



OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

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September 28

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For a complete list of all
upcoming functions go to:

www.OADC.org

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President's Message

by Angela Ailles-Bahm

I want to extend my *Thank You's* to all who attended the Summer conference. The facility at the Gaylord Texan was outstanding! The CLE was timely, educational, and entertaining. It was a great time to see everyone and enjoy each other's company. A huge "Bravo" goes out to CLE chair, Jennifer Annis and her committee. They simply did an awesome job putting the lineup of presenters together. If you have not had an opportunity to get your material from the conference, make sure to get online and pull it from the "members only" content section. In addition, I want to thank Steve Johnson and Tom Manning who took the time to show anyone interested how to sign on to the OADC website.

My thanks to the presenters! Mike Brewer and Malinda Matlock presented on the Reptile Theory of recovery...or "How to Find Your Inner Badger." Jon Starr brought his knowledge and experience to discuss the issues on 12 O.S. 3009.1, the paid vs. incurred statute. The Hon. Brad Taylor was very informative and entertaining on the issue of ethics in the practice of law, "Oh @!\$# It's Ethics." Chris Davis was very insightful on the use of negligent entrustment as a new theory of recovery against employers. Representative Randy Grau did an excellent job explaining the legislative process and discussing what we can anticipate during the next session.

And in case you missed it, the Reptile Theory of recovery is going to be presented again during the **October 9, 2015, Red River CLE in Frisco Texas**. Again, this is going to be a tremendous opportunity to get CLE. We will also have a judge panel comprised of Oklahoma judges which will include Judge Norman Russell from Kiowa County, Judge Lisa Hammond from Oklahoma County, and Judge Thad Balkman from Cleveland County. Keep an eye on the website for more information on this opportunity.

In continuing with providing the membership of the OADC want CLE, I want to remind you of the **Trial Academy which is scheduled for September 25, 2015**. It will take place at the OCU law school. If you have not had an opportunity to see the new facility, the price of admission for the Academy will be worth the tour alone. Our thanks to OADC member Dean Pete Serrata for his help making this happen at OCU. The trial Academy is intended for an audience which has 0 to 5 years of experience. We are looking forward to the opportunity to provide this resource to your young lawyers.

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The Duty of Good Faith Belongs to the Insurer and other Affirmations Regarding Bad Faith Claims

Amy Bradley-Waters

Pierce Couch Hendrickson Baysinger & Green, L.L.P.

Ever since the Oklahoma Supreme Court recognized that insurers have a duty of good faith and fair dealing in handling claims, Plaintiffs have argued that duty applies to other parties outside the insurance contract. The Plaintiffs' bar has also asserted that insurers must pay for all damage to property, including unrelated damage, and that violations of the Unfair Claims Practices Act can be a basis for a bad faith claim. Recently, Oklahoma's appellate courts have issued opinions favorable to the insurance industry concerning an insurer's duty of good faith and fair dealing. One such case decided the issue of whether that duty can be extended to an independent adjuster.

In *Trinity Baptist Church v. Brotherhood Mutual Insurance Services, LLC*, 2014 OK 106, the Oklahoma Supreme Court held that an independent adjuster is not liable to an insured for bad faith, on the basis that the adjuster is not a party to the insurance contract, has no special relationship with the insured, and owes no legal duty to the insured that would subject it to tort liability for negligent adjustment. The facts of this case involve a claim made by Trinity for damage to its church property from a winter storm in December 2009. Trinity was insured with Brotherhood Mutual Insurance Company at the time of the loss. The insurance company retained Sooner Claims Services to investigate Trinity's claim. After a long investigation, Trinity sued both the insurance company and the independent adjuster for bad faith in the handling of its claim. The trial court granted Sooner Claims Services' motion for summary judgment, which was affirmed on appeal.

In its analysis, the Oklahoma Supreme Court noted that an insurance company has the duty of good faith and fair dealing with its insureds, citing *Timmons v. Royal Globe Ins. Co.*, 1982 OK 907 and *Christian v. American Home Assur. Co.*, 1977 OK 141, as it is a party to the insurance contract, and a bad faith claim will not lie against a stranger to that contract. The Court also noted that while an independent adjuster may perform some tasks of an insurance company, that alone is not sufficient to establish a special relationship between the adjuster and the insured. Such a relationship could arise if, for example, the

independent adjuster served as a plan administrator and had primary control of decisions made in the claim, and if the adjuster's compensation was based on premiums and losses paid. *Wathor v. Mutual Assurance Administrators, Inc.*, 2004 OK 2 The Court noted it did not make sense to recognize an independent duty of an adjuster to act reasonably and in good faith when the insurer is liable for the adjuster's mishandling of a claim. In that instance, the insurer would be liable for its breach of its duty of good faith and fair dealing, a duty that is not delegable to others.

