



Tort Reform Unraveled

**A Brief Primer
on the June 4, 2013 Reversal
of the Comprehensive Lawsuit Reform Act of 2009**

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Tort Reform Unraveled: Supreme Court Reverses Landmark 2009 Tort Bill

When the Oklahoma Supreme Court on June 4, 2013 struck down the Comprehensive Lawsuit Reform Act of 2009, it reversed one of the most far-reaching measures governing litigation in Oklahoma lawmaking history. For more than 3 ½ years, attorneys working in almost every area of civil practice studied and embraced the new 2009 Act as prevailing law. By June, 2013, it had become the new norm.

The court's 2013 reversal now rolls back the clock with regard to numerous legal procedures codified in the 2009 Act, including measures that affect service of summonses, pleading requirements and discovery disclosures. Another opinion handed down the same day for the second time reversed an approach to tort reform that violated a constitutional prohibition against special laws in Oklahoma.

Complicating the impact of the courts June 4 action, the opinion does not include references to the specific sections of law now rendered void. Without those references, an automated annotation system at the state court Web site (www.oscn.net) can't include a reference to the court's opinion in the annotations for each of 81 sections in 10 titles of Oklahoma law altered by the decision.

Unless and until legislature adopts new law to again statutes stricken by the court, anyone reading Oklahoma statutes will find obsolete law – on the books and on the online law portal. For that reason, we've prepared a list of each section named in the 2009 Act – House Bill 1603 – in the order they appear in the bill, classified where appropriate according to separate Acts defined in that bill, and with summaries of the content and affect of each section.

We've also included:

- full text (and links) to the two sections of Oklahoma's constitution cited in two June 4 opinions that reversed the 2009 Tort Reform law.
- links to full text of the House Bill 1603 – The Comprehensive Lawsuit Reform Act of 2009 – which was ruled unconstitutional by the 2013 court.
- links to the full text of the two court June 4, 2013 opinions that ruled the tort reform unconstitutional
- links to other attorneys' earlier analysis of the Comprehensive Lawsuit Reform Act of 2009 and analysis of the history and case law associated with single-subject requirements.

Tort Reform Unraveled: Impact Mitigated by Other Legislation

The impact of the reversal, however, is mitigated in part by new law passed since the now-defunct 2009 Act. Those statutes remain enforceable, though they may be subject to other challenges.

A \$350,000 damage cap was separately codified in 2011. Some trial attorneys argue the damage cap remains vulnerable to separation of powers challenges.

Another 2011 Act eliminated joint and several liability, including exceptions provided in the 2009 Act. The impact of court's ruling may be moot in regard to other sections of the 2009 Act in so far as it codified accepted case-law precedent and common law. The 2009 Act required courts to decline jurisdiction in actions more properly heard in another court or another state. That was already at least in part a common law principle adopted by state court precedent.

“The Oklahoma Supreme Court first approved the doctrine of *forum non conveniens* in *St. Louis-San Francisco Railway Co. v. Superior Court, Creek County*, 1955 OK 111, 290 P.2d 188,” an Oklahoma appeals court determined in *Lovett v. Wal-Mart Stores, Inc.*, 2001 OK CIV APP 9. That court noted their 2001 opinion left *forum non conveniens* decision to the discretion of the trial court, subject to appellate review.

Special Laws Also Prohibited

The June 4, 2013 opinion in *Douglas v. Cox Retirement Properties, Inc.* 2013 OK 37 that struck down the 2009 Act as unconstitutional was one of two Supreme Court decisions rendered that day that affected the tort reform act. In a separate decision, the court struck down a provision of the 2009 Act that had required anyone filing a suit alleging professional negligence to submit an affidavit of merit, signed by a qualified professional. The court struck that provision as a violation of Oklahoma's constitutional provision against special laws. The constitution defines 28 subjects in which the legislature cannot pass laws that don't apply to everyone.

The court cited the same reasoning in 2006 when it struck a similar measure that attempted to require those who file medical malpractice lawsuits to include an affidavit of merit. The legislature in 2009 expanded the requirement to include all lawsuits involving professional negligence, but the expanded scope fell withing Oklahoma's provision against special laws all the same, the court concluded in the June 4, 2013 *Wall v. Marouk* 2013 OK 36 opinion. The court further ruled that the cost of obtaining affidavits created an undue financial burden for those seeking access to the courts.

