

**The Comprehensive Lawsuit Reform Act of 2009:**

*What EVERY Lawyer Needs to Know*

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The Comprehensive Lawsuit Reform Act of 2009 (the “Act”) was arguably the most wide-sweeping legislation to be signed into law impacting the practice of law in Oklahoma. While the Act was billed as “tort reform” and certainly had as its main purpose the curtailing of “runaway jury” verdicts (whether real or perceived) in personal injury, products liability, and medical malpractice cases, the Act's provisions reach well beyond the domain of lawyers practicing in those areas. There are changes brought about by the Act which are germane to nearly every practicing lawyer in Oklahoma, whether they now know it or not. It is those Oklahoma lawyers operating under the impression that the Act doesn't apply to their practice that this paper is intended to serve.

The Act is over 130 pages long and contains both new statutes and amendments to existing ones. This paper will attempt to highlight for the general civil practitioner the changes of which they should be aware. This paper is not intended to educate those attorneys regularly practicing in the areas of personal injury, products liability, or medical malpractice on the provisions in the Act specific to those areas of the law. For those attorneys, a more detailed review of the Act is advisable. Likewise, there are a number of provisions in the Act included to benefit a very specific class of defendant and those parts of the Act are not discussed herein. Specifically, changes brought about by the Act that may be of special significance to certain parties and their lawyers, but which are not covered in this paper, include:

- Asbestos-specific issues (76 O.S §60-71; 76 O.S.§§72-79)
- Expert affidavits in professional negligence cases (12 O.S. §19)
- Firearm manufacturers liability immunity (76 O.S. §§51-54)
- “Agritourism” liability immunity (76 O.S. §§50.2)
- Medicaid reimbursement/subrogation changes (12 O.S. §994.1)

- Food distributor/seller liability immunity from obesity claims (76 O.S §§33-36)
- Admissibility of seat belt use (47 O.S. §11-1112 & 420)
- Teacher liability immunity for use of force against a student (51 O.S. §155)
- Manufacturer liability immunity for inherently unsafe products known to be unsafe (76 O.S. §57)
- Volunteer healthcare worker liability immunity during declared emergency (63 O.S. §§683.13-684.24; 76 O.S. §31)
- Class Action issues (12 O.S. §2023)

What follows is a summary of those portions of the Act which this author believes should be of interest to nearly every practicing attorney in the State of Oklahoma. Unless otherwise noted, the following provisions became the law on November 1, 2009.

I. Appeal Bonds (12 O.S. §990.4 - amendment). The statute was amended to state that no bond shall be required in excess \$25,000,000. In addition, it is no longer necessary to post a bond for an appeal of punitive damages.

II. Damages Cap (23 O.S. §61.2 - new). A new provision has been added to place a \$400,000 cap on non-economic damages awarded to plaintiffs in bodily injury cases, regardless of the number of defendants. There are a number of exceptions and qualifiers to this cap. First, it applies only to *non-economic* damages awarded for *bodily injury*. Non-economic damages cover a broad range of harms, including loss of companionship, mental anguish, "pain and suffering" and any other intangible loss. What it does not apply to are damages involved in most commercial business torts, including monetary damages and economic loss. In cases which include claims for both bodily injury non-economic damages and economic damages, the cap applies only to the bodily injury non-economic portion of the damages awarded. Second, the cap

on non-economic damages awarded for bodily injury can be lifted in two scenarios: (1) in cases of professional medical negligence, the cap is lifted if both the judge and the jury find by "clear and convincing evidence" certain facts about the seriousness of the bodily injury and the nature of the acts or omissions resulting in the bodily injury; or (2) in all other cases where the judge finds the same facts by a "preponderance of the evidence." The constitutionality of the disparate treatment of these different classes of defendants is likely to be challenged. Finally, the cap doesn't apply at all in wrongful death actions. In cases of professional medical negligence, any damages awarded in excess of the cap are to be paid by a yet-to-be created or funded state insurance fund.

III. Pleading Requirements (12 O.S. §2004 - amendment). The statute was amended to require that all petitions include a statement specifying whether or not total damages sought are equal to or in excess of the amount required to qualify for diversity jurisdiction in federal court (currently \$75,000 per 28 U.S.C. §1332), except for actions sounding in contract. If claimed damages are less than that amount, the amount must be specified (gone is the \$10,000 rule). Defendants may file a motion to clarify damages sought for the purpose of determining whether or not the case is subject to removal to federal court.

IV. Mandatory Initial Discovery Disclosures (12 O.S. §3226 - amendment). The statute was amended to require that, without the need for a request, the plaintiff in any suit must within 60 days of service of process provide the defendant(s) with a computation of damages and supporting evidence. There is no requirement for reciprocal discovery from the defendant. There are some exceptions to the initial disclosure requirements, but the requirements apply in the vast majority of cases. The requirement must be based on information reasonably available to the

party, but the party is not excused from the requirement only because their investigation is not complete.

