



# OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

December 2005

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## President's Message

by Michael Brewer

Four hundred and ten practicing trial lawyers call the Oklahoma Association of Defense Counsel their organization of choice. This is a fairly large number of trial lawyers considering that fewer jury trials take place these days and most of our classmates calling themselves trial lawyers belong to that other organization. In fact, this is the largest number OADC has had on its membership rolls in recent years. This is in no small part due to the constant nagging of Membership Chair Jake Jones. OADC board members, officers, committee chairs and volunteers worked together to make 2005 an excellent vintage. Reminiscent of our summer meeting in Napa Valley where several excellent vintages were tested, OADC members were put to the test in 2005. They responded with a loud roar, stood up and were counted.

The 2005 year began as notes on a legal pad prior to the 2005 planning meeting in November of 2004. The action started with a fabulous sit down dinner and DPAC Fundraiser at Quail Creek Golf and Country Club in January, 2005. Many other things on the planning legal pad were accomplished, but some simply never got off the ground. I assume it is that way for every association president every year. This simply means there is work left to do in the future. I will use my last message to highlight those things that did get off the legal pad. The Association is in the good and able hands of Brad Jackson who will direct us through 2006.

I am proudest of OADC's civic and charitable contributions this year. This Christmas Season, OADC members, using funding outside of membership dues, provided financial support to Oklahoma Lawyers for Children in Oklahoma City and to the Laura Dester Shelter in Tulsa. Earlier this fall OADC members responded to the catastrophic losses on the Gulf Coast by providing financial support to the Jefferson Parrish Bar Association in Metairie, Louisiana. During the summer and fall, the Young Lawyers Division of the OADC collected clothing, household items, toys and money for the John 3:16 Mission in Tulsa and for Infant Crisis Services, Inc., in Oklahoma City. The Association's response to civic needs of the community within the State of Oklahoma and nationally is outstanding. OADC members were truly accountable for things real of importance in 2005.

On the education front, the OADC Trucking and Insurance Law Committee Members plunged into the competitive CLE/Seminar market. A Trucking Law seminar was successfully presented in both Tulsa and Oklahoma City locations this fall. Thanks to Dan Folluo, Rob Coffey and Carrie Hoisington for an extremely successful trucking program which was well attended and substantively impressive.

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Also, thanks to Bob Naifeh, Angela Bahm, Paul Middleton, Tom Hird and Rich Hathcoat for a fantastic presentation at the End of the Year seminar on Insurance Law Issues. Seminar attendees included many professional adjusters, the State Insurance Commissioner's Office staff and lawyers in private practice. While at the summer CLE program in Napa, attendees took time out from wine tasting, golf and shopping in San Francisco for a truly entertaining seminar by Gene Robinson, Chris Condren, Jake Jones, Kyle Sweet and Malinda Matlock. DPAC President, Grady Parker and Workers' Compensation Chief Judge Gene Prigmore provided a lively workers' compensation seminar in May followed by some real competition on the golf links at Twin Hills Country Club.

OADC's legislative efforts in the workers' compensation reform area in the spring of 2005 were lead by Shane Curtin. Legislative chair Kevin Driskill headed up the civil lawsuit reform effort. As you know, workers' compensation reform was achieved, although the type and substance of reform were different than what we had hoped for. Only time will tell whether this reform has any real effect on the respondent's practice and the bottom dollar for our clients. OADC worked during the year in an unprecedented close manner with legislators, physicians' groups and the State Chamber on both workers' compensation and civil lawsuit reform. The 2006 legislative session appears to be lining up for a duel over civil lawsuit reform between the Governor, plaintiffs' trial lawyers and the rest of us. The Association held four DPAC fund raisers netting its largest contributions to date. However, the amount raised is not enough to allow OADC to lobby at the level where we need to be. Tom Hird shepherded through an unprecedented number of Amicus assignments as court challenges to fairness in the civil law system continue to grow. When the core values of the civil jury trial system are at risk in the legislature and judiciary, defense trial lawyers must get involved with their money and time.

Board Secretary Leslie Guajardo and Executive Director Skoshi Heron insured our first membership directory in years was a good one. Mike Heron coordinated a fantastic summer meeting and increased the amount of financial support from vendors and supporters of OADC for advertising on our website, in the directory and the Newsletters. Mike blew past our goals for vendor support in 2005 and looks forward to an even better 2006.

