Liability Insurance: Membership Has Its Privileges

By Philip R. Bruce and Paul M. Kolker

Governor Fallin recently signed a new bill into law that limits the types of damages plaintiff-motorists may recover if they fail to comply with the state's compulsory insurance law.[1] This type of law is commonly referred to as "no pay, no play" legislation. A growing number of states, including Alaska,[2] California,[3] Iowa,[4] Kansas,[5] Louisiana,[6] Michigan,[7] New Jersey,[8] North Dakota[9] and Oregon,[10] have enacted similar statutes. The policy rationale for these statutes is obvious: motorists should obtain insurance before getting behind the wheel. Oklahoma's newly enacted law contains three main parts: 1) the general rule, 2) exceptions to the general rule, and 3) who and when a party may assert the defense. This article briefly summarizes each part below and compares Oklahoma's law to the similar "no pay, no play" statutes in other jurisdictions.

THE GENERAL RULE

Under the new law, if a plaintiff-motorist lacks liability insurance on his vehicle, he may still sue, but his recovery will be limited to "medical costs, property damage and lost income."[11] By contrast, the prior law allowed all motorists — including uninsured ones — to also recover pain and suffering damages.[12] The new law does not *expressly* limit recovery for other forms of non-economic damages, such as disfigurement, loss of enjoyment of life or loss of consortium. However, the law may limit those damages as well because it does not equivocally enumerate these forms of recovery.

As discussed below, the new law does not apply when the tortfeasor acts intentionally.[13] Thus, the statute does not limit punitive damages for intentional torts. But it is unclear whether the law limits Category I punitive damages when the tortfeasor only acts recklessly.[14] On the one hand, the law may limit Category I punitive damages because there is no facial exception to the law for reckless acts of the tortfeasor, and the plain language of the statute limits the "maximum amount" recoverable to medical costs, property damage and lost income.[15] On the other hand, the law does not specifically limit — or even mention — punitive damages. Therefore, the courts may conclude the new law only limits actual damages and a plaintiff may still receive punitive damages but only in the amount of the newly limited actual damages or $100,000, which is the amount allowed for Category I punitive damages.

EXCEPTIONS

Even if a claimant lacks automobile insurance at the time of an accident, he may still

pursue all available legal remedies (including pain and suffering) if one of the following seven exceptions applies:

First, an uninsured claimant may still recover all damages if a driver under the influence of drugs or alcohol injures him.[16] For this exception to apply, the intoxicated driver must either be convicted of or plead guilty to driving under the influence.[17] If the intoxicated driver dies as a result of the accident, the claimant must prove by a preponderance of the evidence that the tortfeasor was intoxicated.[18] Alaska, California, Kansas, Louisiana, New Jersey and Oregon all have similar exceptions.[19]

Second, an uninsured passenger of a vehicle is exempt, but only if the passenger did not own the vehicle that was involved in the accident.[20]

Third, an uninsured claimant is exempt for injuries caused by an automobile accident if he was not physically located within the motor vehicle involved in the accident.[21] For example, an uninsured pedestrian is exempt if struck by a vehicle.

Fourth, this legislation does not apply to any wrongful death claim.[22] Therefore, an estate may sue for the wrongful death of anyone injured in an automobile accident, even if none of the exceptions would otherwise apply had the claimant survived the accident.[23]

> "Until the courts sort that issue out, however, practitioners would be wise to assert the limitation as an affirmative defense."

Fifth, an uninsured claimant may still recover all damages if the other driver in the accident: a) intentionally caused the accident, b) left the scene of the accident or c) was committing a felony at the time of the accident.[24] Unless otherwise specified by statute, a felony is generally defined as a crime that is punishable by at least one year in prison.[25] Thus, if the other driver is speeding or committing other misdemeanor traffic violations, this exception will not apply. All the other states with "no pay, no play" statutes have similar exceptions.[26] Accordingly, case law from those states may be helpful when addressing any issues here.

Sixth, minors can always recover full damages, even if the child's parents were uninsured motorists.[27] To qualify, the parent or parents must claim the child "as a dependent on the federal income tax return."[28] Although federal income tax returns allow different types of dependents beside children, this exception is arguably limited to children-dependents because the statute uses the words "parent or parents."[29]

Finally, the law provides a "grace" period that applies only if specific criteria are satisfied.[30] The grace period would only apply if 1) the claimant had a valid insurance policy that was terminated or nonrenewed for "failure to pay the premium," and 2) the insurer failed to send notice to the claimant's last known address at least 30 days prior to the accident.[31] Notably, if the insurance policy was cancelled or nonrenewed for some other reason besides "failure to pay the premium," the claimant may not be able to assert this exception even if notice was never provided.[32]

ASSERTING THE LIMITATION: WHO AND WHEN

Each person "involved in the accident" *and* "found liable" for the claimant's injuries may assert the limitation on damages.[33] Consequently, it appears the defense may not be asserted until *after* there is a finding of liability. The precondition of fault is odd, inasmuch as a violation of the compulsory liability law occurs well before the accident.

