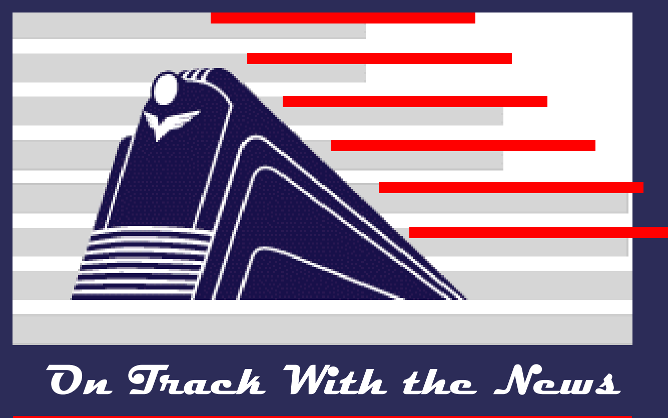
IN BRIEF

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

September 15, 2004 Tulsa, Oklahoma



NEGLIGENCE OF INSURER IS NOT BAD FAITH

In *Badillo v Mid Century Ins. Co.*, 2004 OK 42, the Oklahoma Supreme Court addressed the issue of insurance bad faith and clarified Oklahoma law.

The court said that "bad faith performance includes the intent by the insurer to act in a manner inconsistent with the justified expectations of the insured, that is, the insurer intends to act unfairly or unreasonably." The court then discussed the definitions of good faith and bad faith. In order to be in good faith, (1) an insurer's intentions must be honest, and (2) the insurer cannot take unconscientious advantage of the insured. Bad faith includes acts by the insurer that are unreasonable and unfounded. In order to present a claim for bad faith to a jury, "there must be some evidence of dishonest intentions, unconscientious advantage, or action taken that is unreasonable and unfounded." The court concluded, "To violate the contractual duty of good faith and fair dealing, an insurer must have the intent to deprive the insured of the benefit of the contract of insurance. That act must involve dishonest intentions, taking unconscientious advantage to that degree that the act becomes unreasonable. That act, as a matter of causation, must result in the loss to the insured."

Oklahoma's uniform jury instruction on bad faith implies that assuming coverage, there are three elements to bad faith: (1) the insurer's action was unreasonable under the circumstances; (2) the insurer did not deal fairly and in good faith with the plaintiff; and (3) the violation of its duty of good faith and fair dealing was the direct cause of the injury sustained by the plaintiff. The court notes that the use of the term "unreasonable" makes bad faith sound like a negligence claim, while Oklahoma case law describes bad faith as an "intentional tort." The court stated, "negligence is not an intentional tort."

After the opinion, the Oklahoma Trial Lawyers Association intervened as an amicus curiae to assist in obtaining reconsideration of the court's decision. Also intervening as amicus curiae were various insurance companies and the Association of Defense Counsel.

Since alleged negligent conduct is often used as the basis for alleged bad faith, this case will be one to watch as it continues to heat up in the Supreme Court.

WE ARE PROUD OF . . .

. . .our lawyers for their recent accomplishments

Paul Prather and **Jody Nathan** won summary judgment in a products liability case based on the statute of repose.

Curtis Roberts filed a motion to compel discovery. The opposing party simply gave up and produced the documents. The documents were critical to presentation of our client's case.

Joe Farris won a defense verdict (or as he says, "we pinked 'em") after the trial of a breach of contract suit. (In state court, the jury uses a pink verdict form to enter a verdict for the defendant.)

Paula Quillin and **Jody Nathan** were able to get their client dismissed from a products liability action against a manufacturer based on the statute of limitations.

Paula Quillin won dismissal of an employment class action lawsuit.

Victor Wandres won a defense verdict after the trial of a property damage suit.

Joe Farris lost an ERISA class action on appeal. The defendant is now offering $8 million to settle.

Thayla Bohn won a federal court appeal of an ERISA-related claim for disability insurance benefits.

Jason Goodnight obtained a six-figure judgment in favor of one of our trucking company clients in a breach of contract action.

Curtis Roberts received a six-figure judgment in an assault and battery case.

JUST REMEMBER THIS . . .

Give a person a fish and you feed them for a day; send them to prison for a major felony and you feed them for a lifetime.

Some people are like Slinkies . . . not really good for anything, but you still can't help but smile when you see one tumble down the stairs.

I read recipes the same way I read science fiction. I get to the end and I think, "Well, that's not going to happen."

PIE THROWING INCIDENT ESCALATES

Danbury High School in Danbury, Ohio decided on an unusual fundraiser for the American Cancer Society last April. Students purchased raffle tickets which allowed the winning entrants to throw pies in the face of various school officials.

Blake Molnar was selected to throw a pie in the face of the school principal, Karen Abbott. Allegedly, Molnar threw the pie so hard that he snapped Abbott's head back and knocked her off balance. Abbott grabbed the boy and took him to the vice principal's office.

Wiping off her face, Abbott called the Danbury Police and requested that Molnar be arrested for assault. Molnar's father countered by asking that an assault charge be filed against Abbott for manhandling the boy.

Ultimately, the county prosecutor, Mark Mulligan, determined that charges would not be filed against either the thrower or the throwee. Upper crust or not, no crime had been committed.

ERISA PREEMPTS OKLAHOMA INSURANCE BAD FAITH CLAIMS

In a recent case we won on appeal, Allison v. UNUM Life Insurance Company of America, No. 03-5052, the 10th Circuit decided that ERISA preempts Oklahoma bad faith claims. Such claims conflict with ERISA's remedial scheme. The Court said that such conflict is apparent from *Rush Prudential HMO v. Moran,* 536 U.S. 355, 377 (2002).

