

# IN BRIEF

The newsletter of  
Feldman, Franden, Woodard, Farris & Boudreaux

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Tulsa, Oklahoma



QUENCHING  
YOUR  
THIRST FOR  
THE  
NEWS

## THIRD-PARTY ADMINISTRATORS NOT SUBJECT TO BAD FAITH LIABILITY

The Oklahoma Supreme Court decided that a third party administrator who is not an insurer is not subject to suit based on its alleged bad faith actions in administering an insurance plan.

The court affirmed summary judgment in favor of the third-party administrator.

The court discussed and agreed with a previous federal decision, *Wolf v. Prudential Ins. Co. of America*, 50 F.3d 793 (10th Cir. 1995), where the Tenth Circuit Court of Appeals considered the issue of whether an insured under a self-funded health benefits plan could sue the plan administrator for its own bad faith refusal to pay for treatment.

The court found that where a plan administrator performs many of the tasks of an insurance company, has a compensation package that is contingent on the approval or denial of claims, and bears some of the financial risk of loss for the claims, the administrator has a duty of good faith and fair dealing to the insured. In this case, the court found no breach of contract claim because the TPA was not obligated to pay the

claim, but were strangers to the contract.

Many defense firms have relied on *Wolf* in the past to convince a court that a third-party administrator is not liable for alleged bad faith. The Oklahoma Supreme Court, however, had not yet adopted the rule that a TPA who is a stranger to the insurance contract and has no claims-paying responsibilities cannot be charged with bad faith. The decision therefore helps clarify and settle Oklahoma law on this point. *Wathor v. Mutual Assurance Administrators, Inc.*, 2004 OK 2

### WORKERS COMP WAS ABDUCTED WORKER'S SOLE REMEDY

The Oklahoma Court of Appeals recently ruled that workers' compensation was the exclusive remedy for an employee who was abducted from a common area of a building and raped.

As to claims against parties other than the employer, the Court ruled that there was no premises liability for failure to provide security.

*Rogers v. Burger King Corp.*, 2003 OK CIV APP 108

## WE ARE PROUD OF ...

...our lawyers for their recent accomplishments

**Paula Quillin and Joe Farris** won the appeal of a contract dispute involving a non-complete agreement.

**Jason Goodnight** obtained a protective order, barring disclosure of HIPAA records for a private company.

**Paul Prather** won a motion to dismiss a personal injury suit against a motel chain.

**Jason Goodnight** won dismissal of a suit against a national motel chain sued for an alleged false arrest.

**Joe Farris & Jody Nathan** defeated an application for a writ of prohibition in the Oklahoma Supreme Court.

**Jason Goodnight** won dismissal of a libel claim.

### \$25 MILLION PUNITIVE DAMAGE AWARD NIXED

A California appeals court has reduced a punitive damages award in a tobacco case from \$25 million to \$9 million to meet the standard for punitive damages articulated in *State Farm Mutual Auto. Ins. Co. v. Campbell* 123 S. Ct. 1513 (2003). *Patricia Henley v. Philip Morris Inc.*, 2004 Cal. App. LEXIS 57.

**Paula Quillin and Jason Goodnight** defeated a motion to remand a case to state court. After remand, the Plaintiff permanently dismissed the case.

**John Woodard and Thayla Bohn** won summary judgment in a suit against a major retailer.

**Jason Goodnight** obtained a protective order preventing the plaintiff from taking our client's deposition.

**Joe Farris and Jason Goodnight** won a defense verdict in the trial of a lawsuit against a title company.

### Supreme Court To Decide Whether Malpractice Claims Are Preempted

A participant and beneficiary are arguing that the U.S. Supreme Court should affirm that their Texas statutory medical malpractice claims alleging that their HMOs negligently failed to pay for physician—recommended medical treatment are not completely preempted by ERISA.