Louisiana and Oregon are the only other jurisdictions that require the defendant to "assert" the limitation.[34] In fact, Louisiana's statute expressly states that the limitation is an affirmative defense and requires a defendant to assert it in the defendant's first responsive pleading.[35] On its face, Oklahoma's statute does not go that far. As such, there may be an open issue regarding whether an Oklahoma litigant must also specifically assert the limitation as an affirmative defense in an answer for the limitation to apply.

Until the courts sort that issue out, however, practitioners would be wise to assert the limitation as an affirmative defense. Oregon's law may be particularly instructive on this point. Like Oklahoma, Oregon requires defendants to prove that the plaintiff did not have insurance.[36] Further, Oregon does not specifically name the limitation as an affirmative defense.

Yet Oregon case law makes it clear that the limitation is, in fact, an affirmative defense.[37]

But, while instructive, there may be some limitations on the applicability of Oregon's statute. Unlike Oklahoma's law, Oregon's statute only generally requires a party to assert the limitation; it does not require a party to assert the limitation after a finding of liability. Therefore, the applicability of Oregon law may be limited.

Because the responsible party must assert this limitation, it stands to reason that the liable party carries the burden of proof in this regard. One Louisiana case specifically held that the defendant asserting the limitation, as an affirmative defense, must prove by a preponderance of the evidence that the plaintiff-motorist did not have insurance.[38] Thus, Louisiana case law may be helpful to those practitioners facing issues about the sufficiency of evidence to meet this burden.

Another curious aspect of the new law is that it states a person must be "involved in the accident" to assert the limitation.[39] This raises the issue of whether a plaintiff, under the right circumstances, may avoid the limit on damages by suing a non-involved owner of a vehicle for negligent entrustment.

In one California case, *Day v. City of Fontana*, the court addressed a similar issue.[40] There, the plaintiff sued the city for creation of a dangerous condition on public property and for nuisance when overgrown shrubbery prevented the tortfeasor from seeing the plaintiff's vehicle.[41] The city asserted the "no pay, no play" limitation, arguing that the court should broadly construe the statute.[42] The plaintiff objected, contending that the statute only applied when a litigant's insurance was personally implicated in the lawsuit.[43] In the end, the court held that the limitation still applied because the lawsuit was one "arising out of the operation or use of [a] motor vehicle."[44]

Oklahoma courts may likely follow *Fontana* because Oklahoma's statute contains very similar language.[45] Further, both statutes have the same general policy goal of incentivizing drivers to buy car insurance.

Another issue that might arise under the new law is whether it applies to product liability cases involving car accidents. Again, California law may be instructive. There, one court held that the limitation did not apply to a case where a product defect caused a car wreck.[46] The court reasoned that it would not meet the policy aims of the "no pay, no play" legislation if it applied the limitation.[47] Intuitively, this makes sense because the "no pay, no play" legislation seeks to encourage drivers to take responsibility; it does not concern the corporate defendants at the heart of product liability cases. Oklahoma courts, however, may disagree, especially if an uninsured plaintiff injures another person in an accident caused by a defective product.

A final notable issue is whether Oklahoma's "no pay, no play" statute will apply to foreign uninsured motorists. In *Atkinson v. Boyne*, a Louisiana federal court found that the "no pay, no play" statute, in conjunction with Louisiana's compulsory insurance law, did not apply to foreign uninsured motorists if the foreign motorists' vehicles were not registered in Louisiana.[48] Whether Oklahoma courts would refuse to extend Oklahoma's "no pay, no play" statute under similar circumstances is an open question. However, there is a strong argument that the failure to apply the law would violate Oklahoma public policy. This is true regardless of whether a court applies the *lex loci contractus* rule or the most significant relationship test.[49] Simply put, the spirit and purpose of the law is to protect Oklahoma drivers, and an Oklahoma defendant would be penalized merely because the claimant resided out-of-state. Moreover, the foreign plaintiff would receive a benefit to which Oklahoma citizens are not entitled.

Undoubtedly, other issues beyond the scope of this article will arise.[50] Practitioners should be aware of the similar laws and persuasive case law from other jurisdictions. At the same time, however, attorneys should also understand that Oklahoma's law is unique; it has taken bits and pieces from other statutes, but it is certainly not patterned after any specific law. Thus, the lawyers and judges here will have to use their own Oklahoma ingenuity to mold and interpret any ambiguities in the statute.

1. *See* 47 O.S. §7-116 (2011) (effective Nov. 1, 2011).
2. Alaska Stat. §09.65.320 (2004).
3. Cal. Civ. Code §3333.4 (1996).
4. Iowa Code §321A.5 (2006).
5. Kan. Stat. §40-3130 (2011).
6. La. Rev. Stat. §32:866 (2007).
7. Mich. Comp. Laws §500.3113 (1986).
8. N.J. Rev. Stat. §39:6A-4.5 (2003).
9. N.D. Cent. Code §26.1-41-20 (2003).
10. Or. Rev. Stat. §31.715 (1999).
11. 47 O.S. §7-116(A) ("[T]he maximum amount that a plaintiff or claimant may receive, if the plaintiff or claimant is not in compliance with the Compulsory Insurance Law, shall be limited to the amount of

medical costs, property damage, and lost income and shall not include any award for pain and suffering.").