The crowning feature of the summer meeting was a fantastic wine cave dinner complete with a guitarist, candles and a beautiful night sky in Napa (for those looking for after dinner cigars and drinks). Wine tasting at Elaine Honig's personal residence provided an awesome warm up for the dinner. Mike Heron

and President Elect Brad Jackson were already planning the 40<sup>th</sup> Anniversary Gala for OADC that will be celebrated throughout 2006. State DRI Representative Kevin Driskill managed to convince the Southwest DRI Regional Directors and state representatives that Oklahoma City-Bricktown should be their destination of choice for the Southwest Regional DRI meeting in the summer of 2006. Our guests will all learn how to kick it up Oklahoma style at Toby Keith's along the Bricktown Canal. In 2005, Mike Keester unveiled an upgraded user friendly version of the OADC website with lots of information and multiple means for networking. Newsletter Editor Cindy Sparling oversaw the publication of six OADC Outlook newsletters in 2005. The look, style and name of our newsletter was updated this year. The Outlook included membership information and substantive articles.

This past year presented many firsts for OADC and also many satisfied goals. However, it somehow just is not enough. OADC members must keep working to maintain the Association's relevance to trial practitioners and to the community in which we live and serve. It means more than paying your dues. You must get involved. OADC can be the lifeline and communication center for defense trial lawyers, but only if you get involved and use our leverage and advantages.

For those who view OADC as a social networking group, it is. For those who want OADC to offer more bang for your memberships buck, it does. Thanks to all for your help and support during 2005! It was truly a pleasure to serve the Association and you.

With many Christmas Blessings to you and yours,

Michael W. Brewer, President

## Looking Ahead

by President Elect Brad Jackson

Whether you are ready or not, 2005 is drawing to a close. The OADC has had one of its best years we have ever had as an organization. Our president, Mike Brewer, has been an exceptional leader, continuing the tradition of outstanding leadership which we have been so fortunate to enjoy.

I am honored, and at the same time intimidated, to follow in the footsteps of Mr. Brewer as the president of the OADC. Mike has started programs, assisted in the passing of legislation and increased our exposure and influence in the legislature, while at the same time reaching out to help those in need. I hope to continue Mike's momentum as we move into the year 2006.

One of our major goals, as an organization, in 2006 will be to identify, support and promote legislation for positive civil tort reform for the betterment of the state of Oklahoma. To do this, we will need to increase our DPAC funding. We hope to increase this funding to an amount in excess of \$10,000. This will then allow us to increase DPAC's contributions to legislators who share our vision relative to civil tort reform.

In addition to tort reform, we will work to secure 100% of membership renewals, and adding 25 new members by the summer meeting of 2006. With regard to our membership, we will seek to increase tangible benefits to our members, leaving no doubt of the value of membership in this great organization.

Finally, we will strive to offer quality and pertinent CLE programs, as well as the implementation of an annual trial academy. As you can see, our goals are lofty, but attainable.

Personally, I, as well as all of the officers and directors of the OADC, look forward to serving you in 2006 for the betterment of our justice system. We certainly hope to make this 40<sup>th</sup> anniversary of the OADC a celebration of all the work that has been put into this organization, and all the leaders who have put us where we are today. We look forward to an outstanding year!

## Legislative Committee Report

by Kevin Driskill

The 2006 session of the State Legislature will convene on February 6, 2006. Although this session of the legislature is some two months away, the legislative committee has been hard at work. Members of the committee have met with the Oklahoma State Chamber of Commerce and other organizations that support lawsuit reform. In that regard, we have advocated certain changes that should be a part of lawsuit reform. These changes are both procedural and substantive. Some of the changes which we have recommended are as follows:

1. Have the statute regarding voluntary dismissals track the federal rule for dismissals;
2. Provide that the filing of a lawsuit in an inappropriate venue does not toll the statute of limitations. Recent experience has shown that plaintiff's counsel will "warehouse" cases by filing cases in an inappropriate venue;
3. Have a deemed dismissal of a case in which service is not obtained within 120 days;
4. Provide that the plaintiff in the plaintiff's petition shall state whether the amount sought is in excess of the amount necessary for diversity jurisdiction in federal court. This will do away with the gamesmanship that often occurs in those cases in which a defendant wants to remove a case to federal court. If a plaintiff claimed that the damages sought were less than the amount necessary for diversity jurisdiction, the amount claimed would serve as a cap on damages;
5. Require the plaintiff to furnish a damage model upon request and mandate that the plaintiff itemize damages on the pre-trial conference order;
6. Limit the discovery of assets where punitive damages are merely pleaded;
7. Provide for certification by an expert witness in products liability cases;
8. Provide that evidence of lack of use of a seatbelt be admissible at trial;
9. Abolish direct actions against an insurer in a trucking case; and
10. Adopt federal law for motions for summary judgment.

