Appeals took in the case the Tenth Circuit cited for

the proposition that the “make whole” rule does not apply to an ERISA claim: *Cutting v. Jerome Foods, Inc.*<sup>4</sup>

Hopefully, the Supreme Court or the Tenth Circuit will, upon mature reflection, conclude it need not defer to claim adjusters as to matters of law. In any event, until these ERISA plans all get rewritten to incorporate the deference language, we will be able to secure money for badly injured, deserving people.

### **Erisa - Arbitrary and Capricious Standard of Review of Denial by Plan**

#### **Administrator**

*Allison v. UNUM Life Insurance Company of America*, 381 F.3d 1015 (10<sup>th</sup> Cir. 2004), holds that where an ERISA plan administrator also insures the plan, a denial of benefits is reviewed under a “sliding scale” arbitrary and capricious standard of review, a less deferential standard than simply arbitrary and capricious. The case also holds ERISA preempts a state-law bad faith claim.

#### **Health Insurance - Pre-existing Condition**

Digest “Insurance” Key # 467.5: Numerous cases holding pre-existing clauses will be strictly construed against insurance company.

#### **Health Insurance - Autologous Bone Marrow Transplant for Breast Cancer - Experimental Treatment**

*Pitman v. Blue Cross and Blue Shield of Oklahoma*, 24 F.3d 118 (10<sup>th</sup> Cir. 1994): Notes recent cases uniformly hold HDC-ABMT no longer experimental.

#### **Disability Insurance - “Confined within Doors” Provision**

*Mass. Bonding & Ins. Co. v. Springston*, 1955 OK 142, 283 P.2d 819: Requirement that insured by confined within doors in disability policy was evidentiary only and not conclusive. Judgment on opening statement proper where Co. admitted disability, but defended on ground insured not “confined within doors.” Accord: *Auto. Owners Safety Ins. Co. v. Baker*, 1958 OK 98, 324 P.2d 867.

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<sup>4</sup>993 F.2d 1293, 1295 (1993), *cert. denied*, 114 S.Ct. 308, holding “make whole” rule inapplicable where the ERISA plan provided that decisions about the interpretation or application of the plan were vested in the sole discretion of the Plan Administrator.

## **Disability Insurance - “Process of Nature” Rule**

*Willden v. Washington Nat. Ins. Co.*, 18 Cal.3d 631, 135 Cal.Rptr. 69, 557 P.2d 501 (1976): Recognizes rule that clause requiring disability w/in certain time of accident will be satisfied if, during longer time but w/in “process of nature,” insured is disabled.

## **Disability Insurance - “Total Disability”**

*Price v. State ex. rel State Employees Group Health, Dental and Life Ins. Board*, 1988 OK 72, 757 P.2d 839: Total disability means inability to do substantially all the things previously done in the way they were previously done. Fact student able to go to school not disqualifying.

## **CLASS SESSION 6 (casebook pages 420-441, 472-480, 502-529):**

### **Insurance - Bad Faith - Jurisdictions Accepting/Rejecting Cause of Action**

*Ashley*, *Bad Faith Actions* §2:22; Shernoff, et al., *Insurance Bad Faith Lit.*, §5.02; *Braeshch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991): Nebraska accepts; *Washington v. Government Employees Ins. Co.*, 769 F.Supp. 383 (D.D.C. Civ.A.No. 90-2377 4/2/1991): D.C. rejects.

### **Bad Faith- Insurance Law Column–Rex K. Travis**

Bad Faith Revived–*Badillo v. Mid Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080.

The Oklahoma Supreme Court recently reversed its previous disastrous opinion in *Badillo*. Slightly more than a year after the original *Badillo* opinion appeared to substantially do away with Oklahoma bad faith cases, the Supreme Court reversed itself on rehearing.

Mr. Badillo, insured with Farmers’ sub-standard risk subsidiary, Mid Century, struck a woman in a cross walk while making a right turn. She was badly hurt and incurred more than \$700,000 in medical bills. Mid Century had only a \$10,000 policy, which it promptly offered.

