



OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

June 2005

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Website Update

Deadline for submissions to the OADC Fall 2005 Newsletter is August 15th. Submissions should be sent to Cindy Sparling at:

CSparling@swmb.net or Cindy Sparling, Short, Wiggins, Margo & Butts, 210 Park Avenue, Suite 3100, Oklahoma City, OK 73102.

Midway Point for Association

As of this publication date, the Oklahoma legislature will have completed its business for the session. At this time it appears that some opportunity for workers' compensation reform still exists while the opportunity for broad based tort reform is unlikely. There is talk of a special session of the legislature to deal only with the issues of civil lawsuit and workers' compensation reform.

Your OADC has been very involved in legislative issues this session. Through partnerships with the State Chamber, the Oklahoma Alliance of Physicians for Tort Reform and other entities interested in reforming workers compensation and civil lawsuit rules and procedures, we have had an impact on the proposed laws that were considered this year. At the outset, I want every OADC member to know that OADC remains committed to the American jury trial system for civil lawsuits and to the trial system for workers' compensation claims. OADC is committed to real and broad based reform. This most often should involve changes to civil procedure, discovery code, evidence code, insurance code, rules of the workers' compensation court and definitions used in the workers' compensation system.

The Association also believes that clients should be allowed to freely contract with attorneys for fees within guidelines already set forth by Oklahoma statute and the Rules governing ethical conduct. These are the broad guidelines from which we work on reform in attempting to level the playing field for businesses and individual defendants. A tremendous amount of energy has been spent by Kevin Driskill and Shane Curtin in helping to explain and define reform for various legislators, interested groups and partners. They have reviewed, revised and written much of the law which was proposed this session. Unfortunately, politics and not the rule of law, are what govern which laws we are given by the legislature. We urge each member to get involved in the legislative system, send us your comments, contribute to DPAC, call your representative or senator, and be ready to work when called upon.

This is the midway point of our 2005 OADC year. We will soon be attending the summer meeting in Napa Valley. This trip promises to truly be one of the best OADC has ventured upon. We currently have in excess of 50 members registered for the summer meeting and will have in excess of 100 persons at our Friday night Wine Cave Dinner. I've not seen the entire movie "Sideways" but I like the trailer I've seen, where one of the main characters is wildly swinging his driver overhead chasing away two other golfers who are in a golf cart. I do sincerely hope we all make it back from Napa in one piece.

The Association has already made several important accomplishments in 2005. We have a new OADC brochure for prospective members. A new look and updated

format for the newsletter is in place. Additionally, we have a new membership directory, membership numbers are at an all-time high, DPAC fund-raising is at an all-time high, and we have the ability to securely share with other members briefs, strategy and expert information on-line on our new and improved website. Your Association board, committee chairs and leadership have been hard at work. I think I will stay in Napa for the remainder of the year and let the Association coast to Brad Jackson's term next year... I only wish!

Six months into the 2005 term, the Association has earned an A+, but we need to keep working to maintain this high level for the rest of the year and into 2006. Plans are currently under way for the Gala Celebration of OADC's 40th Anniversary in 2006. There are many projects left to start or complete for 2005. Several substantive seminars including insurance law, trucking law and a trial clinic are on the 2005 Fall schedule. Publication of substantive law newsletters, a public service project, a membership drive, the law school initiative and young lawyers programs are all planned for the second half of 2005. OADC will continue to be involved in legislation and raising DPAC funds. The Association is gaining momentum. You need to be part of it!

Michael W. Brewer, President

OADC 40th Anniversary
June 22 - 24, 2006
Four Seasons . Las Colinas
Mark Your Calendars!

Law Day Celebrated

By Leslie Guajardo

The Young Lawyers Committee recently participated in two activities at the OCU and OU Law School campuses on May 2, 2005. OCU was celebrating Law Day with a host of activities throughout the day. YL Members Leslie Guajardo and Roe Simmons set up a booth in the Sarkey's Law Center and distributed OADC membership brochures and pizza to interested students, as well as answering questions generally about OADC. While the OU campus did not have a similar celebration of Law Day at its law school, YL Members Jeremy Carter and Jennifer Jackson set up an information booth on May 2 as well to hand out food and brochures to students who were present for the beginning of finals week. Both the OCU and OU locations enjoyed a good turnout.