Although OADC does believe that certain lawsuit reform is necessary, OADC strongly believes in the judicial system. Therefore, we have not endorsed as a part of lawsuit reform a limitation on contingency fees. If any of you have any suggestions for additional legislation, please contact me with such suggestions. The legislative committee does look forward to what the committee believes will be an interesting legislative session and election year.

# The Basics of Handling Coverage Questions

by Angela Ailles-Bahm

The following is part of the materials which were presented during the seminar hosted by the OADC on December 1, 2005.

The underlying rule of handling a coverage question is to **DO YOUR RESEARCH**. First, **get a certified copy of the policy**. In other words, it needs to be certified to you, usually by the underwriting department of the company, that the policy you are reviewing is indeed THE policy at issue. The certified copy of the policy should include the declarations sheet, the application, and all applicable endorsements for the time period you are researching. You always need to know exactly what language in the policy you are dealing with. If you have not obtained an exact copy of the applicable policy, you should note in your letter that the opinion could be different if the language in the policy is different. Seemingly insignificant language in the policy can substantially change your opinion. Innocuous appearing words such as “an” and “the” can change the outcome.

Review the basic questions: **Who is the insured?** Is the person or entity claiming coverage an insured as defined in the policy? In *American Economy Ins. Co. v. Bogdahn*, 2004 OK 9, ¶11,89 P.3d 1051, the Court reviewed whether the son of the sole shareholder of a company was insured under the policy. The named insured was the company. The Court held that the definition of “an insured” was not ambiguous. Therefore, the son was not insured under the policy.

**Make sure you know the specific date, or the time frame of the events upon which the claim for coverage is being made.** Compare the time of the events or the specific date of the event giving rise to the claim, to the effective period of the policy at issue. Some policies are “occurrence” policies which depend on the date of the event occurring during the policy period. Some are “claims made” policies which depend on the claim being made during the policy period. See, *State ex rel. Crawford v. Indemnity Underwriters Ins. Co.*, 1997 OK CIV APP 39, 943 P.2d 1099.

Once you know the basics, you must **fully research the case law and statutes**. Start with Oklahoma case law and statutes first. **The objective is to get case law interpreting policy language and facts which are as similar to your policy language and facts as possible.**

**Get a copy of the reservation of rights letter.** The insurer will send the insured a letter commonly referred to as a “reservation of rights letter.” The reservation of rights letter puts the insured on notice that the insurer is reserving the right to deny coverage based on specific language in the policy. While reviewing the letter, make sure the insurer has adequately included all bases on which coverage may be denied. If it has not, you should advise your client to send an amended letter.

**The duty to defend vs. the duty to indemnify.** In preparing your coverage opinion, **you must address two issues: the insurer’s duty to defend and the insurer’s duty to indemnify.** *First Bank of Turley v. Fidelity Deposit Ins. Co. Of Maryland*, 1996 OK 105, 928 P.2d 298, contains a fairly exhaustive discussion of the duty to defend and the duty to indemnify.

“An insurer’s duty to defend claims against its insured is an *ex contractu* obligation. A liability insurance policy generally contains two basic duties - the duty to defend and the duty to indemnify its insured. The insurer’s primary duty is to provide indemnity for loss or to pay a specified amount upon determinable contingencies. **The duty to defend is separate from, and broader than, the duty to indemnify, but the insurer’s obligation is not unlimited.** The defense duty is measured by the nature and kinds of risks covered by the policy as well as by the *reasonable expectations of the insured*. **An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the potential of liability under the policy.** The insurer’s defense duty is determined *on the basis of information gleaned from the petition (and other pleadings), from the insured and from other sources available to the insurer* at the time the defense is demanded (or tendered) rather than by the outcome of the third-party action.” *Id.*, at ¶13. (Citations omitted. Bold, added.)

**The insurer must investigate the coverage question.** You will direct or assist in that investigation by collecting all relevant facts concerning the loss to help form your opinions about coverage. You will need to review the petition/complaint, other pleadings and discovery to know the basic facts of the claim. The insurer must make a decision based on the “potential of liability” and “facts available to the insurer”. Therefore, you may also need to take an examination under oath of the insured, review hers and the claimant’s deposition, and/or have the insured produce documents for your review.