However, the injured woman's lawyers were unwilling to settle for the \$10,000 limit without first taking a statement of the insured (Mr. Badillo) to satisfy themselves whether he could have been on the job so that another policy might be applicable or whether he had been drinking so that a dram shop action might be available.

Without consulting Mr. Badillo, Farmers' adjustor refused to produce him for a statement. The injured plaintiff's lawyers filed suit and thereafter refused to settle for the policy limits. Trial resulted in a verdict for \$1 million damages, reduced by \$400,000 for contributory negligence, leaving a net verdict of \$600,000 plus \$33,202.63 in pre-judgment interest.

Farmers paid its \$10,000 limit and did not appeal. After a hearing on assets, Badillo hired counsel and filed the present bad faith case against Farmers. Trial, before Judge Nancy Coats, in Oklahoma County, resulted in a verdict for Mr. Badillo and against Farmers for \$2,200,000. Pursuant to an agreement between Mr. Badillo and the injured woman, any recovery was to pay attorney fees with remaining amounts to pay the judgment off against Badillo and the balance to be paid to Badillo.

The trial court refused to submit a punitive damages claim against Farmers. The Supreme Court ultimately affirmed this holding along with the trial court's refusal to award attorney fees or pre-judgment interest.

In the original opinion, the Supreme Court (which retained the case rather than refer it to COCA) reversed Badillo's judgment against Farmers. The Court, in a five to four opinion, held that bad faith was an intentional tort, not a negligent tort, and that Farmers satisfied its obligations to Badillo by offering its limits, so it could not be held liable for bad faith.

After Mr. Badillo's Petition for Rehearing was pending for more than a year, the Supreme Court came down with an opinion withdrawing the original opinion and, in the new opinion, affirming the trial court. The new opinion holds that Oklahoma bad faith law does not require any ill will or intent to injure on the part of the insurance company. Rather, it says the test for a bad faith recovery in Oklahoma is "more than simple negligence but less than the reckless conduct necessary to sanction a punitive damage award." Language seeming to support the proposition that negligence would support a bad faith award in an earlier case is reversed.

### **Insurance - Bad Faith - Erisa Preempts Oklahoma Bad Faith Claim**

*Hollaway v. Unum Life Ins. Co. of America*, 2003 OK 90, 89 P.3d 1022, 2003 WL 22439659, holds that the nature of the Oklahoma bad faith cause of action is such that it does not escape ERISA preemption as a "law regulating the business of insurance" so that there can be no bad faith cause of action under an ERISA policy.

*Allison v. UNUM Life Insurance Company of America*, 381 F.3d 1015 (10<sup>th</sup> Cir. 2004), holds that an Oklahoma bad faith claim is both inconsistent with ERISA's remedial scheme and expressly preempted by ERISA.

### **Insurance - Bad Faith - Bad Faith Should Not Be Bifurcated from Coverage Issue**

*Cales v. Le Mars Mutual Insurance Company*, 2003 OK CIV APP 41, 69 P.3d 1206, holds that breach of contract and bad faith are two interrelated theories of recovery in one cause of action that should not be bifurcated.

### **Insurance - Bad Faith - First Party**

*Christian v. American Home Assur. Co.*, 1977 OK 141, 577 P.2d 899: Adopts first party tort of bad faith.

### **Insurance - Bad Faith - Assignment**

Shernoff, Gage & Levin, *Insurance Bad Faith Litigation*, §3.07: near universal rule is that liability insured can assign excess bad faith claim to plaintiff; §3.07[1] fn 5: "Tennessee is apparently the only state in which such a tort cause of action cannot be assigned." *Accord*: Anno. 12 ALR3d 1158 "Assignability of Insured's Right to Recover

Over Against Liability Insurer for Rejection of Settlement Offer.” See, however, 12 O.S. 1991 §2017D “The assignment of claims not arising out of a contract is prohibited.”

### **Insurance - Bad Faith - Third Party Against Liability Carrier**

*Allstate v. Amick*, 1984 OK 15, 680 P.2d 362: Third party has no standing to sue liability carrier for bad faith.