In *Aduddell Lincoln Plaza Hotel v. Certain Underwriters at Lloyd's of London*, 2015 OK CIV APP 34, the Court of Civil Appeals addressed the requirements for modified jury instructions and reaffirmed several principles of the duty of good faith and fair dealing. This case involved a bad faith claim brought by the Plaintiff, the owner of the former Lincoln Plaza Hotel, arising from Lloyd's investigation of its wind and hail claim following a storm in July 2009. The Plaintiff claimed that Lloyd's acted in bad faith by denying portions of its claim without a reasonable basis, conducting an inadequate investigation, withholding information from Plaintiff, conditioning payment of undisputed portions of the claim on settlement of disputed portions, hiring an independent engineering company to inspect the damage, failing to follow the law in its investigation and payment of the claim, and canceling the policy while the claim was pending. The case went to trial, and the jury returned a verdict in favor of the Plaintiff that was in excess of 19 million dollars.

The Court of Civil Appeals overturned the jury's verdict and remanded the case for a new trial, on the basis that there were errors in the jury instructions that "probably resulted in a miscarriage of justice." 2015 OK CIV APP 34, ¶ 1. The Court noted that if a jury instruction is modified, it must "accurately state the law and be simple, brief, impartial, and free from argument." *Id.* at ¶ 23; 12 O.S. 2011 § 577.2 Several modified instructions did not meet this standard. As an example, one jury instruction stated that Lloyd's knew of the condition of the Plaintiff's property (because it had the

Bad Faith Claims

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property inspected before issuing the policy) and could not limit or avoid payment of Plaintiff's claim by asserting that some of the damage was present prior to the storm. This instruction was not an accurate statement of the law. While Lloyd's inspection of the Plaintiff's property prior to issuing the policy was a factor in its decision to write the policy, it did not prevent Lloyd's from asserting as a defense that a portion of the Plaintiff's loss was not caused by the storm. This instruction suggested to the jury that the condition of the Plaintiff's property was waived by Lloyd's when the policy was written, and the company could not claim that the property was damaged by other causes unrelated to the storm. This instruction was prejudicial to Lloyd's and was not proper.

The Court also reaffirmed in its opinion that the Unfair Claims Settlement Practices Act, 36 O.S. 2011 §§ 1250.1-1250.17, does not create a private cause of action, and is not a guide for a jury to determine whether an insurance company breached its duty of good faith and fair dealing. The purpose of the Act is to provide the Oklahoma Insurance Commissioner with the authority to regulate the insurance industry, and if an insurer violates the Act, the Commissioner has the ability take action, including issuing cease and desist orders, or suspending an insurer's license to do business in Oklahoma. The Act is not a vehicle to be used to support bad faith claims.

The *Trinity* and *Aduddell* cases are demonstrative of the efforts by Plaintiffs to expand the duty of good faith and fair dealing to include individuals and entities retained by an insurer to assist with the investigation of a claim, and to prevent insurers from asserting proper policy defenses in claims where some of the damage claimed is unrelated to the loss. Such efforts have been unsuccessful thus far, and hopefully the Courts will continue to limit such claims in the future.

President's Letter

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Last but definitely not least, I urge you all to continue to be ambassadors of accurate information. If you've been paying attention to the news on the recent opinions of the United States' and Oklahoma's Supreme Courts, you know that the next legislative session is going to again be filled with visceral attacks on the Judiciary. Whether you agree with the outcomes or not, it's rather frightening that the general public, and members of the legislature, are so uninformed about the three EQUAL branches of government. I implore you to talk with family and friends; to educate them on why it is so important that our Judges and Justices are NOT political. A good resource for Oklahomans is www.courtfacts.org.

And speaking of the next legislative session, the Legislative Committee is looking for suggestions on what bills the OADC would like to propose during the next session. If you have a suggestion, please email a tracked version of the amendments you want to make to the law along with an explanation of why the changes should be made. Get any suggestions you have to any member of the Board and/or Chair of the Legislative Committee, Jason Reese.

www.OADC.org

Continuing Legal Education

Save the Date:

OADC Trial Academy

September 25, 2015

Oklahoma City University
J. William Conger Moot Courtroom
8am - 5pm

Watch your Email
for Registration Information

OADC Young Lawyers Division would like to invite everyone to join in a happy hour on September 25 at Fassler Hall starting immediately after the OADC Trial Academy. This will get the younger and the more experienced attorneys together for an excellent networking & mentoring opportunity.

Please contact Mary Beth Nesser or Liz Oglesby to participate in the OADC YLD committee and join in our efforts to build this organization.



The **Oklahoma Association of Defense Counsel** &
The **Texas Association of Defense Counsel** present the



2015 Red River Showdown Fall CLE

Friday, October 9 - Westin Stonebriar Resort - Frisco, Texas

Approved for 5.7 OK CLE including 1.5 Ethics*

- ⇒ **Recent Developments in Spoliation - An Update** **Cost: \$200**
- ⇒ **Medicare Secondary Payer: An Update from the Frontlines**
- ⇒ **How to Negotiate with E-Discovery Vendors**
- ⇒ **Combatting the Reptile Theory**
- ⇒ **A View from the Bench, North & South of the Red River:
*What Works and What Doesn't in the Pre-Trial and Trial ****

GOLF: If you are interested in playing golf at the Westin Stonebriar Fazio Resort Course please contact Jerry Fazio at jfazio@owenfazio.com.

For more information and registration form go to: OADC.org