**The insured’s duty to cooperate in the investigation of the coverage question.** In *First Bank of Turley*, supra, the Supreme Court addressed whether Oklahoma recognized a defense based on the insured’s “comparative bad faith” conduct. At issue was the insured’s failure to provide the insurer adequate information to allow the insurer to make a decision whether it owed an obligation to defend or indemnify the insured in a lawsuit that had been filed against it. The Court stated:

“An insurer ordinarily has no duty to defend an insured absent a request to provide a defense, which act serves to trigger the insurer’s performance under the contract. **It is the insured’s sole duty to give its insurer timely and adequate notice of a third-party claim to aid the insurer in the discovery of facts bearing on coverage.** Once an insurer receives notice of a claim and proof of loss, the insurer should evaluate the matter and make a reasonable investigation to determine whether a *potential* for coverage exists. **An insured in turn has an obligation to cooperate with the insurer, which is both contractual and implied in law. An insurer who disputes the insured’s demand to defend has three options. It can (1) seek declaratory relief that would define the insurer’s rights and obligations; (2) defend the insured under a reservation of rights, or (3) refuse to take any action at the peril of being later found in breach of its duty to defend.”**

The Court concluded that an insured has a duty to cooperate in the investigation of the coverage question. **A failure on the part of the insured to do so will result in a defense to liability under the contract.**

**Contract interpretation.** An insurance policy is a contract; therefore, the rules governing contract interpretation apply. The courts have held that parties are free to contract and cover risks as they see fit. The courts cannot rewrite a policy. *Wiley v. Travelers Ins. Co.* 1974 OK 147, 534 P.2d 1293.

**“In construing an insurance contract, its terms and words, if unambiguous, must be accepted in their plain, ordinary and popular sense. *Penley v. Gulf Ins. Co., Okl., 414 P.2d 305 (1966)*. Parties to insurance contract are at liberty to contract for insurance to cover such risks as they see fit and are bound by terms of contract and courts will not undertake to rewrite terms thereof. **The construction of an insurance policy should be a natural and reasonable one, fairly construed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result.**” *Torres v. Sentry Ins.* 1976 OK 195 ¶7, 558 P. 2d 400 (holding that a homeowner’s policy is not intended to cover a medical malpractice suit).**

However, an insurance policy is a “**contract of adhesion.**” Therefore the Court has determined that under certain circumstances the “reasonable expectations” of the parties may be considered. *Max True Plastering Co. v. USF&G*, 1996 OK 28, 912 P.2d 861. The reasonable expectations doctrine applies when construing an ambiguity or uncertainty in an insurance policy. In construing an ambiguity or uncertainty against the insurer, the court will look to the objectively reasonable expectations of *the insured* to determine the remedy. **The doctrine of reasonable expectations may be applied only when**

- (1) **the challenged policy language is ambiguous, and where, although clear,**
- (2) **an exclusion within the policy is**
  - a. **masked by technical or obscure language, or**
  - b. **hidden in the policy’s provisions.**

*Max True Plastering Co.*, 1996 OK 28, ¶23.

“Whether the language is ambiguous is a question of law. *Wynn v. Avemco Ins. Co.*, 1998 OK 75, ¶17, 963 P.2d 572, 575. The test for ambiguity is whether the language ‘is susceptible to two interpretations on its face ... from the standpoint of a reasonably prudent lay person, not from that of a lawyer.’ *Cranfill v. Aetna Life Ins. Co.*, 2002 OK 26, ¶¶ 7-8, 49 P.3d 703 at 706.” *American Economy Ins. Co. v. Bogdahn*, 2004 OK 9, ¶11, 89 P.3d 1051.

In *Dayton Hudson Corp. v. American Mut. Liability Ins. Co.*, 1980 OK 193, 621 P.2d 1155, the Court addressed whether punitive damages were recoverable under a policy of insurance. In reviewing the insuring language of the policy, the Court noted that “where the contract is susceptible of two meanings, the words of inclusion are liberally construed in favor of the insured and words of exclusion are strictly construed against the insurer.” *Id.*, at ¶ 7. In this case, a Target employee falsely arrested a patron. The patron was awarded damages including punitive damages against Target. The Court held that **as a matter of public policy, punitive damages are not recoverable under a policy of insurance.** However, where the liability is imposed on the insured vicariously, punitive damages may be covered, except if the insured “may be said to have been guilty of gross negligence in not discharging the vicious servant.” *Id.*, at ¶1.