*Walker v. Chouteau Lime Co., Inc.*, 1993 OK 35, 849 P.2d 1085: Unfair Claim Settlement Act creates no private right of action in third party.

*Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, 861 P.2d 308: Passenger in car has no standing to bring bad faith case against liability insurance co. covering the car for its handling of the passenger’s claim against the driver. cf. *Townsend v. State Farm Mut. Auto. Ins. Co.*, 1993 OK 119, 860 P.2d 236: Passenger in car has standing to sue UM carrier for bad faith handling of UM claim.

### **Insurance - Bad Faith - Workers’ Comp. Claim**

*Goodwin v. Old Republic Insurance Co.*, 1992 OK 34, 828 P.2d 431: employee has bad faith claim against Workers Comp insurance company. But see: *Kuykendall v. Gulfstream Aerospace Technologies*, 202 OK 961, 66 P.3d 374: “No Oklahoma case holds that a workers' compensation insurer has a duty of good faith in paying a workers' compensation award, the violation of which is a tort.”

### **Insurance - Bad Faith - Proof Required**

*Norman’s Heritage Real Estate Co. v. Aetna Cas. & Surety Co.*, 727 F.2d 911 (10<sup>th</sup> Cir.Okl. 1984): Proof insufficient where insurer paid property damage without prejudice to other claims and verdict was less than offer.

*Manis v. Hartford*, 1984 OK 25, 681 P.2d 760: Proof insufficient where D’s arson proof, if believed, would have been a defense. Followed: *Williamson v. Emasco*, 696 F.Supp. 1583 (W.D.Okla. 1988).

*Thompson v. Shelter Mut. Ins. Co.*, 875 F.2d 1460 (10<sup>th</sup> Cir. 1989): Delay in paying additional living expense on fire policy justified bad faith recovery. Plaintiff entitled to attorney fee on bad faith claim as well as policy claim under 36 O.S. 1981 § 3629(B).

*McCoy v. Oklahoma Farm Bureau Mut. Ins. Co.*, 1992 OK 43, 841 P.2d 568: Insurer’s introduction of expert’s testimony that fire was set did not preclude jury finding of bad faith.

*Alsobrook v. Nat. Travelers Life Ins. Co.*, 1992 OK CIV APP 168, 852 P.2d 768: Evidence justified submitting BF to jury and lifting punitive damage cap of 23 O.S. §9.

*Capstick v. Allstate Inc. Co.*, 998 F.2d 811 (10<sup>th</sup> Cir. 1993): Bad faith arson defense justifies submitting BF and punitive damages, despite fact that insurance company's defense, if believed, would have been a defense.

*Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982): No malice required for BF; bad conduct is enough.

*Oulds v. Principal Mut. Life Ins. Co.*, 813 F.Supp. 768 (W.D.Okla. 1981): No BF as a matter of law where there was a swearing match between agent and insured whether ins'd revealed med. history.

### **Insurance - Bad Faith - Limitations**

*Lewis v. Farmers*, 1983 OK 100, 681 P.2d 67: Two-year tort (not 1-year fire insurance) SOL applied to bad faith claim for refusal to pay fire insurance policy claim; *McCarty v. First of Georgia Ins. Co.*, 713 F.2d 609 (10<sup>th</sup> Cir. 1983): Fact SOL had run on fire claim did not preclude bad faith suit.

### **Insurance - Bad Faith - Health Insurance - Plan Administrator**

*Wolf v. Prudential Ins. Co. of America*, 50 F.3d 793 (10<sup>th</sup> Cir. 1995): Administrator of non-ERISA employer health plan could be liable in bad faith where a "stop loss" plan caused administrator to share risk of loss at particular levels w/employer.