The YL Committee is exploring several other activities for the year, including possible civic projects with Oklahoma County Youth Services, the Infant Crisis Center, and the Habitat for Humanity, as well as pairing with the Membership Committee to host social events for new attorneys this fall. The YL also plan to hand out brochures with care packages at upcoming bar exams in Tulsa and Oklahoma City.

The YL Committee is always looking for volunteers for its projects. If you are a YL and would like to assist, please contact Leslie Guajardo at Iguajardo@piercecouch.com or Nicole Longwell at nlongwell@jpm-law.com.

DPAC Contributions Continue

By Grady Parker

The DPAC committee has set a goal of raising over \$10,000 this year to help with its lobbying and legislative efforts. With the help of committee members, Mike Brewer, Mike Carter, Angela Bahm, Kevin Driskill, Shane Curtin, Brad McClure, Brad Jackson and Mike Heron, we are well on our way to achieving that goal.

On March 8, DPAC held a fund raiser at Maker's, where Rep. Fred Morgan, Chair, House Judiciary Committee, Senator Charlie Laster, Chair, Senate Judiciary Committee, Senator Glenn Coffee, Senate Minority Floor Leader, and Pat Hall, Chief Lobbyist, Oklahoma State Medical Association discussed the Workers' Compensation legislation that had recently passed from the House and Senate Judiciary Committees. By attending this fund raiser, not only did we have the opportunity to express our concerns, but also a willingness to assist in the legislative process.

Friday, May 13th, the DPAC and Workers' Compensation committee joined forces for a "Lunch C.L.E. and Golf" seminar at Twin Hills Golf and Country Club. The Honorable Gene Prigmore, Presiding Judge of the Workers' Compensation Court, gave those attending his view of ethical issues and dilemmas faced by attorneys practicing at the Workers' Compensation Court. Some of those attending attempted to put into practice what they had just learned by playing golf, the ultimate ethical dilemma.

Although the legislative session is almost over, we will need additional funds to support key legislators and maintain OADC's lobbying and legislative efforts. To those who have already contributed to DPAC, THANK YOU! To all others, I encourage you to do so.

Class Action Fairness Act

By Karen Grundy

On February 19, 2005, President Bush signed into law the Class Action Fairness Act of 2005 (“CAFA”). CAFA became effective immediately, and applies to all civil actions filed on or after its enactment. The primary effect of CAFA is to transfer most multi-state class actions from state court to federal court. By conferring federal court jurisdiction on such cases, Congress intended CAFA to put a stop to the practice of forum shopping, in which a large number of multi-state class actions have been filed in certain “magnet jurisdictions” known for returning disproportionately large verdicts.

CAFA changed the former law by expanding federal diversity jurisdiction to include cases where plaintiffs seek at least \$5 million in damages and where there is diversity between any putative class member, and any defendant, adopting special rules for removal of class actions to allow immediate appeal of remand orders, and by limiting attorneys’ fees for “coupon” settlements, and requiring governmental authorities to be notified of certain proposed class action settlements.

Federal Jurisdiction Over Large Class Actions

In an effort to funnel a majority of large multi-state class actions out of the state court system, CAFA greatly expands federal diversity jurisdiction by allowing the “amount in controversy” to be satisfied by aggregating class damages and granting jurisdiction to the federal courts for certain class actions in which the total damages exceed \$5 million. Under prior case law interpreting the federal diversity statute, 28 U.S.C. §1332, a case involving solely state laws could proceed in federal court only if each named class member was from a state different from the defendant. In addition, most appeals courts required that at least one class member had to seek \$75,000. In other appeals courts, this was also true of each class member; that is, they could not aggregate their claims to satisfy the amount-in-controversy requirement. CAFA changes federal diversity jurisdiction so that only “minimal” diversity, instead of “complete” diversity, is now required for large, interstate cases, as long as other new requirements are satisfied.