Oklahoma's Logrolling Prohibition Among the Strongest Nationwide

The constitutional provision that thwarted the 2009 tort reform is similar to those in most states that attempt to prevent “logrolling” - the legislative practice of including dissimilar measures in one bill to garner votes for otherwise less popular initiatives. Experts say Oklahoma's single subject rule has survived court tests to stand among the strongest such rules nationwide.

The U.S. Congress represents one end of the spectrum, where little if any controls prevent the inclusion of unrelated topics in bills for purely political purposes. While courts in some states have vacillated on their interpretation of their state's single subject rule, “Oklahoma courts have been more consistent in their single subject decisions,” attorneys Stanly Kaminski and Elinor Hart wrote in a February, 2012, article for The United States Law Week.

Tort Reform Unraveled: Resources

June 4, 2013 Oklahoma Supreme Court Opinions Invaliding 2009 Tort Reform:

Douglas v. Cox Retirement Properties, Inc. 2013 OK 37:

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=469532>

Wall v. Marouk 2013 OK:

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=469531>

Comprehensive Lawsuit Reform Act of 2009 – Session Law :

HB 1603 (2009) Part 1

<http://www.oscn.net/applications/oscn/deliverdocument.asp?id=454799>

HB 1603 (2009) Part 2

<http://www.oscn.net/applications/oscn/deliverdocument.asp?id=454800>

Mitigating Laws and Case Law:

HB 2128 (2011) (\$350,000 damage cap)

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=461935>

SB 862 (2011) (Joint and Several Liability)

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=461936>

Lovett v. Wal-Mart Stores, Inc., 2001 OK CIV APP 9:

<http://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=181699>

Other Analysis of the Comprehensive Lawsuit Reform Act of 2009:

Gabe Bass 2010 Analysis:

<http://www.ccokbar.org/pdf/TheComprehensiveLawsuitReformActOf2009.pdf>

Buckman and Gray 2009 Analysis:

<http://www.okinsuranceblog.com/articles/tort-reform/>

Log Rolling Versus the Single Subject Rule -- United States Law Week:

United States Law Week history and analysis of single-subject law and case law:

http://www.duanemorris.com/articles/static/kaminski_hart_bloombergbna_022812.pdf

Oklahoma Constitutional Authority Cited in June 4, 2013 Opinions:

Article 5 Section 46 . Local and special laws on certain subjects prohibited.

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=84894>

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:

- The creation, extension, or impairing of liens;
- Regulating the affairs of counties, cities, towns, wards, or school districts;
- Changing the names of persons or places;
- Authorizing the laying out, opening, altering, or maintaining of roads, highways, streets, or alleys;
- Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other state;
- Vacating roads, town plats, streets, or alleys;
- Relating to cemeteries, graveyards, or public grounds not owned by the State;
- Authorizing the adoption or legitimation of children;
- Locating or changing county seats;
- Incorporating cities, towns, or villages, or changing their charters;
- For the opening and conducting of elections, or fixing or changing the places of voting;
- Granting divorces;
- Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;
- Changing the law of descent or succession;
- **Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate;**
- Regulating the fees, or extending the powers and duties of aldermen, justices of the peace, or constables;
- Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes;
- Fixing the rate of interest;
- Affecting the estates of minors, or persons under disability;
- Remitting fines, penalties and forfeitures, and refunding moneys legally paid into the treasury;
- Exempting property from taxation;
- Declaring any named person of age;
- Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from due performance of his official duties, or his securities from liability;
- Giving effect to informal or invalid wills or deeds;
- Summoning or impaneling grand or petit juries;

- For limitation of civil or criminal actions;
- For incorporating railroads or other works of internal improvements;
- Providing for change of venue in civil and criminal cases.

Article 5 Section 57 - Subjects and titles - Revival or amendment by reference - Extent of invalidity

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=84905>

Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof.