### **Insurance - Bad Faith - Denial - Reason Different than Original**

*Buzzard v. Farmers Ins. Co., Inc.*, 1991 OK 127, 824 P.2d 1105: Ins. Co. must stand on original reason for denial and may not investigate after the fact and arrive at other reasons; *Accord: Bankers Life v. Crenshaw*, 483 So.2d 254 (Miss 1985); *Britton v. Farmers*, 721 P.2d 303 (Mont. 1986). See also, Schermer, *Automobile Liab. Ins.* §22.03[9].

### **Insurance - Bad Faith - Contract to Insure**

*Scivally v. Time Insurance Co.*, 724 F.2d 101 (10<sup>th</sup> Cir. 1983): No bad faith claim in suit for failure to issue policy since duty to exercise good faith flows from policy.

*Coble v. Bowers*, 1990 OK CIV APP 109, 809 P.2d 69: Ins. Co. could be liable in bad faith for a failure to issue a requested policy.

## **Liability Insurance - Occurrence - Multiple Claims**

*Business Interiors, Inc. v. Aetna Cas. and Sur. Co.*, 751 F.2d 361 (10<sup>th</sup> Cir. 1984): Oklahoma will adopt the “cause” analysis, so embezzlement by 39 checks over 7 months was a single loss; *Transport Ins. Co. v. Lee Way Motor Freight, Inc.*, 487 F.Supp. 1325 (N.D. Tex 1980) (Multiple claims of discrimination arising from a single employment practice gave rise to only one occurrence.)

## **Liability Insurance - Intentional Act - Mistaken Identity**

*Curtain v. Aldrich*, 589 S.W.2d 61 (Mo.App. 1979): Where insured hit b-in-law over head w/crowbar, thinking he was a burglar, intentional act did not bar coverage.

## **Liability Insurance - Intentional Act**

*Employers Surplus Lines of Boston v. Stone*, 1963 OK 279, 388 P.2d 295 (Okla. 1964): “Non-assaulting” partner covered where liability policy covered assault and battery as accident, except where committed by or at the direction of the Insured.

*Lumbermen’s Mutual Ins. Co. v. Blackburn*, 1970 OK 211, 477 P.2d 62: Unintended injury from intentional act covered where teenage insured hurt P. in a rock fight. Disapproves *Pendergraft v. Comm. Standard*, 342 F.2d 427 and applies *Union Acc. Co. v. Willis*, 145 Pac. 812 (life ins. case) to liab. ins. case.

*Allstate v. Hisely*, 465 F.2d 1243 (10<sup>th</sup> Cir. 1972): Reaffirms *Pendergraft* where ins’d. bumped P. w/car going 100+ mph. Restricts *Blackburn* to fact situation, where stipulated no intent to injure.

*Mass. Bay Ins. Co. v. Gordon*, 708 F.Supp. 1232 (W.D.Okla. 1989): A & B not covered.

## **Liability Insurance - CGL - Business Risk Exclusion**

*Hartford v. Pacific Mutual*, 861 F.2d 250 (10<sup>th</sup> Cir. 1988): 1973 CGL policy exclusion for damage to insured’s work or product excluded both cost of material and labor to replace, since ins’d both furnished and installed the defective material; excess policy defining property damage as physical injury to tangible property and loss of use did not cover diminution of value nor consequential damage.

## **CLASS SESSION 7 (casebook pages 529-587):**

## **LIABILITY INSURANCE - POLLUTION EXCLUSION - NON-ENVIRONMENTAL LOSS**

*Bituminous Casualty Corp. v. Cowen Construction Co.*, 2002 OK 34, 55 P.3d 1030: Absolute pollution exclusion is not limited to environmental pollution but applied where

hospital patients were injured due to lead poisoning from pipes installed by insured contractor.

### **Liability Insurance - Notice of Accident or Suit**

*Fox v. National Savings Ins. Co., 1967 OK 27, 424 P.2d 19:* Insurance company must prove prejudice.

### **CLAIMS MADE AND OCCURRENCE BASIS POLICIES -- PITFALLS FOR PROFESSIONALS\***

Today's column is intended to benefit the lawyer himself, as well as other professionals (doctors, architects, and insurance agents) whom the lawyer may represent.