*Aetna Health, Inc. v. Davila, and CIGNA HealthCare of Texas, Inc. v. Calad*

## JURY AWARDS AT ALL-TIME LOW, AND OKLAHOMA PROPOSES TORT REFORMS

Oklahoma Senate and House Republicans have proposed a Texas-style lawsuit reform package. Under the new law, there would be a cap on attorneys fees. Contingency fees would be set on a sliding scale, ranging from 30 percent of the first \$250,000 in damages dropping incrementally to 10 percent on awards greater than \$1,250,000. But if actual, provable billable hours exceed the cap, the attorney could receive the greater amount.

Also proposed is a \$250,000 cap on non-economic damages. This protection would extend to all civil suits, including those involving medical liability.

Reforms call for a cap on punitive damages to two times the plaintiff's award for non-economic damages, if awarded. All punitive damages would go to benefit Oklahoma's indigent health care system. No legal fees would be allowed on punitive damage awards.

The Oklahoma Legislature also proposes the abolition of joint and several liability. The result is that defendants would be financially responsible for an award equal only to the extent of their liability. Under current law, a defendant who is only 1 percent responsible could be held liable for 100 percent of the damages.

The bill also seeks to shift fees to losing plaintiffs. If a plaintiff loses a civil action, he could be required by the court or the jury to pay the defendant's attorneys fees. If a case is determined by the court to be frivolous, the plaintiff would be required to pay the defendant's attorneys fees.

Another part of the new law is to eliminate the collateral source rule. This would allow a defendant to introduce evidence that the plaintiff received benefits from sources outside the dispute (such as insurance payments).

Oklahoma law currently prohibits the introduction of such evidence.

The proposed new law would also protect police, firefighters, government employees, educators, and volunteers from liability for actions occurring during the legal performance of their duties. There is also protection for landowners and homeowners in cases of unauthorized entry, and innocent property owners would be protected from lawsuits brought because of the criminal actions of others.

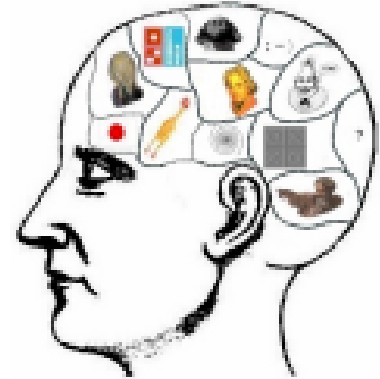
The bill also contains reforms relating to class actions and products liability suits. Most significant is a 7-year statute of repose, barring any suit filed more than 7 years after a product was first sold or leased. The bill would also protect the manufacturer or seller if it complies with applicable regulations applicable to the product.

A recent survey disclosed fewer big-ticket verdict awards to individual plaintiffs in 2003. The value of the 10 biggest jury awards fell to \$1.27 billion, a six-year low, according to Lawyers Weekly USA. The largest verdict was \$254.6 million, the smallest top award since 1993. Some observers attribute recent juror stinginess to complaints from politicians about irresponsible jury verdicts.

The year's largest award went to two Germans who prevailed in a complex lawsuit in which they claimed they were cheated out of their equity stake in a European joint venture between Bertelsmann AGG and America Online.

Other notable awards were a \$250 million to a man who developed cancer from working in an Indiana steel factory, \$163.8 million to the family of a Texas mechanic who was killed while attempting to remove a massive truck tire using a blowtorch; and \$70.4 million to an oilman who lost the opportunity to develop a lucrative oil field in Kazakhstan.

## NOW YOU KNOW EVERYTHING!!



The liquid inside young coconuts can be used as substitute for blood plasma.

Donkeys kill more people annually than plane crashes.

The first product to have a bar code was Wrigley's gum.

The king of hearts is the only king without a mustache.

Venus is the only planet that rotates clockwise.

Walt Disney was afraid of mice.

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### Old Customs Die Hard

Barbara Walters of 60 Minutes (USA) did a story on gender roles in Kabul several years before the Afghan conflict. She noted that women customarily walked about 5 paces behind their husbands.

She returned to Kabul recently and observed that women still walk behind their husbands, but now seem to walk even further back and are now happy with the old custom.

