

OADC OUTLOOK

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News you need to know.

www.OADC.org

For a complete list of all
upcoming functions go to:

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President's Message

by Eric Begin

Happy belated New Year! Since our last newsletter, there has been considerable activity that I want to bring our members up to date on, and outline the events of the coming year. First, it was great to see so many of you at the Winter meeting in January at the Riverspirit Casino in Tulsa. Many thanks, as always, to our Executive Director, Skoshi Heron, for putting together another wonderful event. For those who weren't able to attend, you were missed. We were joined by a good number of Past Presidents, current Judges, and our own Tracy Priddy, who is currently running for District Judge in Tulsa County. A new slate of Board members/Officers were elected, we had the opportunity to recognize and honor the stellar work of our Immediate Past President, Michael Carter and our DPAC fundraiser raised \$2470!

Next, the Legislative session is in full swing, and our Legislative Committee, headed by Angela Ailles Baum and assisted by Brett Robinson, is very active in monitoring/providing direction concerning several bills that could impact our practice areas. If you would like to get involved with this committee, please contact Angela at her Oklahoma City office. Speaking of potential changes affecting our practice areas, please pay particular attention to Dru Prosser's included article on a recent 10th Circuit opinion addressing the preservation of the non-economic damage cap in litigation.

Finally, there are many upcoming events this year our membership should start planning now to participate in. Preliminary plans are being made by the Civil Jury Project at NYU Law School to conduct a lunch program in Oklahoma City where trial attorneys, judges, and recent jurors get together to discuss how the civil jury trial system is working, and how improvements can be made. Stay tuned for additional details, once some logistical issues are resolved. If you haven't already, block your calendars for our **Summer Meeting that will be held May 31st through June 3rd at the Hyatt Hill Country Resort in San Antonio**. By all accounts, this is a wonderful, family friendly facility, and I know our Programs Committee is planning a timely, engaging series of presentations. The Fall will likewise be filled with additional programs/community service projects, so be on the lookout for additional information as the year progresses.

In closing, I would encourage each of our members to join at least one committee in the coming year. There are so many (social, educational, and practice development) benefits to participation. If you didn't indicate any committee preference(s) on your recent annual dues notice, please advise our executive director, Skoshi Heron of your interest at Skoshi@GoBaker.com, and she will get you plugged in. Thanks again for your past involvement in our organization, and I look forward to working with you in the coming year.

Use it or Lose it: 10th Circuit Rules Oklahoma's Statutory Damages Cap Waived if not Raised as Affirmative Defense

by Dru Prosser, McAfee & Taft

On September 28, 2017, the Tenth Circuit Court of Appeals handed down its opinion in *Racher v. Westlake Nursing Home*, an appeal from a \$1.21 million jury verdict rendered in a nursing home abuse case in the Western District of Oklahoma.

Defendant/Appellant Westlake raised four issues on appeal, but one issue in particular seemed to pique the court's interest: whether the district court erred by declining to reduce compensatory damages in accordance with Oklahoma's statutory cap.¹ This question concerns 23 O.S. § 61.2, which provides that in personal injury lawsuits, the amount of compensation a jury may award a plaintiff for noneconomic losses "shall not exceed" \$350,000.00. Although the statute may seem fairly straight-forward on its face, the 10th Circuit devoted approximately 15 pages of its decision to dissecting the procedural application of 23 O.S. § 61.2 in federal diversity cases.

The court began by acknowledging that a state's statutory limit on damages is undisputedly a matter of substantive state law that federal courts must apply when sitting in diversity, but also noted the "precise parameters of the findings and procedures" required by 23 O.S. § 61.2 were not immediately clear. Further, any state law procedures may not be binding on federal courts under the *Erie* Doctrine. The 10th Circuit would go on to conclude that application of the 23 O.S. § 61.2 pursuant to Oklahoma procedural law did not conflict with the Federal Rules of Civil Procedure, and ultimately resolved the issue by determining whether the statute created (i) an affirmative defense that defendants must assert, or (ii) a pleading requirement that plaintiffs must satisfy. Since no Oklahoma court has addressed this question of substantive state law, the 10th Circuit endeavored to predict how the Oklahoma Supreme Court would decide the issue.