Some understanding of professional liability policies is vital to the professional. Historically, most professional liability (sometimes called "malpractice" or "errors and omissions") policies were written, like most liability policies, on an "occurrence" basis. An occurrence basis policy protects the insured from claims, whenever made, so long as the event or occurrence (usually negligence) occurred during the policy term.

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Occurrence basis policies create problems where claims may be made long after the event. These problems occur peculiarly in professional liability and products liability type claims. The phenomenon of claims arising long after the event (and often after the policy has expired or been cancelled) is known in the trade as the "claim tail." In effect, insurance companies which have written occurrence basis policies may not be able to "close the books" on a policy for many years after expiration or cancellation.

For this reason, occurrence basis policies are difficult to “underwrite” or determine an appropriate premium. In recent years (although less so recently), professional liability claims (particularly those of lawyers) have increased in size. The insurer which has written an occurrence basis policy may end up paying 1986 size claims based on a 1976 premium.

For this reason, most professional liability policies are now written on a “claim made” basis. Claim made policies cover the insured for claims made and reported during the policy period, but not after. For the most part, claim made policies cover the insured for a claim made during the policy term, even if the negligence or other event giving rise to liability occurred before the policy was written. The insured making application for coverage is required to reveal occurrences of which he has knowledge which may give rise to a claim. Failure to report such an occurrence may cause the claim not to be covered. If the prior occurrence is reported, the policy will not be written or the prior, known occurrence, will be excluded from coverage.

The advantage to the insurer of writing a claim made policy is that, at the end of the policy (and its subsequent renewals), the insurance company may “close the books” on that policy and not be troubled with a long “claim tail.” The insurer’s exposure is generally (but not always) shorter in time. Thus, the insurer is more likely to be able to accurately underwrite the exposure by increasing premiums as claims increase in size.

There may be some advantage to the insured professional in that (particularly if he is insured with the same company all along) he deals only with one company and not several who may have insured him over the years. Further, he can adjust his limits in accordance with his perception of the need to reflect increasing exposures.

A few claim made policies partake of the worst characteristics of both the claim made and occurrence basis policy. A few companies offer claim made policies which do not afford retroactive coverage, prior to the inception date of the first policy issued by that company. Such a policy leaves the professional with a significant uninsured exposure and should be avoided. At least one court has found a claim made policy which does not offer retroactive coverage contrary to public policy. Sparks v. St. Paul Insurance Co., 495 A.2d 406 (N.J. 1985). The professional should not, however, rely on that policy not being enforced. In fact, Sparks indicates that if the insurance company offers retroactive coverage on an optional basis, such policy might be enforceable.

A couple of rules concerning professional liability policies suggest themselves: (1) Do not buy a claim made policy without retroactive coverage. (2) Do not change from a claim made to an occurrence basis policy.

Changing from an occurrence basis to a claim made policy is not a bad move from the professional's point of view. This may actually result in double protection, since the occurrence basis policy would cover a loss arising while the policy was in force while the claim made policy would cover the same claim if the claim were first asserted and reported to the company during the term of the claim made policy.

The converse is not true. If the professional is insured under a claim made policy and drops that policy in favor of an occurrence basis policy, the professional will be exposed to claims as to which the event occurred before the inception of the occurrence basis policy and after the claim made policy has expired. This will be an uninsured claim.

Claim reporting becomes extremely important under a claim made policy. Under an occurrence basis policy, if the insured fails to timely report a claim, the insurance company must prove it was prejudiced by the late reporting or the late reporting is not a defense under the policy. On the other hand, the making (and reporting) of the claim during the policy term is the event which triggers the coverage. If the professional fails to report a claim of which he has knowledge during the policy term, it is highly likely no coverage will be afforded under the claim made policy.

### **CLASS SESSION 8 (casebook pages 588-630):**

#### **Liability Insurance - Estoppel - Conflict of Interest in Defense**

*Hildebrand v. Gray*, 1993 OK CIV APP 182, 866 P.2d 447: A liability insurance company is not estopped by findings in an earlier case in which it defended its insured where there would have been a conflict of interest in the lawyer hired by the insurance company arguing the point on which estoppel is sought.