CAFA amends the diversity statute to add §1332(d). In general, CAFA creates three categories of class action cases: i) those in which federal diversity jurisdiction is *available* at the request of a party; ii) those in which federal diversity jurisdiction is barred; and iii) cases in which the district court has discretion. The rules may be analyzed as follows:

Federal jurisdiction present: §1332(d)(2). CAFA provides that federal courts have original jurisdiction of class actions if *any* class member is from a state different from any defendant, and the aggregate controversy exceeds \$5 million, exclusive of

interest and costs. Section (d)(5) also requires that there be 100 or more class members. As a practical matter, because of the provisions outlined below, the law automatically vests jurisdiction in the federal courts only if S! or less of the class members are from the forum state. Section (d)(9) exempts cases solely involving securities law or claims relating to business governance under the laws of the state in which the business entity is organized. As mentioned, claims involving less than 100 class members are also exempt.

Federal jurisdiction lacking: §1332 (d)(4). The law leaves “home state” and “local” controversies to the state courts. There are two scenarios under which a federal court *must* decline jurisdiction under § 1332(d)(2):

- §1332 (d)(4)(B). If T! or more of the class members are from the forum state, and so are the primary defendants, the federal court lacks diversity jurisdiction. The term “primary defendants” is not defined, but the legislative history suggests that the purpose is to leave in state courts class actions brought against a company in its home state in which T!of the class members are from that state.
- §1332 (d)(4)(A). The court also lacks diversity jurisdiction if more than T! of the proposed class members and at least one defendant are from the forum state, the principal injuries occurred there, the defendant’s conduct is a significant basis for the claim, *and* significant relief is sought from that defendant. For this rule to apply, there also must have been no class lawsuits in the prior 3 years involving similar factual allegations against any of the defendants.

Discretionary Federal Jurisdiction §1332 (d)(3). A federal district court may decline to exercise jurisdiction if more than S! but less than T! of the class members are from the forum state and so are the primary defendants. In this circumstance, the courts consider the “totality of the circumstances” to determine what is “in the interests of justice”. Six factors are relevant to this determination: 1) whether the matter is of national or interstate interest; 2) whether the claims asserted will be governed by the law of the state in which the action was originally filed, or by the laws of other states; 3) whether there was artful pleading of the class to otherwise avoid federal jurisdiction; 4) whether the action was brought in a forum with a distinct nexus to the class members, the alleged harm, or the defendants; 5) whether the number of class members from the local state is substantially greater than the rest of the class, with the others being dispersed around the country; and 6)

whether, during the three year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims have been filed on behalf of the same persons against the same defendants.

The date for determining the citizenship of the members of the proposed class is the date that the operative pleading was filed; there is no provision for determining the citizenship of defendants. Additionally, the jurisdictional rules apply before and after any class certification.

In cases not brought under a state counterpart to Rule 23, the new rules may apply if monetary relief is sought on behalf of 100 or more persons, and there are allegedly common questions of law or fact; however, in this circumstance, each plaintiff must separately meet the \$75,000 in controversy requirement. A few types of cases are exempt from this provision: i) where there was an “event or occurrence” in the forum state (e.g. an airplane crash or other major accident) that caused injuries there or in nearby states; ii) the claims were joined at the request of the defendants, or solely for pretrial purposes; or iii) the claims are brought on behalf of the general public, not individual claimants. Removal to federal court under this provision cannot be followed by a transfer to another court as a “multidistrict litigation” case under §1407, unless the majority of plaintiffs request, or they seek Rule 23 treatment, or the case is certified under Rule 23 at another party’s request.

In short, the critical factor for determining whether a case is subject to removal from state court will be the composition of the class. The more “multi-state” the class members and claims, the more likely the case is to fall under the requirement that it be heard in federal court. How each of the various factors will be interpreted will certainly be the subject of substantial future litigation.