Table of Laws Reversed by *Douglas v. Cox Retirement Properties, Inc.* 2013 OK 37:

Comprehensive Lawsuit Reform Act of 2009 Act

<u>12 O.S. §19</u>	<i>new</i> expert affidavits	requires expert affidavits in professional negligence cases
<u>12 O.S. §140.2</u>	<i>new</i> venue	requires courts to decline jurisdiction if action more appropriate for another forum
<u>12 O.S. §192</u>	<i>new</i> indigent certificate of merit	persons requesting indigent's exemption from filing affidavit of merit must apply to court clerk, pay \$40 fee, which may be deferred.
<u>12 O.S. §683</u>	voluntary dismissal	changes numbering
<u>12 O.S. §684</u>	voluntary dismissal	plaintiff may dismiss prior to pretrial, by agreement or order after pretrial, must pay defendants cost if refiled
<u>12 O.S. §727.1</u>	prejudgement interest	interest starts to accrue 24 months after suit filed
<u>12 O.S. §990.4</u>	Post-trial stays, appeal bonds	caps appeal bonds at \$25 million, no bond required in appeal of punitive damages, judgment may be stayed while appeal is pending in any court
<u>12 O.S. §993</u>	class actions	allows appeal of certain denied motions but only when class has been certified and only as part of appeal certifying class
<u>12 O.S. §994.1</u>	<i>new</i> Medicaid recovery	set formulas for Medicaid reimbursement on judgment or settlement
<u>12 O.S. §2004</u>	summons	summons must be served within 180 days of filing, presumptive dismissal if no service
<u>12 O.S. §2008</u>	statement of damages	require statement if damages in excess of \$75,000, requires specification of amount if less than \$75,000
<u>12 O.S. §2009</u>	motion to clarify damages	defendant may file motion to clarify damages to require defendant to show damages will not qualify for diversity jurisdiction
<u>12 O.S. §2011</u>	frivolous lawsuits	changed language for attorneys certifying case as non-frivolous
<u>12 O.S. §2023</u>	class actions	various changes, including court determines attorney fees if class members object
<u>12 O.S. §2056</u>	<i>new</i> summary judgement	must dismiss if "no genuine issue as to any material fact" (formerly "no dispute as to")
<u>12 O.S. §2702</u>	expert testimony	adds conditions for relevancy of expert testimony

<u>12 O.S. §2703</u>	expert testimony	inadmissible evidence can't be introduced during expert testimony
<u>12 O.S. §3226</u>	statement of damages	plaintiff must provide computation of damages and supporting evidence within 60 days of filing
<u>12A O.S. §1 – 304</u>	duty of good faith	eliminates cause of action for breach of duty of good faith in contracts
<u>20 O.S. §56</u>	<i>new</i> indigent certificate of merit	required Supreme Court to set standard for indigent exemption to affidavit of merit
<u>23 O.S. §15</u>	joint and several liability	eliminates exception from several liability where jointfeasor has less than 50% of liability and no comparative negligence by plaintiff. Clarifies that only jointfeasor jointly liable when liability arises from that jointfeasor's willful or reckless conduct.
<u>23 O.S. §61.2</u>	<i>new</i> cap damages	caps non-economic damages at \$400,000
<u>36 O.S. §2211</u>	<i>new</i> indemnity fund	creates Health Care Indemnity Fund Task Force
<u>47 O.S. §11 – 1112</u>	seat belt	seat belt use inadmissible unless child under 16
<u>47 O.S. §12 – 420</u>	seat belt	seat belt use inadmissible unless child under 16
<u>63 O.S. §1 – 1709.1</u>	peer review statements inadmissible	revises and limits circumstances in which professional peer review statements are subject to discovery in medical malpractice cases
<u>63 O.S. §683.9</u>	emergency operations planning	minor changes – copy edits
<u>63 O.S. §683.13</u>	emergency management	excludes volunteer health practitioners as defined in new Volunteer Practitioner Act

Uniform Emergency Volunteer Health Practitioners Act

<u>63 O.S. §684.14</u>	<i>new</i> volunteer health workers	title
<u>63 O.S. §684.15</u>	<i>new</i> volunteer health workers	definitions
<u>63 O.S. §684.16</u>	<i>new</i> volunteer health workers	scope
<u>63 O.S. §684.17</u>	<i>new</i> volunteer health workers	grant authority
<u>63 O.S. §684.18</u>	<i>new</i> volunteer health workers	describes registration system
<u>63 O.S. §684.19</u>	<i>new</i> volunteer health workers	grants license reciprocity in emergency
<u>63 O.S. §684.2</u>	<i>new</i> volunteer health workers	clarifies scope of credentials
<u>63 O.S. §684.21</u>	<i>new</i> volunteer health workers	limits scope of practice

<u>63 O.S. §684.22</u>	<i>new</i> volunteer health workers	allows official inclusion of volunteer workers
<u>63 O.S. §684.23</u>	<i>new</i> volunteer health workers	authorizes Board of Health to promulgate rules
<u>63 O.S. §684.24</u>	<i>new</i> volunteer health workers	seeks uniformity among states
<u>76 O.S. §31</u>	volunteer health workers	grants limited immunity from liability