V. Voluntary Dismissals (12 O.S. §684 - amendment). The statute was amended in several respects. A plaintiff may now voluntarily dismiss anytime prior to pretrial (prior rule allowed for dismissal anytime before trial upon payment of costs). This right is somewhat limited if the defendant has pleaded a counterclaim, unless the counterclaim can remain pending for separate adjudication. After pretrial, dismissal is only allowed by agreement of the parties or by order of the court. In addition, if after the plaintiff dismisses an action, the plaintiff files a new action against the same defendant and for the same claim, the court may order the plaintiff to pay the costs of the previous dismissal and may stay the new proceeding until the court's order has been complied with.

VI. Expert Testimony (12 O.S. §§2702, 2703 - amendment). The statutes were amended to incorporate the *Daubert* and *Kuhmo Tire* standard from FRE 702 (probably already the law in Oklahoma before the amendment). In addition, the statute now states that the proponent of expert testimony may not elicit testimony from the expert regarding facts or data upon which the expert has based her opinion or inference that would otherwise be inadmissible unless the court finds that the probative value of the testimony substantially outweighs its prejudicial effect.

VII. Forum Non Conveniens (12 O.S. §140.2 - amendment). A new section of the statute was added to codify the common law in this area. That statute states that if the court finds that, in the interest of justice and for the convenience of the parties, an action would be more properly heard in another forum (in this state or another) the court *shall decline* to exercise jurisdiction and shall stay, transfer, or dismiss the action. The statute provides a number of factors for the court to consider in determining whether the forum is appropriate or not.

VIII. Joint and Several Liability (23 O.S. §15 - amendment). This section was added to the statutes in 2004. The 2004 version provided that in actions based on fault and not arising out of contract, liability for damages caused by two or more persons is several and not joint unless a joint tortfeasor has 50% or more of the liability allocated to him or he acted with willful and wanton conduct or with reckless disregard of the consequences of his conduct, in which case his liability is joint and several. The 2009 amendment *eliminates the exception in cases of no comparative negligence on the part of the plaintiff*. In addition, the language of the statute was modified to make it clear that if a joint tortfeasor acts with willful and wanton conduct or with reckless disregard, joint liability applies only to that joint tortfeasor, and not all joint tortfeasors. The changes apply to all actions that *accrue* on or after November 1, 2009.

IX. Prejudgment Interest (12 O.S. §727.1 - amended). The statute was amended to state that in cases of personal injury or injury to personal rights (defamation, invasion of privacy, etc.) interest does not start to run until 24 months after the suit resulting in judgment was commenced. Further, interest is to be determined using a rate equal to the average U.S. Treasury Bill rate of the preceding calendar year (it was previously prime rate plus 2%). These provisions apply to all actions filed on or after January 1, 2010. It does not appear that these changes apply to prejudgment interest awarded in cases not involving personal injury or injury to personal rights (e.g., liquidated damages claims).

X. Summary Judgment (12 O.S. §2056 - new). A new statute was added to adopt the summary judgment standard of FRCP 56. The new statute requires that a motion for summary judgment be granted if the court finds *no genuine issue as to any material fact* (gone is the “no dispute as to any material fact” standard) and that the movant is entitled to judgment as a matter of law. In responding to a motion for summary judgment properly made and supported, an

opposing party may not rely merely on allegations or denials in its own pleadings to defeat the motion. Rather, its response must, by affidavits or as otherwise permitted, set out specific facts showing a genuine issue for trial. In addition, if judgment is not issued on the whole action, the court is required to the extent practicable to determine what material facts are not genuinely at issue. The court should examine the pleadings and the evidence before it and interrogate the attorneys to make its determination of the material facts not at issue and then issue an order specifying what facts, including damages, are not genuinely at issue and such facts must be treated as established in the action. Finally, the court is permitted to enter interlocutory judgment on liability alone even if there is a genuine issue on the amount of damages.

XI. Summons and Service of Process (12 O.S. §2004 - amended). The statute was amended to require that process must be served within 180 days or the petition is *deemed dismissed* without prejudice. The prior version of the statute read that, "the action may be dismissed...upon the court's own initiative with notice to the plaintiff or upon motion."

XII. UCC Duty of Good Faith in Contracts (12A O.S. §1-304 - amended). The statute was amended to eliminate a separate tort cause of action for breach of the duty of good faith in contracts.

XIII. Stay of Enforcement (12 O.S. §990.4 - amended). The statute was amended to provide that a judgment, decree, or final order may be stayed while a post-trial motion is pending, while an appeal is commenced, or while an appeal is pending in *any court* inside or outside of Oklahoma.