Ms. Walters approached one of the Afghani women and asked, "But why do you now seem happy with the old custom that you used to try and change"

"Land mines," said the woman.

## WHISTLEBLOWER WINS COMPLAINT Under The Sarbanes-Oxley Act

In a successful whistleblower claim under the Corporate and Criminal Fraud Accountability Act, or Sarbanes-Oxley Act, an administrative law judge ruled that a former bank CFO was unlawfully terminated after protesting suspected insider trading and other financial practices. The law judge ordered reinstatement for the former CFO with back pay and interest, reimbursement for litigation costs and expenses, including expert witness fees and reasonable attorneys' fees, and that "all references to the protected activity and the discipline emanating therefrom" be purged from his personnel file.

The employer's stated reasons for terminating the CFO's employment did "not ring true," said administrative law judge Stephen J. Purcell. The petitioner "has carried his burden of proving by a preponderance of the evidence that his conduct was a contributing factor in his suspension and subsequent discharge," the ALJ concluded.

The former CFO expressed concerns internally about certain stock transactions that he believed were improper. He refused to certify a financial statement in accordance with the then new SOX Act. As a result, he was fired.

The CFO's complaint was first denied by OSHA. He then appealed to the DOL Office of Administrative Law Judges. At a hearing, the company's outside auditor testified that the questioned stock trades did not constitute insider trading, and that there was no basis for the CFO to question the internal controls over the accuracy of the financial statements. The company also argued that even if the CFO's allegations were protected activities under the Act, they were not the reason he was fired.

The ALJ considered the proximity of

the protected activity and the termination. In August 2002, the CFO refused to sign off on the quarterly financial statement and notified a state bank examiner of his concerns. In mid-August, he advised the company president he would not certify the financial statement. Six weeks later, his employment was terminated. According to the ALJ, the "proximity in time between [the CFO's] protected activity and the adverse action is itself sufficient to create an inference of unlawful discrimination."



The ALJ found the company's stated reasons for the termination were pretextual, noting the company's arbitrary refusal to allow the CFO to bring his attorney to a meeting with the company attorney and outside auditor to discuss the CFO's concerns. The company conceded that the CFO was not terminated for poor performance.

The ALJ's decision is available on the website of the U. S. Department of Labor Office of Administrative Law Judges.

*Welch v. Cardinal Bankshares Corp.*,  
DOL ALJ, No. 2003-SOX-15, 1/28/04

We don't see things as they are. We see things as we are.

The difference between genius and stupidity, is that genius has its limits.

If I save the whales, where do I keep them?

Never solve a problem from its original perspective.

My mind works like lightning... one brilliant flash and it's gone.

I would like to help you out. Which way did you come in?

## SHORT JOKE

A man was walking in the city, when he was accosted by a particularly dirty and shabby-looking bum who asked him for a couple of dollars for dinner.

The man took out his wallet, extracted two dollars and asked, "If I gave you this money, will you take it and buy whiskey?"

"No, I stopped drinking years ago," the bum said.

"Will you use it to gamble?"

"I don't gamble. I need everything I can get just to stay alive."

"Will you spend the money on greens fees at a golf course?"

"Are you NUTS! I haven't played golf in 20 years!"

The man said, "Well, I'm not going to give you two dollars. Instead, I'm going to take you to my home for a terrific dinner cooked by my wife."

The bum was astounded. "Won't your wife be furious with you for doing that? I know I'm dirty, and I probably smell pretty bad."

The man replied, "That's OK. I just want her to see what a man looks like who's given up drinking, gambling, and golf."

## QUOTABLES

Imagination was given to man to compensate him for what he is not; a sense of humor to console him for what he is.

Why do writers write? Because it isn't there.

Me, Ambivalent? Well, yes and no.

There's an old story about the person who wished his computer were as easy to use as his telephone. That wish has come true, since I no longer know how to use my telephone.

The secret of success is sincerity. Once you can fake that, you've got it made.

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