12. *See, e.g., Edwards v. Chandler,* 1957 OK 45, 308 P.2d 295.
13. *See* 47 O.S. §7-116(B)(5).
14. *See* 23 O.S. §9.1(B).
15. 47 O.S. §7-116(A).
16. 47 O.S. §7-116(B)(1).
17. 47 O.S. §7-116(B)(1)(a).
18. 47 O.S. §7-116(B)(1)(b).
19. *See* Alaska Stat. §09.65.320(b)(1); Cal. Civ. Code §3333.4(c); Kan. Stat. §40-3130(b); La. Rev. Stat. §32:866(3)(a)(i); N.J. Rev. Stat. §39:6A-4.5(b); Or. Rev. Stat. §31.715(5)(c).
20. 47 O.S. §7-116(B)(2).
21. 47 O.S. §7-116(B)(3).
22. 47 O.S. §7-116(B)(4).
23. *See id.*
24. 47 O.S. §7-116(B)(5).
25. *See* 21 O.S. §9; 12 O.S. §2609.
26. *See* Alaska Stat. §09.65.320 (felony, intentional tort and fleeing the scene); Cal. Civ. Code §3333.4 (felony); Iowa Code §613.20 (felony); Kan. Stat. §40-3130 (felony); La. Rev. Stat. §32:866 (felony, intentional tort, and fleeing the scene); Mich. Comp. Laws §500.3113 (intentional tort); N.J. Rev. Stat. §39:6A-4.5 (intentional tort); N.D. Cent. Code §26.1-41-20 (intentional tort); Or. Rev. Stat. §31.715 (felony).
27. 47 O.S. §7-116(B)(6).
28. *Id.*
29. *Id.*
30. 47 O.S. §7-116(B)(7).
31. *Id.*
32. *Id.*
33. 47 O.S. §7-116(C) ("Each person who is involved in the accident which is the basis for the action or claim by the plaintiff or claimant and who is found liable for damages to the plaintiff or claimant may assert the limitation of recovery provided for in subsection A of this section, unless the provisions of subsection B of this section apply. The motor vehicle liability insurer of the person asserting the limitation of recovery also may assert the limitation.").
34. La. Rev. Stat. §32:866(B); Or. Rev. Stat. §§31.715(1)-(2).
35. *See* La. Rev. Stat. §32:866(B); La. Code Civ. Proc. Art. 1005 (2009).
36. Or. Rev. Stat. §§31.715(1)-(2).
37. *Lawson v. Hoke*, 77 P.3d 1160, 1162 (Or. Ct. App. 2003).
38. *Johnson v. Henderson*, 899 So. 2d 626, 627-28 (La. Ct. App. 2005).
39. 47 O.S. §7-116(C).
40. 19 P.3d 1196 (Cal. 2001).
41. *Id.* at 1199-200.
42. *See id.* at 1198-99.
43. *See id.* at 1202.
44. *Id.*
45. *Compare* Cal. Civ. Code §3333.4(a) (applying limitation to "any action to recover damages arising out of the operation or use of a motor vehicle…"), *with* 47 O.S. §7-116(A) (applying limitation to "any civil action involving the operation of a motor vehicle…").
46. *See Hodges v. Super. Ct.*, 980 P.2d 433 (Cal. 1999).
47. *Id.* at 437.
48. *See* 178 F. Supp. 2d 670, 673 (E.D. La. 2001).
49. *See* 15 O.S. §162 (contract choice of law rule); *Bernal v. Charter County Mut. Ins. Co.*, 2009 OK 24, ¶ 12, 209 P.3d 309, 315 (tort choice of law rule).
50. One issue certainly beyond the scope of this article is the constitutionality of "no pay, no play" statutes. Suffice it to say, California, Louisiana, Michigan, and New Jersey have all addressed various constitutional issues, with each state upholding the constitutionality of their respective statutes. *See Quackenbush v. Super. Ct.*, 70 Cal. Rptr. 2d 271 (Cal. Ct. App. 1997); *Progressive Sec. Ins. Co. v. Foster*, 711 So.2d 675 (La. 1998); *Gersten v. Blackwell*, 314 N.W.2d 645 (Mich. Ct. App. 1982); *Caviglia v. Royal Tours of Am.*, 843 A.2d 125 (N.J. 2004); *Lawson v. Hoke,* 119 P.3d 210 (Or. 2005).

ABOUT THE AUTHORS

Philip R. Bruce primarily practices in the areas of business law, employment law, insurance defense and general litigation at the Tulsa law firm of Savage, O'Donnell, Affeldt, Weintraub & Johnson. He graduated from the University of Kentucky in 2008 and earned his J.D. from the OU College of Law in 2011, where he served as the symposium and articles editor for the *Oklahoma Law Review*.

Paul M. Kolker is a partner and shareholder at Pignato, Cooper, Kolker & Roberson PC where he devotes 100 percent of his time to civil litigation. He is a 2000 graduate of the OU College of Law.