#### **Liability Insurance - Obligation to Defend - True Facts as Opposed to Allegation**

*Hardware Mut. Cas. Co. v. Hilderbrandt*, 119 F.2d 291 (Okla. 1941): Where ins. co. knew injured parties were not employees, ins. co. has duty to defend, even though policy excluded coverage for employees and the petition alleged injured parties were insured's.

#### **Liability Insurance - Duty to Defend**

*Conner v. Transamerica Ins. Co.*, 1972 OK 64, 496 P.2d 770: Duty to defend is *not* coextensive with coverage. Co. was obligated to defend insured in suit, alleging criminal act even though criminal act was not covered by policy, but was excluded, citing *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966).

#### **Liability Insurance - Duty to Defend - Multiple Policies**

*F. & Cas. Co. of N.Y. v. Ohio Cas. Ins. Co.*, 1971 OK 31, 482 P.2d 924: Duty to defend is personal to each carrier, so no contribution where one carrier defends and seeks to recover from other carrier. Follows *U.S.F. & G. v. Tri-State*, 285 F.2d 579 (10<sup>th</sup> Cir. 1960).

## **Insurance - Bad Faith - Oklahoma Standards**

*Boling v. New Amsterdam Cas. Co.*, 1935 OK 587, 46 P.2d 916 (Okla. 1935): Company has duty “to exercise skill, care and good faith” to protect insured. *Nat. Mut. Cas. Co. v. Britt*, 1948 OK 256, 200 P.2d 407, 413 (Opinion on rehearing and dissenting opinion) 218 P.2d 1039 (Okla. 1948): Duty to settle, if probable judgment would be in excess and likelihood of winning was slight. *Davis v. Nat. Pioneer*, 1973 OK CIV APP 9, 515 P.2d 580, 582: “Substantial possibility” of excess verdict.

## **Liability Insurance - Release by Insured**

*Worthan v. Ohio Cas. Ins. Co.*, 1974 OK CIV APP 25, 535 P.2d 1025 and *Bossert v. Douglas*, 1976 OK CIV APP 55, 557 P.2d 1164: Third-party claimant’s rights become fixed on loss arising and cannot be defeated by acts of the insured after the loss.

36 O.S. §3617: No annulment of policy after claim arose.

## **Liability Insurance - Excess - Coverage Defense**

*State Farm v. Skaggs*, 251 F.2d 356 (10<sup>th</sup> Cir. 1957) (Okla. law): Where insurer denies coverage in good faith, there is no excess liab. even if, had there been coverage, good faith would have required settlement.

## **Liability Insurance - Excess - Suit by Judgment Creditor (Plaintiff)**

*Cue v. Cas. Corp. of Amer.*, 1975 OK CIV APP 33, 537 P.2d 349: No direct action by P. judgment creditor against carrier for excess, since excess claim is not one for coverage under policy but, rather, a tort claim. *Fid. & Cas. Co. of N.Y. v. Southall*, 1967 OK 235, 435 P.2d 119: No garnishment to collect excess, since excess claim is a tort claim not susceptible of garnishment.

*Allstate v. Amick*, 680 P.2d 362 (Okla. 1984): No direct bad faith action by third-party claimant against insurer.

## **Liability Insurance - Intentional Act - Compulsory Insurance**

*State Farm v. Tringali*, 686 F.2d 821 (9<sup>th</sup> Cir. 1982): Intentional act covered under compulsory auto liability insurance, due to legislative intent.

## **CLASS SESSION 9 (casebook pages 643, 657-697):**

### **Automobile Insurance - Compulsory Insurance Law**

47 O.S. §7-600 et seq.

### **Automobile Insurance - Compulsory Insurance Law - Misrep as Defense**

*Harkrider v. Posey*, 2000 OK 94, 24 P.3d 94: Misrepresentation in application not a defense to claim under compulsory insurance law policy.