**Declaratory judgment actions.** As previously stated one of the ways to resolve the coverage question is to file a declaratory judgment action (aka “dec action”). As of November 1, 2004, the District court can hear cases involving insurance policies. 12 O.S. § 1651. Prior to the change to §1651, dec actions were filed in federal court pursuant to 28 U.S.C. §2201. Unfortunately, the jurisdictional prerequisite of an amount in controversy over \$75,000.00 had to be met. This meant that the policy limits at issue had to exceed \$75,000.00. Fortunately, this has been rectified and even “small” policies can now be addressed in State court.

It is my recommendation that in a dec action the petition or complaint be filed against any insured claiming coverage under the policy, and any other person or entity which may benefit from the policy, i.e. *the claimant*. If you do not include the claimant, you run the risk of having to try the coverage question again in a garnishment action. If you file the dec action only against the insured, the claimant can proceed against the insured to judgment and then sue the insurer in a garnishment action. If the claimant was not included in the dec action as a defendant, the issues litigated in the dec action may be litigated again in the garnishment because the claimant was not a party to the dec action.

The theory of collateral estoppel or estoppel by judgment was discussed in a garnishment action in *Hildebrand v. Gray*, 1993 OK CIV APP 182, 866 P.2d 447. In this garnishment action, Mid-Continent’s insured crashed into the claimants’ vehicle after a high-speed chase. The claimants, the Hildebrands, suffered injuries and sued the insured. They obtained a judgment against the insured which they sought to recover from Mid-Continent by way of garnishment. Mid-Continent denied it was responsible for the judgment and relied on the policy excluding coverage for “bodily injury...caused intentionally by or at the direction of the insured.” The Court explained that “For a judgment to be an estoppel, there must be an identity of parties, as well as of subject-matter; and the parties between whom the judgment is claimed to be an estoppel must have been parties to the action in which it was rendered **in the same capacities and in the same antagonistic relation**, or in privity with the parties in such former action.” (Emphasis added.) *Hildebrand*, ¶14.

The Court held that the underlying action would not preclude litigation of the defense raised by Mid-Continent. The insured and Mid-Continent were not “in privity” with each other in the trial. Their interests were not the same. In fact, the insured’s and Mid-Continent’s interests were adverse to each other. It would have been to Mid-Continent’s best interests to argue in the trial that the insured acted intentionally, which of course, would be against the interests of the insured. That is, the Hildebrands were subject to the same defenses under the contract as was Mid-Continent’s insured. The Hildebrands were not allowed to use the judgment against the insured as ipso facto proof of a basis on which to collect from the insurer.

**Conclusion.** The objective of preparing a coverage question letter is to educate your insurer/client on the law applicable to the specific facts presented, and how the law and facts may be applied to the language of the policy by the reviewing court. The objective is *not* to take a position adverse to the insured and against coverage. You should fairly review the applicable law and advise your client, the insurer, of the likely outcome. The client/insurer then decides the path it will take.

The Oklahoma Association of Defense Counsel  
Board of Directors and President Michael Brewer

Cordially Invite you to attend the

## 2006 Winter Dinner and Dance

January 27, 2006

Renaissance Tulsa Hotel and Convention Center

Please join us for a great evening of fellowship & fun as we honor our outgoing President Michael Brewer, welcome our incoming President Brad Jackson & honor members for their outstanding service.

Name

Firm Name

Address

City, State, Zip

Phone Number

Email Address

Additional Attendees: **Total # of Attendees X \$85** \_\_\_\_\_

Send payment and registration to:

**OADC**

2601 NW Expressway, Suite 703W

Oklahoma City, OK 73112

405.415.7366 FAX

### Nominations Wanted: OADC Board

#### Positions Available

Board of Director - 3 / 3Yr Terms

Vice President - 3 / 1Yr Terms

Send to: Phil Richards

Richards & Connor

525 South Main Street

Suite 1250

Tulsa, OK 74103

prichards@richardsconnor.com

### Nominations due 12/31/2005

#### Nominations Wanted: Outstanding Defense Lawyer of 2005

Candidates for the award must have demonstrated outstanding commitment to the work of OADC and during the 2005 year have obtained one or more substantial litigation wins (not necessarily a defense verdict). Nominations must be submitted by December 30th.

Send to: Michael Brewer at

mwbrewer@hiltgenbrewer.com



Oklahoma Association of Defense Counsel

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