The Court also rejected the plaintiff's contention that Oklahomabad faith claims are within the ERISA savings clause. The Court found that Oklahoma bad faith law is not specifically directed toward insurance and does not regulate the spreading of policyholder risk. Oklahoma bad faith claims are therefore not within ERISA's savings clause.

For more details or a copy of the decision, email Thayla Bohn, tpbohn@tulsalawyer.com.

INSURER NOT LIABLE FOR PREJUDGMENT INTEREST IN MEDICAL MALPRACTICE CASE

The insurer had an opportunity to settle a malpractice claim for policy limits before trial. Acting on the instructions of its insured, the case was not settled. At trial, Plaintiff obtained a judgment against the insured doctor in excess of the policy limits, and was additionally awarded prejudgment interest. Plaintiff sought to collect the policy limits plus the prejudgment interest in a post-judgment garnishment action.

The Court ruled that the insurer was not liable for the prejudgment interest, because it was required by the policy to follow the insured's instructions not to settle the case within policy limits. The insured, who made the decision not to settle, is required to pay the prejudgment interest.

Parish v. Henry, 2004 OK 62

OKLAHOMA ENACTS TORT REFORM BILL AND RAISES MANDATORY INSURANCE LIMITS

The Oklahoma Legislature passed various measures this year under the "tort reform" rubric. These include raising minimum auto liability limits, making joint tortfeasors severally liable only, instead of jointly and severally liable, and requiring a manufacturer to indemnify a seller of a good in a products liability case. For additional details concerning this law or to obtain your own copy of the legislation, contact Jody Nathan, nathan@tulsalawyer.com.

FELDMAN FRANDEN 2nd Place 2004

CENSORS NIX JUDGE THOMPSON ARTICLE

The story about Judge Thompson's alleged conduct while on the bench has been national news. So why is IN BRIEF strangely silent on this unusual blockbuster story? After all, the alleged story originated a few miles from the alleged worldwide headquarters of IN BRIEF. Our alleged lawyers have actually stood before the alleged Judge Thompson to try cases and argue alleged motions. We may have even been among those who allegedly misinterpreted the look on his alleged face and thought he was pleased with our alleged *arguments*. So, why haven't we gone after this alleged story?

The truth is, we had a great article, full of humor, pathos, human interest, and some rather original puns,. The Official Censors of this newsletter called us on the carpet, laughed heartily, and then told us to deep-six the story. Dire consequences were threatened, such as no beer at the firm softball games.

We were, of course, gravely disappointed. We had gone to the trouble of visiting many novelty and gag shops to get the details and reconstruct what may have or did not allegedly occur, depending on your viewpoint. We ourselves have no viewpoint on this alleged subject. It was either an alleged gag gift, or it was not, or it was intended as an alleged gag gift, but was taken seriously, or perhaps it was a serious alleged gift but was seen as an alleged joke. Or perhaps it didn't exist. We can't say, one way or another. We just wanted to let you know why we have been permanently taken off the story. Freedom of the press? Not here.

One censor went so far as to suggest that it was in "bad taste" to write an article about not writing an article about Judge Thompson. A settlement was reached, and we can run the story about not running a story if we use the word "alleged" at least 93 times. And if we stay away from the gag gift store.

CASE COMMENTARY

In re Walnut Leasing Co., 1999 WL 729267 E.D.Pa.,1999

Why not just buy one? They're not that expensive.

White Elephant v. Commissioner of Jobs and Training, 474 N.W.2d 435, Minn.App., Sep 03, 1991

Not our fault! Your skills are outdated.

Goats v. A. J. Bayless Markets, Inc., 481 P.2d 536 (Ariz. 1971)

Baa-aa-aa-aa-aad Store!

Hamburger v. Fry, 338 P.2d 1088, 1958 OK 287

Supersize that?

Green Fly S.R.1. v. Bell Helicopter Services, Inc., 2004 WL 743662, Tex. App.-Fort Worth 2004

Splat!

Chicken 'N' Things v. Murray,
329 So.2d 302, Fla., Mar 17, 1976

Which came first? The chicken or the things?

Easter Seal Society for Crippled Children v. Playboy Enterprises, 815 F.2d 323 (5th Cir. 1987)

That's not the kind of "bunny" we wanted!

SHORT JOKE

A guy walks into work, and both of his ears are all bandaged up. The boss says, "What happened to your ears?"

He says, "Yesterday I was ironing a shirt when the phone rang and shhh! I accidentally answered the iron."

The boss says, "Well, that explains one ear, but what happened to your other ear?"

He says, "Well, I had to call the doctor!"

John Woodard has been elected Vice President of the University of Tulsa Law School Alumni Association.

The firm welcomes **Belinda Aguilar**, Law Clerk, who will be taking the bar exam in February 2005. She is from New Orleans, Louisiana. Belinda obtained a J.D. with honors in 2004 from TU College of Law.

Our softball team, under the leadership of paralegal **Antonio Quezada**, won the second place slot this year.

THOUGHTS TO THINK

A problem shared is a problem halved, so is your problem really yours or just half of someone else's?

There's no "I" in "team." But then there's no "I" in "useless smug colleague," either. And there's four in "platitude-quoting idiot." Go figure.

If you treat the people around you with love and respect, they will never guess that you're trying to get them sacked.

They say everything happens for reason. Okay, but what's the reason behind THAT?

Saying something over and over again doesn't make it true — unless, of course, you're saying, "I'm obnoxious and repetitive."

It's sobering to think there was a time in this country when women couldn't vote. I mean, how hard is it to vote, for crying out loud?!

Nobody plans to fail, they just fail to plan. Therefore, it's probably best to always plan to fail to fail to plan.

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Fall Back Edition