Removal of Cases to Federal Court

In addition to expanding the jurisdiction of the federal courts over large multi-state class actions, CAFA also provides defendants with expanded opportunities to remove eligible cases throughout the pendency of the case. CAFA adds a new section to the chapter of the Judicial Code on the procedures for removal of cases to federal court from state court: 28 U.S.C. §1453. In general, the provisions of former §§1446 and 1447 apply.

The one-year time limit in §1446 for cases that first appear to be removable based on diversity jurisdiction does not apply. The purpose of this provision is to prevent plaintiffs from changing their pleadings, such as seeking substantially more money, after the removal deadline has passed.

CAFA provides that any defendant may remove an eligible class action to federal court, without the consent of the other defendants. Prior law imposed a “unanimity requirement” under

which all defendants then served had to consent to removal. Now any defendant can remove a class action that satisfies CAFA without obtaining the consent of all defendants, and regardless of whether the defendant is from the forum state.

CAFA also provides for expedited review of district court decisions granting or denying remand. A federal appellate court may accept an appeal from an order granting or denying remand if application is made within 7 days after entry of the order sought to be appealed. The appellate judgment must be rendered within 60 days of the notice of appeal, unless all parties agree to an extension or there is good cause to extend the time period for another 10 days. If a final decision on the appeal is not rendered within this time, the appeal is automatically denied.

Settlements and Attorneys Fees

In addition to expanded federal court jurisdiction and removal procedures, CAFA also creates the “Consumer Class Action Bill of Rights”, which addresses a variety of perceived abusive settlement practices. One aspect of this provision of CAFA is increased notice procedures in connection with class action settlements. Specifically, within 10 days of filing a proposed class action settlement in court, defendants participating in the settlement must notify certain federal and state officials of the prospective settlement. Appropriate officials include the U.S. Attorney General or State Attorney General, or the state regulator or licensing authority with jurisdiction over the subject matter of any of the allegations of the complaint. The court cannot approve a proposed settlement until 90 days after such notification, and a settlement is not binding on class members if proper notice is not made. Defendants may thus tend to err on the side of over-notification, albeit with the risk that state regulators may be spurred to take action they might not otherwise have undertaken had notice not been given.

In addition to these notification provisions, CAFA provides for specific procedures that must be followed in “coupon settlements” involving low or no monetary payments to consumers. In these types of settlements, CAFA provides that any award of plaintiffs’ attorneys’ fees attributable to the value of coupons must be based on the value to class members of the coupons that are redeemed, as opposed to the value of total coupons available. Although CAFA provides that the value of unclaimed coupons may be distributed to charitable organizations, plaintiffs’ attorneys’ fees may not be based on the value of such unclaimed funds. CAFA also prohibits settlements that provide greater benefits to class members located near the forum state, and limits circumstances in which plaintiffs can accept a settlement which results in a “net loss” for some plaintiffs.

OADC Membership Continues to Grow

By Jake Jones

OADC now has over 380 members. The committee membership is composed of: Mariano Acuna, Stacey Acord, Mike Keester, Stephan Mathis, Tom Prince, and me. At the behest of President Mike Brewer and former-President, Phil Richards, we are working to increase the membership to at least 425. We have contacted the 40 members from last year who did not rejoin and encouraged them to renew their membership. We are also trying to increase membership within the larger firms to 100% of their defense lawyers.

The Board and Membership Committee are also attempting to insure that OADC continues to be an organization that benefits lawyers, as opposed to being the type of organization where lawyers are told by a senior partner that they must join. The new website and its numerous offerings, the CLE programs, networking, and the annual meetings have helped in this regard.

At our last meeting on March 17, 2005, we discussed how to increase our membership base in Tulsa, as well as in the larger “rural” counties, specifically Cleveland, Garfield, Comanche, Canadian, and Muskogee Counties. We hope to have an answer to this question by our next meeting.

If you would like to join the Membership Committee, or if you have any suggestions as to how to increase our membership or make it more attractive to you, please contact me or any other committee member. Thank you.