### **Automobile Insurance - Compulsory Insurance - Failure to Notify No Defense**

*Baldrige v. Kirkpatrick*, 2003 OK CIV APP 9, 63 P.3d 568, holds that an insured's failure to notify his insurance company he is being sued is not a defense to statutorily mandated compulsory liability coverage. Public policy behind the compulsory insurance law places emphasis on protecting innocent third parties despite possible contract defense on part of insurance company.

### **Automobile Insurance - Compulsory Insurance Law - Exclusions and Public Policy**

*McElmurry v. Garbow*, 2005 OK CIV APP 38, 116 P.3d 198, holds that, to the extent it leaves innocent third parties without coverage, the named driver exclusion is invalid where the excluded driver is also the only named insured under the policy.

### **Automobile Insurance - Compulsory Insurance Law - Exclusions and Public Policy**

*Tapp v. Perciful*, 2005 OK 49, 2005 WL 1514647, 120 P.3d 480., holds that where it leaves an injured third party without recourse to the coverage afforded under Oklahoma's Compulsory Insurance Law, the "Automobile Business Exclusion" violates Oklahoma public policy.

### **Automobile Insurance - Financial Responsibility Law**

47 O.S. §7-301, et seq.

### **Automobile Insurance - Underage Driver Exclusion**

*Young v. Mid-Cont. Cas. Co.*, 1987 OK 88, 743 P.2d 1084: Underage driver exclusion invalid as contrary to public policy of compulsory Liability Ins. Law. 47 O.S. 1981 §7-601.

### **Automobile Insurance - Cancellation - Statutes**

36 O.S. 1988 Supp. §941: No cancellation for collision not the insured's fault.

36 O.S. 1988 Supp. §942: Can't consider MVR beyond last 3 years.

## **Automobile Insurance - Permission of Insured or Owner**

*Samuels v. Amer. Auto Ins. Co.*, 150 F.2d 221 (10<sup>th</sup> Cir. 1945) (223): “Where A operates B’s auto, with B’s consent and for B’s purpose, benefit, or advantage, it may be said that B is using the auto, but where A operates B’s auto with B’s consent solely for A’s purposes and in no sense for any purpose, benefit, or advantage of B, it cannot be said that B. is using the auto.”

7 Am.Jur.2d Auto Ins. §260: General rule that permittee may not allow 3<sup>rd</sup> party to use car does not apply where: (1) original permittee is riding in car, or (2) 2<sup>nd</sup> permittee is serving some purpose of original permittee.

Same rule Couch 2d §45:418-423.

*Duff v. Alliance Mutual Cas. Co.*, 296 F.2d 506 (10<sup>th</sup> Cir. 1961): *Samuels* followed, even where 1<sup>st</sup> and 2<sup>nd</sup> permittee close friends and had previously borrowed one another’s family cars.

*Spears v. Preble*, 1983 OK 8, 661 P.2d 1337, 1341: Once general permission is given, accident is covered even though particular use not contemplated by owner. Owner’s son used car with permission, accident occurred while fleeing burglary.

## **Automobile Insurance - Permission of Insured or Owner-Scope of Deviation**

*Commercial Standard Ins. Co. v. Mahan*, 116 F.Supp. 76 (W.D. Okla. 1953); *Aetna Life and Cas. Co. v. Lumbermen’s Mut. Cas. Co.*, 446 F.2d 217 (1971); and *Lloyd’s American v. Tinklepaugh*, 88 P.2d 356 (Okla. 1939): Oklahoma adopts the “slight deviation” rule (there will be permission to use if the deviation is only slight, but if it is great, there will be no coverage).