With no guidance from the plain language of the statute itself, the 10th Circuit reasoned the Oklahoma Supreme Court would look to the Oklahoma Pleading Code, which requires only notice pleading and does not impose additional requirements unless the legislature expressly provides otherwise. Since the legislature did not set forth any additional pleading requirements in 23 O.S. § 61.2, the 10th Circuit held the statute created an affirmative defense which must be asserted by defendants.

Notably, Westlake argued that the statute created neither an affirmative defense nor a pleading requirement, but was rather a "mandatory" statute that should automatically apply to all cases falling within its ambit. This argument appears consistent with the decision of at least one other circuit court, which concluded a state's statutory damage cap was a "limitation on damages" rather than an affirmative defense. *Taylor v. United States*, 821 F.2d 1428, 1432-33 (9th Cir. 1987), *cert. denied*, 485 U.S. 992 (1988). The 10th Circuit acknowledged the "shall not" language utilized by the legislature in 23 O.S. § 61.2, but noted the Oklahoma Supreme Court has previously interpreted similar language as creating an affirmative defense that must be asserted by defendants. *See Gaylord Entm't Co.*, 1998 OK 30, ¶ 29, 958 P.2d at 145 (interpreting 12 O.S. § 1443.1(B)).²

In the case at hand, Westlake did not raise 23 O.S. § 61.2 until its post-trial motion was filed, over a month after the conclusion of trial. The court held Westlake's failure to raise the statutory damages cap in a responsive pleading—or at any point before the trial was completed—constituted a waiver of the affirmative defense created by 23 O.S. § 61.2. Accordingly, the 10th Circuit upheld the trial court's decision not to apply the damages cap, and Westlake's appeal was denied.

It should be noted that the 10th Circuit's holding is not binding on Oklahoma courts, although it will likely be viewed as persuasive authority when the issue arises in state court proceedings. Until the matter is addressed by the Oklahoma Supreme Court, defendants would be prudent to assert the damages cap as an affirmative defense in all personal injury cases. The affirmative defense should be subsequently incorporated into the pretrial order, and an oral motion for application of the damages cap should be made if a jury awards non-economic damages in excess of \$350,000.00.

Additionally, although not addressed by the 10th Circuit in *Racher*, defendants in personal injury cases should ensure the record is clear as to the amount of non-economic damages awarded by the jury, as courts may be unable or unwilling to apply the damages cap where a general verdict renders economic and non-economic damages indistinguishable. To ensure the cap may be appropriately applied, defendants should request that juries render special verdicts specifying the amount of non-economic damages awarded.

¹ This question was imprecisely stated, as the statute in question, 23 O.S. § 61.2, caps non-economic damages, not compensatory damages.

² Of note, the statute interpreted in *Gaylord* was codified in title 12 of Oklahoma's statutory code, which is dedicated to matters of civil procedure. The legislature codified Oklahoma's damages cap in title 23, which is devoted to the issue of damages.

Meet your 2018 Officers and Directors!

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Summer Meeting

May 31 - June 2

**HYATT REGENCY HILL COUNTRY
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9800 Hyatt Resort Drive
San Antonio, Texas, USA, 78251

Calling All Authors!

Are you or someone in your firm interested in writing an article for the newsletter on a topic of interest to our members? If so, please contact Amy Bradley-Waters at 918.583.8100 or abradley-waters@piercecouch.com

Past Presidents in Attendance at the Winter Meeting



First Row: Angela Ailles Bahm, Burt Johnson & Jennifer Annis *Back Row:* John Woodward Dan Folluo, Phil Richards, Jim Secrest III, Mike Heron, Mike Carter, Jon Starr, G. Calvin Sharpe and Eric Begin.