Common Sense Consumption Act

<u>76 O.S. §33</u>	<i>new</i> food products	title
<u>76 O.S. §34</u>	<i>new</i> food products	purpose
<u>76 O.S. §35</u>	<i>new</i> food products	definitions
<u>76 O.S. §36</u>	<i>new</i> food products	limit liability and provide exemptions from limited liability
<u>76 O.S. §50.2</u>	agritourism	adds agritourism to ag business with liability immunity
<u>76 O.S. §51</u>	<i>new</i> firearms	firearms manufacturer liability immunity findings
<u>76 O.S. §52</u>	<i>new</i> firearms	firearms manufacturer liability immunity
<u>76 O.S. §53</u>	<i>new</i> firearms	firearms licensed dealer or collector liability immunity
<u>76 O.S. §54</u>	<i>new</i> firearms	exemptions
<u>76 O.S. §57</u>	<i>new</i> product liability	immunity for manufacturers of inherently unsafe products
<u>76 O.S. §58</u>	<i>new</i> product liability	product improvements are not evidence of prior culpability

Asbestos and Silica Claims Priorities Act

<u>76 O.S. §60</u>	<i>new</i> asbestos
<u>76 O.S. §61</u>	<i>new</i> asbestos
<u>76 O.S. §62</u>	<i>new</i> asbestos
<u>76 O.S. §63</u>	<i>new</i> asbestos
<u>76 O.S. §64</u>	<i>new</i> asbestos
<u>76 O.S. §65</u>	<i>new</i> asbestos
<u>76 O.S. §66</u>	<i>new</i> asbestos
<u>76 O.S. §67</u>	<i>new</i> asbestos
<u>76 O.S. §68</u>	<i>new</i> asbestos
<u>76 O.S. §69</u>	<i>new</i> asbestos
<u>76 O.S. §70</u>	<i>new</i> asbestos
<u>76 O.S. §71</u>	<i>new</i> asbestos

Innocent Successor Asbestos-Related Liability Fairness Act

<u>76 O.S. §72</u>	<i>new</i> asbestos	
<u>76 O.S. §73</u>	<i>new</i> asbestos	
<u>76 O.S. §74</u>	<i>new</i> asbestos	
<u>76 O.S. §75</u>	<i>new</i> asbestos	
<u>76 O.S. §76</u>	<i>new</i> asbestos	
<u>76 O.S. §77</u>	<i>new</i> asbestos	
<u>76 O.S. §78</u>	<i>new</i> asbestos	
<u>76 O.S. §79</u>	<i>new</i> asbestos	
<u>70 O.S. §6 – 101.7</u>	<i>new</i> educational institution representation	attorneys who represented school district in personnel hearings may not preside at hearings or influence related executive sessions

School Protection Act

<u>70 O.S. §6 – 140</u>	<i>new</i> school liability	title
<u>70 O.S. §6 – 141</u>	<i>new</i> school liability	purpose
<u>70 O.S. §6 – 142</u>	<i>new</i> school liability	definitions
<u>70 O.S. §6 – 143</u>	<i>new</i> school liability	criminalizes false accusations of criminal activity against education employe
<u>70 O.S. §6 – 144</u>	<i>new</i> school liability	award costs to prevailing party in action against school or staff, but not in actions between school and staff
<u>70 O.S. §6 – 145</u>	<i>new</i> school liability	insurers indemnity isn't waiver of defense
<u>70 O.S. §6 – 146</u>	<i>new</i> school liability	provides suspension of students who assault volunteers, does not bar criminal prosecution
<u>70 O.S. §6 – 147</u>	<i>new</i> school liability	provides leave of absence for education workers injured in assault
<u>70 O.S. §6 – 148</u>	<i>new</i> school liability	clarifies relationship with Governmental Tort Claims Act
<u>51 O.S. §155</u>	teacher liability	State not liable for claims resulting from reasonable force or resulting from out-of-school detention

Repealed

<u>6 O.S. §6602</u>	emergency health care	
<u>63 O.S. §1708.1E</u>	affidavit of merit	affidavit of merit in medical liability cases previously stricken as special law
<u>63 O.S. §1708.1G</u>	prejudgement interest	set prejudgment interest at U.S. Treasury Bill rate