## **Automobile Insurance - Household Exclusion**

*Looney v. Farmers*, 1980 OK 111, 616 P.2d 1138: Exclusion upheld as to spouse who was a named insured by definition; *Farmers v. McClain*, 603 F.2d 821 (10<sup>th</sup> Cir. 1979): No coverage where claim was by omnibus insured’s common law wife; *Wheeler v. State Farm*, 438 F.2d 730 (10<sup>th</sup> Cir. 1971): No coverage where claim was for injury to named insureds riding in vehicle driven by omnibus insured; *Young v. Mid-Continent*, 743 P.2d 1084 (Okla. 1987): Invalidates “underage driver” exclusion; cites w/approval cases voiding HHE’s; *State Farm Mut. Ins. Co. v. Schwartz*, 933 F.2d 848 (10<sup>th</sup> Cir. 1991): HHE invalid, to extent of compulsory insurance law.

*Thomas v. Nat. Auto. and Cas. Ins. Co.*, 1994 OK 52, 875 P.2d 424: California household exclusion which left injured claimant w/no coverage was invalid, to the extent of compulsory insurance law minimum limits.

Gordon v. Gordon, 2002 OK 5, 41 P.3d 391: Household exclusion invalid only to the extent it deprives the insured of coverage from all auto policies to the extent of compulsory insurance law minimum limits.

### **Automobile Insurance - Reasonable Belief Entitled to Use**

*Cooper v. State Farm Mut. Auto. Ins. Co.*, 849 F.2d 496 (11<sup>th</sup> Cir. 1988).

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*Allstate Ins. Co. v. U.S. Fidelity & Guaranty Co.*, 663 F.Supp. 548 (W.D.Ark. 1987); *Dairyland Ins. Co. v. General Accident Ins. Co.*, 435 So.2d 1263 (Ala. 1983); *Canadian Indemnity Co. v. Heflin*, 151 Ariz. 257, 727 P.2d 35 (Ariz.App. 1986); *Roberts v. U.S. Fidelity & Guaranty Co.*, 498 So.2d 1037 (Fla.1stDist.Ct.App. 1986); *Georgia Farm Bureau Mut. Ins. Co. v. Fire & Cas. Ins. Co.*, 180 Ga.App. 777, 350 S.E.2d 325 (1986); *Nationwide Mut. Ins. Co. v. Southern Trust Ins. Co.*, 174 Ga.App. 513, 330 S.E.2d 443 (1985); *Robertson v. Lumbermen's Mut. Cas. Co.*, 160 Ga.App. 52, 286 S.E.2d 305 (1981); *Economy Fire & Cas. Co. v. State Farm Mut. Ins. Co.*, 153 Ill.App.3d 378, 106 Ill.Dec. 543, 505 N.E.2d 1334 (1987); *Economy Fire & Cas. Co. v. Kubik*, 142 Ill.App.3d 906, 97 Ill.Dec. 68, 492 N.E.2d 504 (1986); *State Automobile Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801 (Ky.App. 1985); *McGuire v. Hartford Ins. Co.*, No. L-86-073, Slip Op. (Ohio App. 1986) (unpublished) (available on Westlaw, 1986 WL 9378); *Donegal Mut. Ins. Co. v. Eyler*, 360 Pa.Super. 89, 519 A.2d 1005 (1987); *United Pacific Ins. Co. v. Larsen*, 44 Wash.App. 529, 723 P.2d 8, rev. denied, 107 Wash.2d 1012 (1986); *Safeco Ins. Co. v. Davis*, 44 Wash.App. 161, 721 P.2d 550 (1986).

### **Automobile Insurance - Loading/Unloading**

*Penley v. Gulf Ins. Co.*, 1966 OK 84, 414 P.2d 305: OK adopts "complete operation" doctrine; fuel truck driver's mistake (putting wrong type fuel in machine) was covered.

*Culp v. Northwestern Pac. Indem. Co.*, 365 F.2d 474 (10<sup>th</sup> Cir. 1966): Deliverymen who fought over grocery store display space while stacking merchandise not "loading or unloading."

### **Insurance - Other Insurance Clauses - Oklahoma Rule**

*Equity Mutual Ins. Co. v. Spring Valley Wholesale Nursery, Inc.*, 1987 ok 121, 747 P.2d 947: Spells out Oklahoma rules on "other insurance" clauses. Adopts "Lamb-Weston" rule that policies w/excess-escape clause will apply *pro rata*.