DRI Report

By Kevin Driskill

On March 31 and April 1, 2005, I attended the DRI State Representatives Conference in Chicago. At this conference, there was a presentation on the new and improved DRI Expert Witness Database. This database is searchable through the internet. Significantly, there is no charge to search the database. One can also access transcripts and other documents about expert witnesses through the DRI website for a reasonable fee.

As all of you know, DRI does offer significant benefits to its members through its publications, including the monthly journal, *For the Defense*. Additionally, its seminars in the different substantive practice areas are always outstanding. For those of you who are hiring new lawyers, DRI does provide a one year free membership to DRI for anyone who joins OADC. I would encourage each of you to take advantage of this opportunity. Feel free to contact me if you need an application for membership.

This year is the ten year anniversary of DRI’s annual meeting. The annual meeting this year is in Chicago and runs from October 19th through October 22nd. I have attended several of the annual meetings. They have all been superb. The CLE programs are always outstanding. Moreover, there are significant networking opportunities afforded at the annual meeting. This year, each of the substantive practice committees will have CLE directed toward the committee members. Therefore, there should be something of interest for all. I look forward to seeing you in Chicago, in October.

Legislative Report

By Kevin Driskill

As of the time of the writing of this report, there are two weeks left in the legislative session. Although the legislative committee has been active, we do not yet have anything substantive to show for our efforts. This year, our focus has been on the proposed worker’s compensation reform efforts and the lawsuit reform bill filed in the House of Representative. Shane Curtin and other members of the workers’ compensation committee have been very involved in the shaping of the worker’s compensation reform legislation. OADC has been consulted on numerous occasions to offer input into the bill and offer insight into the effect of the proposed legislative changes. We do believe that we have been able to influence the direction of the worker’s compensation reform legislation. As to the issue of lawsuit reform, this issue has taken a backseat to worker’s compensation reform. Through the alliances OADC has made over the last several years, we were influential in shaping the lawsuit reform bill filed in the House of Representatives. Indeed, a significant number of the provisions contained in the lawsuit reform bill were inserted in the bill at the direct suggestion of OADC. Although this bill was successfully passed by the House of Representatives, the provisions of the house bill were removed in the Senate Judiciary Committee. We anticipate that these provisions may again be raised when the lawsuit reform legislation is considered in joint conference committee. However, it is too early to tell at this point whether any meaningful lawsuit reform will occur this year. The committee does believe that we have been successful in “being at the table” for discussions regarding legislation of interest to the membership.

WWW.OADC.ORG

By Mike Keester

OADC is proud to announce its newly redesigned website at www.oadc.org and we invite you to visit this site often. The website has many functions and offers many new member services. When you visit www.oadc.org, you can read the history of OADC, review the quarterly newsletters, view the scrolling banner for important upcoming events, visit the calendar to see what the organization has planned, and email officers and directors of OADC or our Executive Director. Also, our website has a great many links of interest which are useful in your practice, including links to OSCN, OBA, US District Courts, CFR, DRI, FDCC, Tulsa and OKC (city and county sites), 10th Circuit and Supreme Court cases and others. We are especially excited about our **new MEMBERS ONLY** section of the website which allows you to search our CLE archives, use the bulletin board to communicate with other OADC members and to post questions or matters of interest, review or even add data to our Expert Witness Database and keep up with legislative initiatives and new laws of interest to the defense bar. In order to help you to use the Members Only section, we are sending you this email with login instructions. To log in, and set up your password, simply:

- 1) go to www.oadc.org <<http://www.oadc.org>> and click the MEMBERS link at the top of the page;
- 2) on the members page, click the link below the SUBMIT button that says “NEW MEMBER LOGIN”;
- 3) enter a username and password of your choice;
- 4) enter your first name — make sure to enter your name as shown on OADC records;
- 5) enter your last name;
- 6) enter your work phone number;
- 7) enter your WORK zip code; and then
- 8) click Submit.

As long as the database found you, you will receive a “Welcome to the OADC Website *username*” message. If you have any problems you can email OADC and we will help you get set up on the website!

Welcome to OADC’s new website. Once you visit, you will want to bookmark this site under your “favorites” and come back to check it often.

See you soon at www.oadc.org

